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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.

DEFENDANT'S SUPPLEMENTAL MOTION FOR NEW TRIAL

DEFENDANT, by and through his attorney, Wesley W. Hoyt, herewith submits his SUPPLEMENTAL MOTION FOR NEW TRIAL under Rule 33, F.R.C.P. Incorporated by reference are arguments and authorities in Defendant's Motion for New Trial (Dkt #s 234 & 236; see also Dkt #259). The affidavits and exhibits filed herewith are incorporated by reference and with the trial record provide the factual basis for Defendant's contentions.

I. DEFENDANT'S STATEMENT OF CONTENTIONS

1.1 ***Defendant's Contentions***. Defendant, convicted of all counts in the *Superseding Indictment,* contends that he was denied due process and a fair trial and should be granted a new trial or the case should be dismissed because of: 1) Lack of jurisdiction as to certain counts, dismissal required; 2) Erroneous supplemental jury instruction new trial, required; 3) Prosecutorial misconduct, new trial required, re: a) Violating Defendant's attorney/client privileged communications; b) Improper agreements with informant; c) Brady violations, new trial required

and implicated by: i) Not disclosing the Fairfax "fiction book" regarding immunity; ii) Not disclosing the Buck Report proving device wasn't explosive; iii) Not producing the third recording re: Defendant's June 11, 2010 arrest; 4) Governmental misconduct, new trial required, re: a) Bad faith destruction of original evidence from recordings of June 9th, 10th and 11th; b) Fabricating evidence against Defendant; c) Intimidating witnesses (tampering); and d) Obstruction of justice and misprision of a felony by Agent Sotka, who chose not to follow FBI procedures in reporting a major terrorism risk from a "car bomb" supposedly at large in the public domain when he first learned of it June 9, 2010; 5) Ineffective assistance of counsel, new trial required; 6) Arbitrary ruling by trial court demonstrating judicial bias favoring the Government, new trial required; and 7) Denial of a public trial, new trial required; as follows:

1.2. ***Dispositive Issues:***

1) **LACK OF JURISDICTION**. Counts 1 and 2, based on 18 USC §1958, solicitation of murder, to be dismissed as this Court lacked jurisdiction under interstate commerce requirement such that this law is an impermissible interference with state sovereignty and was not a law within the enumerated powers of the National Government as applied to Defendant. Under *Bond v. U.S.*, (09-1227) at 13, (June 16, 2011), such a law cannot apply to intrastate matters as any that conduct is reserved to and intercepted by the Ninth and Tenth Amendments to the U.S. Constitution. Because Defendant did not "cause" anyone to travel in interstate commerce, the court may not implicate jurisdiction when there is none.

Under solicitation for murder charges, there was no showing that Defendant utilized interstate commerce facilities. Government informants Larry Fairfax and James Maher were dispatched from Idaho on June 11, 2010 by the government, not the Defendant. They were paid $500 by the FBI to travel to Oregon on June 11, 2010 so that FBI Agent Sotka could have Fairfax call Mr. Steele from an Oregon prefix in the event a call from Fairfax was needed. (TR 367.) Under *U.S. v.*

Coates, 949 F.2d 104, 106 (4th Cir. 1991) there is no federal jurisdiction where the FBI traveled across a state line to make a phone call simply to implicate federal jurisdiction. *Coates* held that when the call was the "sole jurisdictional link" and it "was contrived by the government for that reason alone" (ibid.) just going across a state line by an FBI agent to make a call back to the Defendant was not the use of interstate commerce facilities.

In the present case, merely sending Fairfax and Maher into Oregon from Idaho was part of a Government plot schemed by Agent Sotka so that Fairfax could call Mr. Steele from an Oregon prefix. Like *Coates* this contrivance did not implicate the use of interstate commerce facilities in order to commit a federal crime. It has been held that the commerce clause was not created to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, otherwise, the federal authority would embrace practically all the activities of the people and the authority of the state over its domestic concerns would exist only by sufferance of the federal government. *A.L.A. Schecter Poultry Corp. v. U.S.*, 55 S.Ct. 837, 850 (1935). Because there was no Federal nexus, these counts should be dismissed.

2) **ERRONEOUS SUPPLEMENTAL JURY INSTRUCTION**. The jury submitted two "last minute" questions to the Court during deliberations. The Court's answer to the second question regarding the meaning of "interstate commerce facilities" was erroneous because it directed the jury to apply a "but for" reasoning which is based on a Preponderance of the Evidence standard rather than the Beyond a Reasonable Doubt standard as required in all criminal cases.

In fact, the Court should have directed the jury to rely upon the instructions as given without further interpretation. Instead, error was committed with a misleading answer and the jury's verdict must now be overturned and a new trial granted. *Boyd v. California,* 494 U.S. 370, 379-380 (1990); *Payton v. Woodward,* 346 F.3rd 1204, 1211-1213 (9th Cir 2003); *In re Winship,* 397 U.S. 358 (1970); and *Franks v. Franklin,* 471 U.S. 307, 309 (1985).

In a similar situation, in the case of *Bollenbach v. U.S.*, 326 U.S. 607, 611-612 (1946) the U.S. Supreme Court held that in reference to a supplemental jury instruction:

> [P]recisely because it was a "last minute instruction" the duty of special care was indicated in replying to a written request for further light on a vital issue by a jury... In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. *Quercia* v. *United States*, 289 U.S. 466, 469. The influence of the trial judge on the jury is necessarily and properly of great weight, *Starr* v. *United States*, 153 U.S. 614, 626, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptionable and unilluminating abstract charge.

Supplemental instructions, such as used to answer a jury question, are reviewed for abuse of discretion if the question on appeal is whether a factual foundation exists for the instruction and reviewed de novo where the ultimate issue is whether the court's instruction adequately states the law regarding the subject about which the jury inquired. See U*nited States v. Gomez-Osorio*, 957 F.2d 636 (9th Cir.1992). Here the jury was struggling whether the facts supported finding of interstate commerce. The answer creates a virtual presumption of interstate commerce that cannot be overcome (almost a strict liability standard). De novo review should be the standard where the trial court misstated the applicable law. By analogy, in *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450 (1979) there was reversible error in jury charge in which mens rea was presumed. It was held that because the jury may have interpreted the challenged presumption as conclusive, like the presumptions in *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288, and *United States v. United States Gypsum Co.*, 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854, or as shifting the burden of persuasion, like that in *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508, and because either interpretation would have violated the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt, the instruction is unconstitutional. Pp. 514-527. The same would apply to the Government here.

In *Bollenbach*, the jury was misadvised as to the law and had doubts as to defendant's participation in a theft of securities in one state and their transportation to another. Similar to the case at bar, the jury's question indicated that the jurors were confused concerning the relationships and what constituted the use of interstate commerce facilities. Misadvising the jury in the Court's answer about what constitutes use of interstate commerce facilities, led to a quick verdict, but it denied Defendant due process and a fair trial. Thus, a new trial should be granted.

3) **PROSECUTORIAL MISCONDUCT.** Prosecutor misconduct by continually violating Defendant's attorney/client privilege with intrusions into: 1) Defendant's phone calls to private attorneys he was seeking to interview to hire for this case; 2) Defendant's outgoing "Legal Mail" send from jail where Defendant was held as a federal detainee; and 3) Defendant's in-jail, attorney booth conferences, created reversible error (Aff Edgar Steele, ¶16.) A new trial should be granted to Defendant with a fresh prosecutor, not familiar with Defendant's defense strategies that were derived from listening to privileged communications. In this way, Mr. Steele might have a fair trial.

A second part of the claim for prosecutorial misconduct involves newly discovered evidence as mentioned in paragraph 2 of the initial Motion for New Trial (Dkt # 234) which was the Jeff Buck explosives report, filed, by coincidence the day after the Steele trial was over, on May 6, 2011, in the Larry Fairfax case (Dkt #10-183-BLW). That video to that report, regarding the so-called "pipe bomb" involved in this case, showed it could not explode. The report and video was presented at the Fairfax sentencing hearing without Government objection, a dismissal should enter as to the explosive count based on a Brady violation and an insufficiency of evidence.

When the Government's evidence was that the Bomb Squad was unable to set off the Fairfax "pipe bomb" after two shots with a high powered shotgun shell, this was powerful evidence it was not an explosive device. Coupled with the Buck Report, this new evidence proves

that it was not an explosive device because it did not have the potential to explode. In such a case, the bomb related charges must be dismissed for failure of proof that the bomb would explode. *Medley v. Runnels,* 506 F.3rd 857, 863-868 (9th Cir 2007).

4) **GOVERNMENT MISCONDUCT**. FBI bad faith destruction of the recorded evidence from the device that made the recordings of June 9th, 10th and 11th requires dismissal of charges for spoliation of evidence. Bad faith is shown where the law enforcement conduct indicates that the evidence could form a basis for exonerating the defendant. U*nited States v. Heffington*, 952 F.2d 275, 277 (9th Cir.1991). Here Agent Sotka's conduct in failing to listen to the recording on the initial device prevented him from attest to the authenticity. If authenticity is not proven, then defendant must be exonerated.

In addition, government misconduct comes from Government fabricated evidence that appeared for the first time at trial. This amounted to newly discovered evidence in the form of the sound of "Tic Taks" rattling in the government informant's pocket, a sound not on earlier copies of the recording provided to Defendant. Because it was new evidence presented at trial for the first time and Defendant did not have an opportunity to analyze it, nor did Defendant have an opportunity to reasonably foresee it, then a new trial must be granted to allow Defendant to have a proper analysis. In the event that such sounds are established as "new," they disprove authenticity of the recordings of June 9 and 10, 2010 and the case must be dismissed. (See Disclosure of Herbert Joe, attached as Ex. I to the Affidavit of Edgar Steele.)

Further government misconduct comes from Agent Sotka's campaign to convince Mrs. Steele to embrace his view of this case, that her husband was trying to kill her. As pointed out in her Affidavit, Agent Sotka's approach was overbearing and verged on witness tampering. The FBI also engaged in witness tampering with respect to Daryl Hollingsworth by trying to persuade him not to testify for Defendant. (See Affidavit of Edgar Steele.) Witness tampering is a form of

obstruction of justice and applies to both parties. Attempts by the FBI to intimidate these defense witnesses was evidence of government bad faith and violated Defendant's right to due process. See *U.S. v. Vavages,* 151 F.3rd 1185, 1188 (9th Cir 1998). In *Vavages*, it was held: "[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.' *United States v. Little*, 753 F.2d 1420, 1438 (9th Cir. 1984). A defendant alleging such interference is required to demonstrate misconduct by a preponderance of the evidence. See *United States v. Lord*, 711 F.2d 887, 891 n. 3 (9th Cir. 1983). Whether substantial government interference occurred is a factual determination to be made by the district court. See *United States v. Baker*, 10 F.3d 1374, 1415 (9th Cir. 1993); Little, 753 F.2d at 1439. Thus, rather than denying Defendant the opportunity to enquire into government misconduct as the record indicates, the trial judge should have had a hearing to make a factual determination whether government interference occurred. (For examples of the trial court's rulings outright denying Defendant the opportunity to present evidence of government misconduct see: TR at: 411, 755, 1404, 1434, 1435, 1436, 1441.) It was reversible error for the Court not to have held a hearing on the subject and a new trial should result.

Additional bad faith from governmental misconduct derives from Agent Sotka failure to report a "car bomb" was involved on Mrs. Steele's vehicle, even thought he was aware of it prior to June 15, 2010 (listening three times to the recording of June 9th gave him the knowledge, TR 358:3-11). It was Agent Sotka who did not follow FBI procedures in reporting a major terrorism risk to other law enforcement agencies, which put the public at risk without notice to stay away from all cars matching Mrs. Steele's car on which there might have a "car bomb." According to Mr. Fairfax, the Bomb had been at large and in the public domain on May 27, 2010. Bad faith over a fundamental public safety issue indicates that bad faith permeates the entire case.

5) **INEFFECTIVE ASSISTANCE OF COUNSEL.** Lack of performance in the form

of inadequate investigation, preparation and presentation at trial by Defense counsel is the basis of a claim of ineffective assistance of counsel. The U.S. Supreme Court held: "...the right to counsel is the right to the effective assistance of counsel." *Strickland v. U.S.*, 466 US 688, 686 (1984).

> Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled. Id. at 685. (Emphasis Supplied.)

Neither Roger Peven nor Robert McAllister, the primary attorneys responsible for Mr. Steele's defense, rendered adequate legal assistance. Their representation was marked by poor performance that caused prejudice to Mr. Steele (see Affidavits of Edgar Steele, Robert McAllister and Gary Amendola). "Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render 'adequate legal assistance.'" *Strickland*, at 685, citing *Cuyler* v. *Sullivan*, 446 U.S. 335, 344 (1980).

> [A] person who happens to be a lawyer is present at trial alongside the accused ... is not enough to satisfy the constitutional command [for a fair trial].' *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. at 2063.

The law requires reversal when overall performance of the attorney is substantially deficient as opposed to a single egregious act. *Harrington v. Richter*, U.S. Supreme Court, No. 09-587, decided January 19, 2011 (9th Cir. Calif.). See *Reynoso v Giurbino*, 462 F3d 1099, 1110-1116 (9th Cir 2006).

An attorney's failure to represent his client's interests, is the basis for a new trial if the attorney failed to investigate and adequately conduct pretrial preparation as happened here. *Turner v. Duncan,* 158 F.3rd 449 (9th Cir 1998). Neither Mr. Peven nor Mr. McAllister investigated or adequately conducted pretrial preparation because each had personal problems associated with poor professional performance in other areas of their lives. Both were seriously distracted by legal proceedings that had nothing to do with Defendant in this case. Mr. Peven had spent a month

in alcohol rehabilitation ending December 2007, having been relieved of his job after an "intervention" by his staff for related poor job performance, was engaged in a continual battle over administrative control of his office since that time. He had become embroiled in a 2011 lawsuit for civil damages that implicated his poor management of Federal Defender cases. He was sued by former associates alleging ineffective management in 2009. Board action to remove him from his position was pending according to the lawsuit, which is ongoing and provided a severe distraction from his case related duties, including Mr. Steele's case pending in 2010. (Aff Edgar Steele).

Whereas, Mr. McAllister's personal problems were of a financial nature, he having declared bankruptcy in the spring of 2011 just before trial and was disbarred shortly after trial. He admitted to having been under the scrutiny of the Colorado Bar for embezzlement of client funds before and during the trial and, shortly after trial announced his disbarment on June 6, 2011 (Aff Edgar Steele). Peven and McAllister stand as proverbial "bookends" of ineffectiveness

Ordinarily a claim of ineffective assistance of counsel that depends on evidence outside the trial record can be made only by motion under 28 U.S.C. § 2255 to vacate the conviction and sentence. *U.S. v. Myers*, 892 F.2d 642, 649 (7th Cir. 1990). The Myers court held:

> This case is unusual because the trial record itself compels a strong although not conclusive inference of ineffective representation -- so strong that Myers' conviction should not be allowed to become final until the issue is resolved." – *U.S. v. Myers,* at 649.

Further light and knowledge on the subject comes from the Ninth Circuit, which held:

> Where ineffectiveness of counsel is alleged, the defendant must point to errors or omissions in the record on appeal which establish that he did not receive adequate representation. He has the further burden of demonstrating from the record that there is a reasonable likelihood that counsel's errors or omissions prejudiced his right to a fair trial.... *U.S. v. Birges,* 723 F.2d 666, 669, 670 (9th Cir, Nevada, 1984) [internal citations omitted].

The list of actions not taken by both of these attorneys is too long to mention here, however, the Affidavits of Messers McAllister, Amendola and Steele chronicle many of them, the sum total of which is shocking to think that an attorney with that level of skill and experience was

unable to provide even a minimal performance. Confirmatory of this statement is the Affidavit Mr. McAllister himself who simply states:

> 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. (Aff McAllister, ¶ 2B.)
>
> 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. (Aff McAllister, ¶ 3.)

Under the doctrine of ineffective assistance of counsel, the Court must make a factual finding regarding the sufficiency of evidence of either lack of performance or prejudice from the conduct complained of. Attached hereto are the affidavits of many individuals, including Mr. Amendola, who addresses performance and prejudice from the lack of effectiveness of McAllister.

Mr. Peven was responsible for pre-trial preparation and protection of Mr. Steele's rights during the period before trial. Mr. McAllister was responsible for final pre-trial preparation and trial. As shown in greater detail below, neither attorney's performance met the minimum standard for competence of a trial attorney in a Federal criminal case and the actions of both attorneys caused sever prejudice to Defendant.

Messers McAllister and Amendola failed to offer a jury instruction on defendant's theory of the case, which is further evidence of ineffectiveness. A defendant is entitled to have a theory of the case jury instruction in all events. The federal courts have always held that a defendant is entitled to jury instructions as to the theory of the defense and that failure to provide such instructions are often grounds to overturn a conviction. But, as here, before there can be cogent jury instructions (or error when they aren't provided), there must actually be a defense theory presented to the jury. See for example: *United States v. Vole,* 435 F.2d 774 (7th Cir., 1970). Also see *United States v. Ruiz,* 59

F.3d 1151 (11th Cir.), cert. denied, 516 U.S. 1133 (1996) (Defendant has the right to have the jury instructed on his theory of defense); *United States v. Smith,* 217 F.3d 746 (9th Cir. 2000) (Court failed to instruct upon defendant's theory of the case); *United States v. Kayser,* 488 F.3d 1070 (9th Cir. 2007) (Defendant is due a charge on his theory of defense despite its strength or weakness).

Ineffective assistance of counsel is shown if (1) Mr. McAllister's performance fell below an objective standard of reasonableness or (2) prejudice resulted (see *Strickland,* at 689) to avoid the argument that, "...under the circumstances, the challenged action 'might be considered sound trial strategy'" (id., quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). Accordingly, Mr. Steele must show that "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance" (*Strickland*, at 690).

As for the second element, the prejudice flowing from Mr. McAllister's substandard performance, Mr. Steele must demonstrate that there was a 'reasonable probability that, but for McAllister's errors, the outcome of the trial would have been different' (id. at 694). For that purpose a reasonable probability is defined as "a probability sufficient to undermine confidence in the outcome" (id.). And in that respect the analysis is not limited to outcome determination- but must also contemplate "whether the result of the proceeding was fundamentally unfair or unreliable" (*Scarpa v. DuBois*, 38 F.3d 1, 16 (1st Cir. 1994), quoting *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993)). That consideration reflects the fact that at its root the right to effective counsel exists "in order to protect the fundamental right to a fair trial" (*Strickland*, 466 U.S. at 684). Depriving a criminal defendant of a defense certainly renders the resultant trial "fundamentally unfair or unreliable." *Strickland*, supra, sets the 'gold standard' with regards to ineffective assistance of counsel where the *Strickland* court held that:

> The benchmark for judging a claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland,* at 686.

In summary, and as the pinnacle of ineffectiveness, Mr. McAllister's lack of action denied Mr. Steele the opportunity to present the testimony of Dr. George Papcun whose opinions were stated at the April 20, 2011 Daubert Hearing. Those opinions raised a strong inference of FBI fabrication of the two Government Recordings which itself constitutes government misconduct. Because such opinions raised the specter of tampering with or editing those recordings that were presented as if they were true and accurate copies of a continuous and uninterrupted recording of conversations between the informant and Mr. Steele, just one edit raises a reasonable doubt whether the recording is authentic. If there is reasonable doubt as to whether the recording is authentic, then the conviction could not be considered to be "beyond a reasonable doubt" and should be overturned. In addition, McAllister failed to adequately question Mr. Dennis Walsh so that he could be qualified as a forensic expert in the field of audio recordings at the Daubert Hearing. Mr. Walsh is the expert who testified at the Daubert Hearing that he came to the conclusion that the government's recordings were fabricated, whereas, Dr. Papcun's opinions only created an inference of such. Obviously, the stronger defense was developed by Mr. Walsh, whom defendant would have preferred to present as the audio recording expert, but for his exclusion.

Once tampering has been implicated, the burden of going forward was on the Government. Here, the Government, which is required by law to do so, yet it did not make a sufficient showing to eliminate the possibility of alteration of its recordings; in fact, the Government's evidence left open the possibility that the recording could easily have been altered because the recording made in the device was destroyed by Agent Sotka without listening to it. What has been left was the wav form copies provided by the Government to the defense for analysis and used by the Government. Once the original is lost, the recording easily could have been re-recorded with editing and then recorded again into the proprietary format. (See Report of Dennis Walsh of March 10, 2010 as provided to the Govern-ment in discovery.) In order to authenticate the recordings, the

Government presented the testimony of an admitted liar, Mr. Larry Fairfax, who during trial stated that on June 9, 2010 he lied to the FBI when he did not tell them about the existence of a bomb on Mrs. Steele's car. This was a material omission when he promised to disclose all of his criminal activities. Fairfax was represented by retired Idaho State Judge James Michaud who assured his good intentions in 'coming forward' and stood behind the promise to tell all about his criminal activities. That afternoon, Fairfax was sent with the device to meet with Mr. Steele, but was in a barn when the recording was allegedly made and not under surveillance contrary to FBI policy. Also, failing to have a second agent assist Sotka was a violation of FBI policy. Then, Sotka "downloaded" to his computer with proprietary software, the sound information collected by the device, but did not listen to the recording from the device to establish validity. He conducted these actions without another FBI agent being present which was yet another violation of policy. While he was alone on the night of June 9th, he twice listened to said recording of June 9th then destroyed the original. Sotka then listened again to the June 9th recording in the presence of his FBI supervisor and Assistant US Attorney, Tracy Whelan on the morning of June 10th to determine how they should proceed. As these three listened to said recording, they must have heard, just as the jury heard, the words "car bomb" plain and distinguishable near the beginning of the dialogue of said recording (Tr. at p. 360, ls 1-10). No one doubts that if any rational FBI agent, inclined to do his job had heard the words "car bomb" that they, in discharging their public safety duties would have immediately contacted Mrs. Steele and warned her of the possibility that a 'car bomb' might just be the instrument by which she was to be murdered and that she should look under her car for a foreign object or call the local police. An experienced prosecutor such as AUSA Whelan also would have had a similar duty to notify the victim of potential harm from the "car bomb." Failing such a call, can anyone doubt that these three public servants would have at least notified their fellow law enforcement agents in Oregon where Mrs. Steele was visiting her

mother. Can there be any doubt that the Idaho FBI agents who had called for support from the Oregon FBI agents had a duty to advise them that they could possibly be in danger from a 'car bomb' that might be attached to the vehicle of Mrs. Steele? Especially since the Idaho FBI agency was asking the Oregon FBI agency to look in on a case for them at the home of Mrs. Kunzman very early in the morning of Friday, June 11, 2010? What should the Idaho FBI have told the Oregon FBI about what they knew of the recording of June 9th? Should they have said that the Oregon FBI would need to investigate the possibility of a 'car bomb" on Mrs. Steele's vehicle? None of this was done and Mr. McAllister did not ask Agent Sotka whether it was done as a means of impeaching his credibility for it is ridiculous to assume that highly trained enforcers of the law would miss such an obvious statement "car bomb" that jumps out at even the casual observer. Yet, the Government may suggest that its three top law enforcement officials in Coeur d'Alene were so incompetent as to miss what clearly was as obvious as the sun at noon day. Part of his ineffective assistance of counsel is that Mr. McAllister failed to challenge the foundation of said recordings which reeked of fabrication, by making a motion to exclude or to suppress the recordings as evidence in the case. Not doing so, he missed the most significant opportunity to defeat the case against his client. Once challenged, it was the Government that had the burden of showing the recording was not altered, not the other way around. Regarding authenticity of tape recordings (from: *U.S. v. Haldeman*, 559 F.2d 31 (C.A.D.C., 1976)) consider the following:

> Appellants challenge the foundation for the introduction of the tape recordings. In determining whether there was a sufficient showing of accuracy to warrant admissibility, we must keep in mind the governing standard: "the possibilities of misidentification and adulteration (must) be eliminated, not absolutely, but as a matter of reasonable probability * * * ." *Gass v. United States*, 135 U.S.App.D.C. 11, 14, 416 F.2d 767, 770 (1969); accord, e. g., *United States v. Robinson*, 145 U.S.App.D.C. 46, 51, 447 F.2d 1215, 1220 (1971) (en banc), on rehearing, 153 U.S.App.D.C. 114, 471 F.2d 1082 (1972) (en banc), rev'd on other grounds, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973); *United States v. S. B. Penick & Co.*, 136 F.2d 413, 415 (2d Cir. 1943).

Although the evidence bearing on admissibility should be carefully scrutinized to see if it measures up to the standard, it may be circumstantial or direct, real or testimonial, and need not conform to any particular model. E. g., *United States v. Sutton*, 138 U.S.App.D.C. 208, 213, 426 F.2d 1202, 1207 (1969).

Defendant was entitled to have counsel cross examine the law enforcement agent involved (specifically FBI Agent Sotka) and make an effective and coherent argument based on the indicia of Government fabrication of evidence (*Tejeda v. Dubois*, 142 F3d 18, 25 (1st Cir 1998)). Defendant was prevented from such cross exam and prevented from the presentation of his expert's opinion by the IAC of Mr. McAllister.

Ultimately, the Government had no case without said recordings, and Mr. Steele had no defense without Dr. Papcun's opinions. Thus, the prejudice to Mr. Steele's case because of Mr. McAllister's inaction meant that the jury was not given any alternative to a "guilty" finding. That Mr. McAllister failed to present any of the defense points of information in an effective manner and failed to make any proffers of such information as evidence when it was excluded by Court ruling is obvious from the witnesses who were standing by, ready, willing and able to testify to such. The Affidavits of Edgar Steele, Cyndi Steele, Dr. Allen Banks, Dr. George Papcun, Dr. Robert Stoll and Billie Cochran all show that evidence was available to be presented which would have: 1) rebutted prosecution testimony; 2) identified Government misconduct; and 3) established an entirely different picture of the Defendant and his circumstances than as portrayed by the Government. For instance, the Government portrayed Mr. Steele as the equivalent of a love sick teenager. Instead, he had established correspondence with over 90 women at the Romantic Tours website, obtaining from each patterned email responses of the same ilk, asking for money in exchange for their "love" over the internet. Extending an expression of love to each of the 90 was a part of his investigation to bring out the predatory nature of the Russian Bride operation. It was

this predatory program that Mr. Steele had planned to write about in his book in order to expose the fraud of the Russian Bride scam that had plagued one of his clients. In doing so, his plan was to find a party in the United States to sue to help his client recover some of his losses.

Dr. Papcun's opinions as stated in the Daubert hearing and in his reports raise the issue of FBI fabrication of evidence. With Dr. Papcun's testimony, the jury easily could have acquitted Mr. Steele, believing that the Government Recordings had been falsified. Thus, the Papcun opinion reasonably may have been the difference between conviction and acquittal.

Mr. McAllister undoubtedly developed a sense of hopelessness, just as other mental conditions can indeed be a cause of IAC by defense counsel. *Strickland*, at 699. Not only was Mr. McAllister ineffective, he flatly refused to follow the instructions of his client to make objections, move for mistrial and especially to subpoena Dr. Papcun for trial in order to ensure that his opinions would be expressed to the jury (see Affidavits of Edgar Steele and the hand written note from Steele to McAllister dated April 21, 2011). On April 21, 2011, the second day of the Daubert Hearing, Mr. Steele stated verbally and in writing to Mr. McAllister that: "[w]e must bring Papcun back for the trial, whatever the cost!" (See Second Affidavit of McAllister and Affidavit of Edgar Steele with Exhibit A attached, the handwritten note from Steele to Mr. McAllister dated 4/21, wherein Mr. Steele wrote: "We must lay a subpoena on Papcun and, perhaps move to continue (the subpoena is mandatory for our appeal).") It appears that the client understood the significance of Dr. Papcun's testimony even if Mr. McAllister didn't. Similarly, not being able to meet client objectives by failing to subpoena Dr. Papcun undoubtedly further contributed to Mr. McAllister's pervading sense of hopelessness.

With regard to the non-appearance at trial of Dr. George Papcun, Mr. Amendola writes: "it was my understanding that Mr. McAllister was in charge and would handle it." As further explained by Mr. Amendola:

> Before the Daubert hearing I asked Mr. McAllister about what we would do about securing Dr. Papcun's attendance at trial if Mr. Walsh was not allowed to testify and he simply responded that we would get him (Mr. Papcun) there, i.e., to trial. (Id., at ¶ 8.)
>
> At more than one meeting with Edgar Steele at the Ada County Jail, Edgar Steele raised the issue of ensuring that Dr. Papcun was available for trial, and raised the subpoena issue more than once. Mr. McAllister assured Edgar Steele that we would get Dr. Papcun there for trial. (Id., at ¶ 10.)

With regard to the issue of Mr. McAllister's trial preparation, Mr. Amendola opined as follows:

> Between the Daubert hearing and the trial, I sensed that Mr. McAllister was distracted and not properly doing the final preparations necessary for the trial. (Id., at ¶ 11.)

According to Mr. Amendola, Mr. McAllister was singularly ineffective in representing Mr. Steele:

> During the trial, it was clear to me that Mr. McAllister was not well prepared. His cross examination of witnesses called by the United States was disjointed and random and often did not get to the issue that needed to be addressed. His examination of witnesses called by the defense was equally weak, disjointed and random. He also paid little attention to directives from Edgar Steele. (Id., at ¶ 12.)

Regarding he closing argument, Mr. Amendola states that: "[i]t was terrible" and goes on to explain:

> The closing argument did not address key legal issues, including legal issues identified in the jury instructions. I had earlier raised those issues with Mr. McAllister. My recollection is that the closing argument did not address Count IV at all. The closing argument also did not address the validity of the recordings between Larry Fairfax and Edgar Steele in any meaningful way that could possibly persuade the jury to disregard those recordings. In my opinion, the closing argument was rambling and ineffective. (Id., at ¶ 13.)

In conclusion, Mr. Amendola critiques the performance of what he calls "trial counsel" including himself in that category, as follows:

> In my opinion, trial counsel for Edgar Steele were ineffective and did not provide him with adequate, competent or effective representation. (Id., at ¶ 14.)

The law is clear that whenever a court is reviewing a case for IAC, it is a "mixed question of law and fact." *Strickland*, at 698; citing *Cuyler v. Sulivan*, 446 U.S. 335, 342 (1980). The significance is that the standard applied to an allegation of IAC is a review for "performance" or "prejudice," either one of which will trigger a reversal or the grant of a new trial; all it takes is a "...showing that the decision reached would reasonably have been different absent the errors." (*Strickland*, at 696.)

IAC comes from many possible sources and in this case, from Mr. McAllister's (1) failure to have any defense theory whatsoever; (2) his failure to conduct any meaningful adversarial challenge, as shown by his failure to effectively cross-examine any of the prosecution's witnesses; (3) his failure to object to virtually any evidence; (4) his failure to prepare for and allow defense witnesses to tell their story and to introduce documentary evidence in support of Mr. Steele's defense; (5) his failure to move for a mistrial when it was announced that Agent Sotka had destroyed the original recordings from June 9th and 10th; (6) failure to make a meaningful closing argument; and, (7) failure to subpoena Dr. Papcun so that he could express his opinions to the jury

The standard is whether there is a "...reasonable probability that . . . the result . . . would have been different." *Strickland*, at 694. The jury asked questions and deliberated over two days. The massive evidence not presented and errors cited herein can lead only to an affirmative conclusion. As a result, a new trial should be granted based on ineffective assistance of counsel.

6) **ARBITRARY JUDICIAL ACTION IN FAVOR OF THE GOVERNMENT.** A new trial is required because of arbitrary judicial action favoring the Government. 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.) What the Court consistently ruled was witnesses could say nothing bad about the Government and nothing good about the Defendant. The following are a few of the many examples:

a) **Arbitrary Exclusion of Defendant's Expert.** No example is more compelling that the Court's flip-flop-flip over the question of the scheduling of Dr. George Papcun, forensic audio-media expert, for testimony. As stated in his Affidavit, Dr. Papcun was "ready, willing and able" to testify, once he received clearance from the Court that his testimony had been scheduled.

At the Daubert hearing, the Court flipped and ruled that Dr. Papcun could not testify unless pre-conditions were met. On Monday afternoon, May 2, 2011, the Court flip-flopped and approved Dr. Papcun for testimony to occur telephonically the next day, Tuesday, May 3, 2011. However, when the next day arrived, at the insistence of the prosecution claiming that it had a right to "Confront" defense witnesses, the Court flip-flopped-flipped and retracted its ruling, ordering instead that Dr. Papcun would have to appear in court to testify on Wednesday, May 4, 2011 at 8:30 a.m. or he would not be allowed to testify. The Court and prosecution well knew that Dr. Papcun was in Polynesia, but that he was willing to get on a plane and return to America for testimony when notified that he was scheduled and travel arrangements were made. As Dr. Papcun states in his Affidavit, if the Court had entered Tuesday's order on Monday, there would have been enough time for him to have traveled back for testimony by Wednesday morning at 8:30 a.m. But, given the realities of traveling to and from that part of the world, notification by the Judge Tuesday, for him to appear by Wednesday morning would not work. The best he could have done by Tuesday, would have been to arrive in Boise, Idaho late in the afternoon, about 4:30 p.m., Wednesday, May 4, 2011 to be ready to give his trial testimony at 8:30 a.m. on Thursday, May 5, 2011 (by Court Order, the trial ended at 2:00 p.m. each day, so a 4:30 p.m. arrival would not have fit the Court's time parameters). Were it not for the bias in favor of the Government and had the Court honored its initial ruling, Dr. Papcun would have testified by video conferencing Tuesday, because Defendant was arranging for him to go to the nearest U.S. Consulate or Embassy with such equipment. Unfortunately, when the Court's ruling changed from testimony by teleconference to in-court testimony, no further action was taken to establish the teleconference link. Thus, the jury never heard a witness testify as to the large number of transients in the recordings of June 9th and 10th which indicated editing from which Defendant could argue fabrication of the recordings. This was especially so in light of the fact that FBI Agent Sotka had just admitted that he had destroyed

the original recording without ever listening to it (TR 360:7-10). The Court's error made it impossible for Defendant's expert to testify and is the basis for the grant of a new trial.

b) **Arbitrary exclusion of admissions against interest by Government.** When Mrs. Steele was being examined by defense counsel, she was asked about conversations with Agent Sotka. Repeatedly the Government objected on the grounds of hearsay and repeatedly the Court erroneously sustained the objection. (TR 844:1-9, 848:14-23, 849:13-20). Under F.R.E. Rule 801(d)(2) the statements of FBI Agent Sotka constitute an admission of a party opponent and are not hearsay. The ruling was erroneous and caused Defendant substantial prejudice by blocking the Defendant from presenting critical evidence of the lies told by Agent Sotka which is part of the defense of Government misconduct and shows FBI bad faith which was the basis of Defendant's theory of defense. Defendant should be granted a new trial. (Aff Cyndi Steele, ¶7.)

c) **Denial of right to cross examine Government witness.** Allowing the Government to play the video recorded deposition of Tatyana Loginova without requiring her to appear in court, denied Defendant his Fifth Amendment right of confrontation. *Crawford v. Washington*, 541 U.S. 36 (2004). It was a manifestation of the fundamental unfairness in Mr. Steele's trial that the Court refused to recognize his right to confront witnesses against him under *Crawford* while the Court conjured a right to confront for the Government that has never existed, and then using that conjured up right attributed to the Government, reversed a ruling that would have allowed Dr. Papcun to testify by video conferencing, rather than requiring him to personally appear as a witness. The jury verdict should be overturned based on the trial court's failure to exclude the video deposition of Ms. Loginova as it deprived Defendant of his right of confrontation.

d) **Erroneous restrictions on witness examination.** The Court placed unreasonable restrictions on Defendant limiting his ability to cross examine prosecution witnesses as well as direct examination of defense witnesses by repeatedly prohibiting defense counsel from

enquiring into government misconduct. (e.g., TR at pages: 1404; 1434; 1435; 1436.) When government misconduct is at the heart of Defendant's case, then such limitations are unreasonable and the jury verdict should be overturned. *Holmes v. Bartlett* 810 F.Supp 550 (SDNY 1993); and *Wilson v. Mintzes* 761 F.2nd 275 (6th Cir 1985).

Witnesses who were prepared to testify about relevant and material information, but were blocked from doing so by erroneous Court rulings to the extent of denying Defendant the opportunity to present the theory of his defense. (Aff Edgar Steele, ¶ 27(c) and 42.) Each of these witness should have been allowed to tell their story so that Defendant's theory of defense would have been developed. The witnesses are: Cyndi Steele, Dr. Bob Stoll, Dr. Allen Banks, and Billie Cochran whose affidavits have been filed with this Motion for New Trial and which are incorporated by reference as if fully set forth herein.

An example is the testimony of Dr. Robert Stoll with regard to Defendant's state of mind on Thursday, June 10, 2010, only a few hours before the second informant-recording allegedly occurred when Defendant was supposedly of the mind set that he wanted his wife and mother-in-law killed, Dr. Stoll tells quite a different story. In fact, because he is a veterinarian with a medical science background and substantial life experience and interested in health issues, he spent considerable time with Mr. Steele that afternoon discussing the Defendant's miraculous recovery from successive aortic and sinus cavity aneurisms. Here is an instance where the Court refused to allow a witness to say anything good about the Defendant. According to the Affidavit of Dr. Stoll, on the afternoon of Thursday, June 10, 2010, Mr. Steele's mind was filled with gratitude for his life, love for his wife and family and focused on the Bible which Steele mentioned he had read cover-to-cover. Certainly, such evidence was relevant and material to Defendant's state of mind given the accusation that he supposedly was plotting to murder his wife shortly thereafter. (Aff Robert Stoll ¶3.)

The Affidavit of Dr. Robert Stoll provides a unique window into the mental state of Edgar Steele on one of the days that the Government claims he was plotting to murder his wife. Dr. Stoll states that because of the conversation he had with Mr. Steele about his near death experience and his family, that: "...the manner of Edgar's tender affection for his wife and family, I believe that this man's intent on June 10, 2010 when I visited with him was not to kill anyone, especially his wife." (Affidavit of Robert Stoll, ¶ 4). Since intent is an element of the crime with which Mr. Steele was charged and convicted, such evidence was both relevant and admissible, but the Government objected and the Court cut off Mr. McAllister's questioning so that it was not introduced. Then, Mr. McAllister failed to make an offer of proof.

As a further example of a witness who should have been allowed to testify, Dr. Allen Banks was present at the Steele residence during the hours of his arrest. His testimony was that the recording of the conversation between Mr. Steele and the law enforcement officers as reported on the transcript was at least one hour less than the time it took for those events to occur. This created the specter of a missing hour from the recording and was additional evidence of government bad faith in losing or destroying a significant item of exculpatory evidence. (Aff Dr. Banks, ¶6.)

Cyndi Steele planned on testifying that Agent Sotka repeatedly lied to her. That testimony was cut off by trial court rulings that prevented Defendant from presenting the evidence of bad faith and government misconduct that supported Mr. Steele's case. (TR 755; Aff Cyndi Steele.)

During the examination of Agent Sotka and Fairfax, defense counsel was not permitted by the Court to bring up any information negative to the government (TR 388, 411, 1404, 1434, 1435, & 1436); Defendant was also disallowed to bring up matters relative to his life that were positive and would have corrected the negative impression fostered by the Government. Thus, Defendant had no opportunity to develop the theory of his case. Since Agent Sotka was being asked about matters within the scope of his employment with the Plaintiff, his examination on these points by

the defense was properly directed at eliciting an admission against interest, specifically permitted by F.R.E. Rule 802(d)(2), and should not have been excluded.

The court should grant Defendant a new trial so that he may have the opportunity to develop his theory of defense by examining and cross examining witnesses as to prior admissions against the interests of the Government in order to develop his theory of government misconduct as guaranteed by law. *Groseclose v. Bell,* 130 F.3d 1161, 1166 (6th Cir. 1997).

d). **Rushing Defendant through trial.** The trial court pushed hard to compress the trial time of this case in what might be called a "rush job". (Daubert Hrg. 04-20/21-11, at 241; TR: 284:1-3 time spent on case, TR 1370, time pressure to end trial; TR 1376 Court unavailable next week case "has" to be finished; TR 1364, counsel made to assure date trial would be over on Court's time schedule.) The Court announced that it had another commitment the following week and the case must be finished by Friday May 6, 2011. The Government had leeway to try its case over a four-plus day period; however, when it came time for the Defendant to present his evidence, the Court was not so generous. Defendant had easily a weeks worth of testimony (see attached affidavits). But, because of the rulings, Defendant's case was truncated and presented in less than one day, in a much abridged fashion that deprived Defendant of his Constitutional due process right to a fair trial. When a trial court puts pressure on the Defendant to compress the trial time, such pressure violates due process rights and is reversible error. *Williams v. Taylor,* 529 U.S. 362, 375 (2000); *U.S. v. Tory,* 52 F.3rd 207 (9th Cir 1995); *Thomas v. Calderon* 120 F.3rd 1045 (9th Cir 1997); *Wilson v. Mintzes* 761 F.2nd 275 (6th Cir 1985). A new trial should be granted.

7) **Denial of a public trial.** A new trial is required if the Court denies a defendant a public trial. Numerous sealed pleadings, almost a dozen secret hearings and twenty-six sidebar conferences kept the public from knowing and understanding anything about this trial, except

what was presented from the Government perspective. The verdict must be reversed when a defendant is denied a public trial. In Re Oliver, 333 U.S. 257, 266, 273, 278 (1948).

The Court's closure of pretrial hearing closures and excessive trial sidebar conferences is reversible error (*Bell v. Jarvis*, 198 F.3d 432, 438 (4th Cir 1999)) and the trial court had a *sua sponte* obligation to guarantee Defendant an open and public trial. Under the Local Rules, no motion was filed or hearing held regarding denying Defendant a public trial and thus no parameters were set. The Sixth Amendment establishes a strong presumption in favor of a public criminal trial. This right, however, is not absolute. *Globe Newspaper Co.*, 457 U.S. 596, 606: "...the right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Waller v. Georgia*, 467 U.S. 39, 45 (1984). In *Press-Enterprise I*, the Court stated that the strong presumption in favor of openness may be overcome "only by an overriding interest based on findings that closure is essential." *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501, 510 (1984). But, closure in not the usual case as "[s]uch circumstances will be rare." *Waller*, 467 U.S. at 45.

> Before a trial court may close a courtroom, four conditions must be satisfied: (1) the party seeking closure must advance an overriding interest likely to be prejudiced if the courtroom remains open; (2) closure must be no broader than necessary to meet that interest; (3) the trial court must consider reasonable alternatives to closure; and (4) the court must make "findings adequate to support the closure." *Waller*, at 48.

II. FACTS AND ARGUMENT

2.1 ***Background.*** This case stems from Defendant's June 11, 2010 arrest. Defendant is a lawyer who often handled cases involving First Amendment issues and has been outspoken on nationally prominent political issues. Defendant was initially charged by Complaint with solicitation for murder. (Dkt #1) After a jury trial in Boise, Idaho ending May 5, 2011, Defendant was convicted (Dkt #230) of all four counts of the Superseding Indictment (Dkt #25). The first

three counts were related to an alleged plot to murder Defendant's wife, Cyndi Steele and her mother, Oregon resident, Mrs. Kunzman. (Id.) The fourth count, a witness tampering charge, arose out of a telephone conversation between Defendant and his wife of June 13, 2010. (Id.)

2.2 ***Defendant maintains his innocence.*** From the moment of his arrest Defendant has consistently maintained his innocence. Mr. Steele claims he was set up for prosecution by his handyman, Larry Fairfax ("Informant") who stole $45,000.00 in silver coins from the Steele family savings then framed him with false murder-for-hire allegations so that he, Fairfax could mask the theft behind those grotesque allegations and keep the money in the wake of the furor created over the criminal charges against Defendant.

2.3 ***NGOs pressured Government to prosecute.*** Additionally, Defendant asserted that the FBI was under pressure from one or more non-governmental organizations ("NGOs") that were exerting improper influence on the FBI to prosecute Mr. Steele. The NGOs which had previously threatened Mr. Steele and his family were the Anti-Defamation League ("ADL"), the Jewish Defense League ("JDL") and the Southern Poverty Law Center ("SPLC"). Each of these NGOs had, as a part of their agenda, the silencing Mr. Steele for political reasons. The ADL and SPLC were on the new media scene immediately after Mr. Steele's June 11, 2010 arrest with smear campaign articles and TV News appearances, in an effort to foment public hatred toward Defendant; with the added effect of poisoning the minds of the prospective jury pool in the Coeur d'Alene area. (Aff Cyndi Steele, ¶7d; and NGO articles attached) Prior Death threats had been received by the Steele family members which the FBI traced back to the ADL and JDL, but refused to prosecute because of a political alliance with those organizations. The SPLC had targeted Mr. Steele on their list of "Radical Right" persons they wanted silenced ever since he represented the opposition in an SPLC lawsuit against Richard Butler of the Aryan Nation, in 2000. These NGOs have interlocking relationships and one of their members sits on the

Department of Homeland Security Committee along with a member of the FBI, giving them access. The network formed was capable of plotting Mr. Steele's false arrest, prosecution and trial. Part of the government misconduct was that the FBI had allowed itself to be pressured into prosecuting Mr. Steele for political reasons in order to please those in power at said NGOs.

2.4 ***Silencing Edgar Steele was the objective of this prosecution.*** Neither the Government nor these NGOs approved of the manner in which Mr. Steele exercised his freedom of speech and press (the attached articles attack him for his statements, see Ex. L) nor did they approve of his representation of any person that they considered to be "politically incorrect" such as Mr. Butler of the Aryan Nation. In fact, Mr. Steele referred to himself as the "attorney for the damned" because he represented presumptively innocent people, when their politics were not approved by the Government and its NGO affiliates. (Aff Edgar Steele ¶ 42(b); and Aff Cyndi Steele, ¶ 7(d); and see Spokane Review article quoting representatives of the ADL and SPLC at the time of Mr. Steele's arrest in Ex. L.)

2.5 ***Politically motivated prosecution.*** Clearly, this prosecution was politically motivated as shown by the extensive publicity campaign against Mr. Steele that daily, if not weekly reporting carried repeated 'hot button' words such as: "White Supremacist" and "Aryan Nation" etc. A representative from the SPLC, Mark Potok was given "face time" to speak on the local Spokane/Coeur d'Alene TV News immediately after Defendant's arrest (Aff Cyndi Steele, ¶9) indicating that the NGOs were working behind the scenes, ready to pounce as soon as he was arrested, to create as much animosity toward Mr. Steele as possible. In this politically charged environment, prosecutorial misconduct has arisen, possibly as a reflection of the extensive media attention and the public interest it generated against Mr. Steele.

2.7 ***Prejudice resulted from prosecutorial snooping.*** Prosecutorial eavesdropping was prejudicial to Defendant who was not able to have full, open and robust commutation with this

attorney (see Aff Edgar Steele, ¶12, 13, 14, 15, 16; and see Dkt #90 where the Court's findings confirm that such intrusion was still occurring as of February 11, 2011, four months later). The Court denied the motion to disqualify AUSA Whelan in Defendant's February 8, 2011 Reply for listening to Defendant's attorney/client telephone communications, then ruled that Defendant was deemed to have "waived" his attorney/client privilege. Although the Court had a duty and significant opportunity to regulate an out-of-control prosecutor who engaged in an ongoing campaign of listening to Defendant's attorney/client communications, no action was taken to stop the aberrant conduct. Considering that the Court had supervisory responsibilities to prevent this from happening and faced with a blatant admission by the prosecutor, in a showing of remarkable bias toward the Government, the Court neglected to inquire of the prosecutor as to the extent of such governmental eavesdropping, which, at that point included the interception of Defendant's legal mail, an issue not raised by the prosecution in its February 4, 2011 Motion (Dkt #71) (see Aff Edgar Steele, ¶ 13) and probably included recording of Defendant's attorney interviews at in-custody booth conferences. (Id., at ¶ 16_).

2.8 ***Deemed privilege "waiver" was not based on legal standard.*** Under Dkt #90, Defendant was deemed to have "waived" his attorney/client privilege while on the only jail phone available to federal detainees, such as himself, as he pushed a telephone "button," supposedly indicating his acceptance of the recording of said call, which button pushing the Court deemed to be a "waiver" of the attorney/client privilege. Said ruling was made without making findings as to the legal standard whether said "waiver" was either knowing or voluntary. The waiver inquiry "has two distinct dimensions": waiver must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran* v. *Burbine*, 475 U. S. 412, 421 and 427 (1986). The conditions listed in Moran

were not met here because Mr. Steele was being actively deceived by the Sergeant of the Correction Officers at the Spokane County Jail where he was housed (Aff Edgar Steele ¶13(c)) and coercion was in play from the fact that through his incarceration, the jail refused to allow him to use any phone but one that messaged the call "may be recorded." In *Johnson* v. *Zerbst*, 304 U.S. 458 (1938) the court held: we should "...indulge every reasonable presumption against waiver of fundamental constitutional rights." *Id.*, at 464. For that reason, it is the State that has the burden of establishing a valid waiver. *Brewer* v. *Williams*, 430 U.S. 387, 404 (1977). Doubts must be resolved in favor of protecting the constitutional claim. *Michigan* v. *Jackson*, 475 U. S. 625, 633 (1986). In a more recent case, the U.S. Supreme Court held: "Our precedents also place beyond doubt that the Sixth Amendment right to counsel may be waived by a defendant, so long as relinquishment of the right is voluntary, knowing, and intelligent." *Montejo v. Louisiana*, 07-1529 at pg. 7, 129 S.Ct. 1079, 1085 (U.S. 5-26-2009) holding that involuntary waivers of the attorney/ client privilege are "invalid."

2.10 ***Brady violations.*** A new trial should be granted because the prosecution violated the Brady doctrine at least four (4) times by failing to make a timely disclosure of exculpatory evidence to the Defense in the form of: 1) the Fairfax Book (TR 1346:1-11); 2) the failure to transcribe the full text of Defendant's arrest on June 11, 2010, with over one hour of exculpatory conversation missing (Aff Dr. Allen Banks ¶6,); 3) failure to produce a recording of the June 11, 2010 arrest, which recording Agent Sotka repeatedly promised to play for Cyndi Steele, but on June 21, 2011 Agent Sotka informed Ms. Steele that said recording was "not ready yet" (see Aff Cyndi Steele, ¶7(c)(2)) and 4) failure to produce the Buck report used in the May 11, 2011 sentencing of Larry Fairfax showing that Defendant was not guilty of the explosives charge because the device attached to Mrs. Steele's vehicle could not explode (see Ex M);

2.11 ***Mr. Steele was denied effective assistance of counsel by all attorneys.*** Both sets of attorneys, first, from the Federal Defender's Office, and second, from private counsel, each were ineffective in their attempts to provide assistance to Defendant as shown below.

2.12 ***Specific acts/omissions showing ineffectiveness of counsel: Roger Peven.*** Neither attorney Roger Peven of the Federal Defender's office nor the team of Robert McAllister and Gary Amendola were effective in assisting Defendant as trial counsel in his case. In chronological order, the ineffective assistance of Mr. Peven is dealt with first then that of trial counsel will be second. Mr. Peven, because of longstanding personal problems was unable to effectively manage his office and cases (Aff Edgar Steele, ¶4). Further, as he was appointed to represent Mr. Steele, he was embroiled in a dispute over his ability to competently serve as the Federal Defender (Aff Edgar Steele, ¶4). Moreover, as Mr. Steele reached out to qualified local attorneys, such as Mr. Steve Hormel, for reasons that can only be described as retribution arising from their internecine dispute, Mr. Peven strongly recommended against him and refused to allow Mr. Hormel to review Mr. Steele's file. In fact, Mr. Peven told Mr. Steele not to have anything to do with him. Any attorney seeking to be effective in Mr. Steele's case would have been in the process of preparing to defend the case for trial; but not Mr. Peven, he was insisting that Mr. Steele plead guilty to at least some of the charges (Aff Edgar Steele, ¶5). Mr. Peven failed to take the following action: 1) investigate the case; 2) hire knowledgeable experts; 3) file pretrial motions asserting Mr. Steele's defenses. Rather than preparing to defend Mr. Steele, attorney Peven was pressuring him to plead guilty (Aff Edgar Steele, ¶6) so that Mr. Peven would not have to perform any work on this case. It is quite clearly strong evidence of ineffectiveness that, at a time many months before trial, Mr. Peven failed to avail himself of the opportunity to prepare a defense or assert that Mr. Steele's rights, which were being harmed by prosecutorial misconduct, should be protected. Mr. Peven's failures in those early months, made it very difficult for his subsequent counsel to effectively assert and

protect these rights because the damage was already done, the proverbial "cat" was let out of the "bag". Timeliness in asserting such rights was essential to Mr. Steele's defenses.

(1) ***Peven's failure to investigate.*** Attorney Peven did not conduct a proper investigation of exculpatory facts in a timely manner. Information was supplied to him that there was another person, beside Darrel Hollingsworth, to whom Larry Fairfax stated that it was the FBI who asked him to set up Mr. Steele. Mr. Peven failed to make reasonable attempts to locate that witness even though he was notified of her existence in early September 2010. Neither did Mr. Peven have his investigator follow up on the statements in the message from an anonymous phone caller stating that James Maher, cousin of Larry Fairfax, had bragged that both he and Fairfax informed the FBI about a bomb before it was discovered June 15, 2010; and, as a result, the caller claimed that Maher and Fairfax bragged to him that they "had something on the FBI." Reasonable efforts were not made by Mr. Peven to locate or obtain a statement from such anonymous caller (Aff Cyndi Steele, ¶22).

(2) ***Peven's failure to hire knowledgeable experts.*** Attorney Peven did not hire knowledgeable experts who could: (a) analyze Mr. Steele's mental state at the time he made the phone call to his wife on June 13, 2010; (b) analyze the component configuration of the alleged pipe bomb to determine if it could explode; and (c) failure to hire a knowledgeable expert regarding audio recordings to show the same were fabricated. The failure of Mr. Peven to hire such experts in a timely way delayed the acquisition of information necessary to defend Mr. Steele's case and contributed to the fact that no expert testified on his behalf at trial.

(a) **Mental State Expert Needed**. Defendant's mental state was compromised by his arrest, solitary confinement and sudden withdrawal of prescription pain medications any one of which can materially affect a person's mental state, and a combination of all three (Ex. J, Report of Dr. Jonathan Woodcock) and all three of which likely was the cause of

his diminished mental capacity on June 13, 2010, since the time of his arrest, related to the phone call to his wife Cyndi Steele. Mr. Peven had months to apply his knowledge and skill as a criminal defense attorney to the subject of Mr. Steele's mental capacity at the time he committed the alleged witness tampering offense, but attorney Peven failed to do so. Failure by Mr. Peven, set up Mr. McAllister for failure when he submitted his Motion for Severance.

(b) **Explosives Expert Needed**. Counsel for Larry Fairfax hired ballistics expert Buck to perform an analysis of the components of the so-called "pipe bomb" found on Cyndi Steele's vehicle on June 15, 2010 at the oil change garage. That analysis was presented, without objection by the Government at the Fairfax sentencing hearing of May 11, 2011 and showed that said "pipe bomb" was not an explosive device (the Court should take judicial notice of its own files and review the Buck Report and video presented at the sentencing hearing in the case against Mr. Fairfax, (Case No. CR 10-183-BLW). Again, attorney Peven failed to hire a knowledgeable expert to analyze the pipe bomb evidence to show it was not an explosive device;

(c) **Audio recording expert needed**. It was incomprehensible that attorney Peven would not engage a knowledgeable expert who could opine on the subject of the authenticity of the audio recordings. As it turns out, the originals of these recordings were destroyed by FBI Agent Sotka. (TR 360:3-7 & 391.) A knowledgeable expert in the field of forensic examination of audio recordings would have looked into the origins of these recordings, the chain of custody as other generation recordings were made and discovered early in the case that the original was destroyed which would have effectively assisted Defendant in developing the defense of spoliation of evidence; the issue that was raised at trial by implication from the testimony of the Government's witness. Attached is the Declaration of Herbert Joe, regarding the elements of a forensic examination that would be needed in light of the testimony of Agent Sotka as to the manner in which he handled the recording device, "downloaded" the recording, utilized

proprietary software, destroyed the recordings, created wav files, and transmitted the device and CDs containing the alleged recordings to the FBI Lab at Quantico, VA. (See attached Ex. I, Declaration of Herbert Joe, dated August 8, 2011.)

(3) ***Peven's failure to make pretrial motions.*** Attorney Peven failed to timely make the following pretrial motions which would have protected Mr. Steele's due process rights as a defendant:

(a) **Failure to timely seek an order protecting Mr. Steele's attorney/client privilege**. A new trial must be granted because Mr. Peven did not provide effective assistance of counsel to remedy an untenable situation, which caused extreme prejudice to Mr. Steele's defense. For at least four (4) months, from October 2010 through January 2011, when he knew of the prosecutor's intrusion, Mr. Peven failed to make a motion seeking a protective order prohibiting the prosecutor from intruding into Mr. Steele's Sixth Amendment, Constitutionally protected attorney/client communications, which means that the prosecutor had complete access to all of Defendant's strategic decision. The prosecutorial misconduct of intruding into attorney/client communications was prejudicial to Mr. Steele's case, and includes:

(i) **"LEGAL MAIL" VIOLATED.** The prosecutor opened and read Mr. Steele's letter of August 12, 2010 to attorney David Basker (Aff Edgar Steele, ¶ 13(a)-(h)). Mr. Peven knew that said letter was plucked from the inmate mail and opened by the Government because it had become part of the prosecutors discovery (Id., at ¶ 13(d)) yet, Mr. Peven took no action to seek a protective order from ongoing prosecutorial misconduct;

(ii) **ATTORNEY PHONE CALLS VIOLATED.** Mr. Peven learned on October 7, 2010, that Mr. Steele's calls to private counsel were recorded and listened to by the prosecutor. He did not move for a protective order which would have flushed out the US Marshal's policy that prohibited him from speaking on unrecorded lines to private attorneys. That policy by the

Marshal's Service only allowed a federal detainee to be considered the "attorney of record" if that lawyer had been approved by the Judge (TR Hearing July 6, 2011, pgs. 30-36.) Said policy unconstitutionally denied Mr. Steele the right to freely retain and consult with counsel and violated Rules 5 F.R.C.P., which includes the right to "consult" with counsel according to Rule 5(d)(1)(B), F.R.C.P., and the right to "retain" counsel under Rule 5(d)(2). Mr. Peven's knowledge of this matter stems from two separate facts: first, he was in attendance at the hearing of October 7th where he was ordered by the Court to obtain from the prosecutor the recordings of Mr. Steele with private counsel, review them and report any irregularities to the Court. He later said that he accomplished that task and reported it to the Court that there were no irregularities. Secondly, in January 2011, he informed Mr. McAllister, Defendant's wife and Defendant, that he, Mr. Peven, had been informed by AUSA Whelan that she had been listening to recordings of Mr. Steele's conversations with private counsel all along and that she was aware that his defense strategies included: 1) attorney McAllister entering an appearance on February 7, 2011 and request a continuance; and 2) attorney McAllister raising the diminished mental capacity defense. Mr. Peven made the following statement to all three individuals (paraphrasing:) "You might as well call Traci Whelan first and tell her Edgar's defense strategies, because she gets that information before I do." (See Affs Edgar Steele, ¶16(b); and Cyndi Steele, ¶3). Of significance is the fact that AUSA Whelan used the strategic information she gleaned from Mr. Steele's attorney/client communications with attorney McAllister to formulate her tactics. E.g., there was no procedural basis for the prosecutor to file the motion to determine that Defendant had "waived" the attorney/client privilege (Dkt #71 of February 4, 2011) except as a pretext to protect herself from discipline or disqualification as a result of Mr. Steele's claims of misconduct. Said motion was filed only a few days after Mr. Steele was told that AUSA Whelan had been listening to his calls with attorney McAllister. When he was informed of that intrusion by AUSA Whelan, Mr. Steele immediately stated that he intended to file an ethics violation complaint with the Idaho State

Bar which was a significant motivator to AUSA Whelan to seek the Court's authorization and ratification of her ongoing campaign of intrusion into Mr. Steele's attorney/client phone calls.

(iii) **ATTORNEY-BOOTH COMMUNICATIONS VIOLATED.** In addition to the intrusion into his legal mail and jail phone calls, AUSA Whelan intruding into Mr. Steele's attorney/client communications conducted in the jail, attorney-conference booth. Said jail booth was supposed to be for unrecorded consultations with attorneys. The reason that Mr. Steele knows that AUSA Whelan was listening to the booth conferences as well as the phone calls with his attorney is that he did not, over the phone, discuss with Mr. McAllister's the plan to enter his appearance and then request a continuance, only in the jail provided attorney-conference booth in the Spokane County Jail. (Aff Edgar Steele, ¶15.) The attorney-conference booth provided at the Federal courthouse in Boise is also tapped so that the US Marshal can listen, as demonstrated by the Court in the May 3, 2011 proceeding (Dkt #272, pgs 3-5; and Aff Edgar Steele, ¶16(c)).

(b) **Peven's failure to timely move for severance**. This topic is covered above, under heading: "Mental State Expert Needed" and under heading: "Peven's failure to assert severance for diminished capacity defense."

(4) ***Peven's failure to timely assert defenses***. A new trial should be granted based on Mr. Peven's ineffective assistance while acting as Mr. Steele's counsel as a result of failing to timely assert defenses, as follows:

(a) **Peven's failure to timely assert governmental misconduct**. Although Mr. Peven was fully aware that governmental misconduct was Mr. Steele's key defense, yet, he refused to officially alert the Court that Defendant intended to offer the following evidence thereof as a part of his defense at trial:

i) **FABRICATED RECORDINGS NOT ASSERTED.** fabrication of recordings (it was unknown at the time that the original recordings were destroyed and that Agent

Sotka failed to listen to the originals before they were destroyed, two key facts setting the stage for fabrication; however, it Mr. Peven would have pursued this avenue with a notice of intent such as a so-called "Reverse 404(b)" motion, it would have been revealed earlier in the case; that is, if Mr. Peven had been effective in doing his job in obtaining an expert to properly examine the recordings, who likely would have determined early in such examination that original recordings of June 9th and 10th, 2010 were not available because they had been destroyed;

ii) **GOVERNMENT AND PROSECUTORIAL MISCONDUCT NOT ASSERTED.** Mr. Peven needed to timely seek protection from intrusion into Mr. Steele's attorney/client privilege by agents of the U.S. Marshal's Service, who were supplying that information to the U.S. Attorney to stop the invasion into what should have been Mr. Steele's confidential communications with private attorneys (see Aff Wesley W. Hoyt, attached to Dkt #88 regarding the October 7, 2010 *in camera* hearing, marked as Ex. G and attached hereto, regarding the statements of AUSA Whelan receiving recordings of Edgar Steele's lawyer calls from the Spokane County Jail from the US Marshal; see also the admission by AUSA Whelan as contained in Dkt #71, and see the information supplied to the Court by the U.S. Marshal on May 3, 2011, Dkt #272, pgs. 3-5, from the Government's own attorney booth in the Court House which, with the door closed, could only have been obtained by a hidden electronic snooping device in a booth that supposedly was not monitored or recorded. (See also Aff Edgar Steele, ¶35);

iii) **NON-EXPLOSIVE "PIPE BOMB" NOT ASSERTED.** Failure to assert that the so-called "pipe bomb" was not an explosive device, by failing to timely obtain the report of a knowledgeable expert, as above.

(b) **Peven's failure to assert severance for diminished capacity defense.** A new trial must be granted because of attorney Peven's failure to properly assert severance of the witness tampering count, based on Mr. Steele's sudden status change at the time of his arrest of

June 11, 2010 and the resulting diminished mental capacity at the time he made the June 13, 2010 phone call to his wife, Cyndi. (Aff Edgar Steele, ¶33; and Report of Dr. Jonathan Woodcock, attached and marked as Ex. J.) It was ineffective for attorney Peven not to assert severance which arises under the case law that requires a separate trial when antagonistic defenses are asserted as to one count but not to another. Although *Zafiro v. U.S.*, 506 U.S. 534, 539 (1993) deals with severance of joined defendants under F.R.C.P. 14, but the principle announced is applicable to severance of claims as well:

> [A] district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right... or prevent the jury from making a reliable judgment about guilt or innocence. Such a risk might occur when evidence that the jury should not consider against a defendant.... [text deletions as to co-defendant references to avoid confusion].

The antagonistic defense of diminished mental capacity, as it applied only to the charge of witness tampering would not be applicable to the solicitation and explosives related charges, because to apply it would mean that Defendant intended to admit culpability, then deny responsibility based on his mental state. Note that, the severance that Mr. McAllister argued for previously (Dkt #_) did not assert the diminished capacity defense solely related to severing the witness tampering charge. Under *Zafiro*, Defendant's *specific trial right* to be protected is the Fifth Amendment right not to testify against himself in the solicitation case, but to be able to testify and explain what he was going through when he made the phone call to his wife in the witness tampering case, at a time when his mental capacity had been diminished. Such presents a compelling basis for a severance in Mr. Steele's case missed by both Mr. Peven and Mr. McAllister. Thus, Mr. Peven was not being effective in representing Mr. Steele; if he had been effective he would have perceived that a obvious mental status change had taken place from day of his arrested on June 11, 2010 to the time of the phone call in question on June 13, 2010. That change is based on: 1) a sudden and complete withdrawal from medication; and 2) the stress of a first-time incarceration with

solitary confinement, complete with lock down in a high security setting leaving him mentally devastated. Further, if Mr. Peven would have perceived that a separate trial was necessary because the correct defense to the witness tampering count was diminished capacity, then he would have realized that such a defense had no application, and, in fact, was antagonistic to the defense to the other counts. Failure to have an analysis performed as to Mr. Steele's mental state from the moment of his arrest on June 11, 2010 up to and including the time he made the phone call to his wife on June 13, 2010 when his mental capacity to remember, to think, to know right from wrong, to exercise good judgment and to make rational choices was severely diminished by said conditions (see Dr. Woodcock Report, Ex. J) and two new trials with severed counts is warranted. *United States v. Breinig*, 70 F.3d 850, 852-853 (6th Cir. 1995) (Severance should have been granted where the codefendant's defense included prejudicial character evidence regarding the defendant). *United States v. Jordan*, 112 F.3d 14, 17 (1st Cir.), cert. denied, 523 U.S. 1041 (1998) (Charges should have been severed when a defendant wanted to testify regarding one count, but not others). In this case, Mr. Steele would have testified about the witness tampering charge but, elected not to testify as to the solicitation charges. The jury verdict should be overturned based on the failure to sever.

The withdrawal from the drugs without a slow and staged reduction, together with the stress of arrest, being falsely accused of a crime he did not commit and being locked away from human contact caused him to suffer a "fugue" or temporary loss of his rational self and disas-sociate into a delusional state, such that he had a diminished capacity to function mentally. The phone call itself is evidence of this state of a diminished capacity of mind from the fact that he did not recognize the reality of his circumstances being in jail, acting like he was a CEO in charge. That kind of grandiosity is indicative of the loss of touch with reality and presents an issue for the jury, which is separate and apart from the issues in the solicitation case and Defendant should have

been allowed a separate trial because of the disparity of defenses to be applied in the solicitation case. Certainly, a defendant may assert inconsistent defenses, "[i]t is well established that a defendant in a criminal prosecution may assert inconsistent defenses. The rule in favor of inconsistent defenses reflects the belief of modern criminal jurisprudence that a criminal defendant should be accorded every reasonable protection in defending himself against governmental prosecution, *United States v. Demma*, 523 F.2d 981, 985 (9th Cir. 1975) (citing *United States v. Harrell*, 436 F.2d 606, 611-12 (5th Cir. 1970) (denial of conspiracy and claim of entrapment); *Johnson v. United States*, 426 F.2d 651, 656 (D.C. Cir. 1969) (denial of sexual intercourse and claim of consent); *Hansford v. United States*, 303 F.2d 219, 221 (3rd Cir. 1962) (denial of drug transaction and claim of entrapment); *Whittaker v. United States*, 281 F.2d 631, 632 (D.C. Cir. 1960) (denial of underlying acts and claim of insanity); *See also United States v. Harbin* 377 F.2d 78, 80 (4th Cir. 1967); *People v. Perez*, 401 P.2d 934 (Cal. App. 1965). "Under the law of this circuit . . . an accused may present inconsistent defenses." *United States v. Lopez*, 142 F3d 446 (9th Cir. 1998)). "Alternative defenses, of course, are proper, even if inconsistent." *United States v. King*, 587 F.2d 956, 965 (9th Cir. 1978); "[t]he essence or core of the defenses must be in conflict such that the jury, in order to believe the core of one defense, must necessarily disbelieve the core of the other." *United States v. Sherlock*, 962 F.2d 1349, 1363 (9th Cir. 1989) (quoting *United States v. Romanello*, 726 F.2d 173, 177 (5th Cir. 1984)). But, as here, when parties present antagonistic defenses severance pursuant to FRCP Rule 14 is appropriate. *United States v. Ogelby* 764 F.2d 1203 (7th Cir. 1985).

2.13 ***Specific acts/omissions showing ineffectiveness of counsel: Robert McAllister.*** the team of Robert McAllister and Gary Amendola was not effective in assisting Defendant as trial counsel in his case see Affidavits of McAllister and Amendola, attached.

(1) ***McAllister failure to investigate or prepare for trial.*** Even though he entered his appearance late in the proceedings, Mr. McAllister still had an obligation to conduct a thorough investigation and the same facts and arguments apply to him as well as to Mr. Peven.

(2) ***McAllister failure to hire knowledgeable experts.*** The same facts and arguments apply to Mr. McAllister as well as to Mr. Peven, with the following differences:

(a) **Mental State Expert Needed**. Same facts and arguments apply.

(b) **Explosives Expert Needed**. Same facts and arguments apply.

(c) **Audio Recording Expert Needed**. Same facts and arguments apply, with the following caveat. Mr. McAllister did hire a renown expert in this field, Dr. George Papcun. What Mr. McAllister did not do was to secure Dr. Papcun's testimony with a subpoena. Also, Mr. McAllister, having been told by his client, orally and in writing, to subpoena Dr. Papcun but also to ask his supporters to pay a reimbursement for Dr. Papcun's Polynesian vacation that had been pre-paid and was non-refundable and was due to commence two days after trial started, on April 28, 2011 (see Aff Dr. Papcun.) Mr. McAllister's excuse for not sending a subpoena to Dr. Papcun was that he was afraid he would have a hostile witness if he did. However, is it better to have no witness, when a man's life is at stake than to have a hostile witness? Additionally, Dr. Papcun only wanted to be compensated for his loss of a pre-paid vacation and was not hostile. Since Mr. Steele had expressed his desire to have Dr. Papcun testify and "buy out" his vacation, therefore, when Mr. McAllister was dead wrong when he said that Mr. Steele did not want Dr. Papcun to be subpoenaed and when he said that Mr. Steele did not want to have anyone pay to "buy out" Dr. Papcun's vacation. Thus, this was at the very least a colossal misunderstanding or worse, a deliberate attempt to prevent Mr. Steele from defending the charges against him. While it may never be known which was the case, Mr. McAllister's Affidavit has shed significant light on the subject and explained that he was severely distracted with his personal problems. Thus, in all

events, Mr. McAllister was totally ineffective in assisting Mr. Steele present a defense at trial.

(3) ***McAllister failure to make trial objections, motions, proffers, jury instructions.***

(a) **Failure to Properly Handle Witnesses**. The record is replete with examples of Mr. McAllister silently allowing the prosecution, without objection: 1) effectively examine witnesses, by at least asking the questions on the sheets in front of him, in fact, in one case, he read, as if it was a question, the answer to one of the many questions which had been prepared, but which he failed to ask; 2) to allow the prosecution, without objection, to lead her own witnesses as to matters of substance as she would substitute her words for theirs, basically testifying; 3) to allow the prosecution, without objection, to ask compound questions that assumed matters not in evidence; 4) to allow the Government, without objection, to submit evidence that did not have a proper foundation, such as the recordings of June 9th and 10th, which it was not shown what generation of recording these were and what was the chain of custody (see Declaration of Herbert Joe, attached as Ex. I.) Other examples are listed in the attached affidavits and in the Transcript of the Trial Record which is incorporated herein by reference. This list is not by any means comprehensive, but illustrative of the mistakes made by Mr. McAllister, demonstrative of his ineffective assistance of counsel.

(b) **Failure to Make Trial Motions**. The record is replete with examples of Mr. McAllister silently allowing the prosecution, without objection: 1) to put on faulty evidence and when he did make an objection, he did not follow up with Motion to Strike; 2) to fail to move for a mistrial when the Government made such outrageous declarations, such as when Agent Sotka stated that he had deleted the original recordings on the device allegedly carried by Fairfax to the meetings with Mr. Steele of June 9th and 10th; 3) to fail to move to exclude the recordings when Agent Sotka stated that he had not listened to the recordings as they were on the recording device; 4) to move to dismiss when Agent Sotka testified that the microphone of the recorder that

supposedly was recording Mr. Steele's arrest on June 11, 2010, when it was revealed that there was a about an hour of the two hour recording missing and that hour had exculpatory evidence in it that would have shown that Mr. Steele did not "try to cry" nor did he "defecate himself" as alleged by the Government; 5) failed to file pretrial suppression motions as to known prosecution evidence that was faulty, such as the recordings of June 9th and 10th; 6) failed to file a motion to dismiss for lack of jurisdiction, as set forth at the beginning of this pleading; and 7) failed to move for a jury instruction on the defendant's theory of defense, apparently because he had none.

(c) **Failure to Make Offers of Proof and Argument**. The record is replete with examples of Mr. McAllister silently allowing the Court to exclude evidence that was relevant, material and exculpatory (see Affs Cyndi Steele, Edgar Steele, Dr. Allen Banks, Dr. Robert Stoll, Billie Cochran), without making an offer of proof, preserving what each witness would have presented in testimony. It was almost as if Mr. McAllister was in a daze and could not function well enough to realize that his client's case was disappearing before his very eyes and he was doing nothing to stop it. After the Court indicated that it would not allow the Defendant to present any negative information about the Government, the following items should have proffered, which are included in the affidavits just mentioned, and a few examples are: 1) with reference to the testimony of Cyndi Steele's and in her Affidavit at ¶ 7(c) she reveals that she was prepared to testify regarding the pattern of lying by FBI Agent Sotka, who also unlawfully advised her, as a crime victim, not to hire a lawyer. The purpose for Mrs. Steele's testimony would have been to impeach Agent Sotka with statements that constitute admissions against interest of the Government. Although she was prepared to testify, she was not asked the questions by Attorney McAllister who apparently was unable to read from a list of questions. If those questions had been asked and an objection made and sustained, Mr. McAllister should have made an offer of proof as to each question and answer in order to preserve the record on appeal. However, the trial record

indicates he made not one proffer. Nor did he make even one motion for mistrial. Rather he capitulated to every whim of the Government and the Court. Incorporated herein is the information from paragraph 7(c) of the Affidavit of Cyndi Steele which shows Agent Sotka to be a repeated liar and would have shed serious doubt on his credibility as to the other aspects of the case and would have helped establish Mr. Steele's defense of FBI Bad Faith and governmental misconduct.

In fact, in a spoliation case, it is necessary to show that the agent destroyed the evidence in bad faith. *Arizona v. Youngblood*, 488 U.S. 51, 55 (1988).

> Bad faith is shown where the police conduct indicates that the evidence could form a basis for exonerating the defendant. U*nited States v. Heffington*, 952 F.2d 275, 277 (9th Cir.'91)
>
> When criminal evidence is lost or destroyed, the court's principal concern is whether the defendant can have a fair trial even though he is not able to examine all the relevant evidence. U*nited States v. Loud Hawk*, 628 F.2d 1139, 1151 (9th Cir. 1979).

A balancing approach is used to make that determination. While the investigation of Maria Lopez's murder was in progress in *Loud Hawk*, the Government destroyed some relevant evidence in the case: the latch and rivets on the FPO guard booth and certain semen stains on the victim's panties and slip. The Court held: "[t]o determine whether we are required to set aside the conviction on this ground, we must weigh the extent of the Government's culpability and the degree of prejudice to the appellant. (Id., at 1151-54 (en banc), cert. denied, 445 U.S. 917, 100 S.Ct. 1279, 63 L.Ed.2d 602 (1980)).

Defendant submits that all of the following items of material evidence, if preserved, would have been exculpatory and should have been preserved and provided to him under *Brady v. Maryland*, 373 U.S. 86 (1963): 1) The sound recorded on the device June 9th and 10th were deleted and thus destroyed by Agent Sotka (TR Pg. 360, ln 1-10); 2) the fingerprints on the pipe taken from under Mrs. Steele's vehicle on June 15, 2010; 3) Mr. Steele's file marked "Gold" the jacket of which file jacket appeared in the Government's discovery and taken in the raid on his home, but

the contents of which were missing and not produced in discovery by the Government and the contents showed the records of the silver that was sold by Mr. Steele and would have rebutted the prosecution's assertion that the stolen $45,000 in silver was a part of the $50,000 in silver that was cashed; 4) The transcript of the recording from the day of Mr. Steele's arrest shows that one hour is missing and unaccounted for (Affidavit of Dr. Allen Banks).

Spoliation of evidence is the basis for reversal of a conviction if the missing evidence is both material and exculpatory. It is necessary for the defendant to show it was prejudiced by plaintiff's destruction of evidence in order for the spoliation doctrine to apply. *Eli Lilly and Co. v. Air Exp. Intern. USA, Inc.*, 615 F.3d 1305, 1318 (11th Cir. Aug. 23, 2010) (No. 09-12725). Clearly, the loss of such evidence was prejudical to Mr. Steele's defense in this case because the Government has maintained that the recording played for the jury was unedited and claimed the defense audio expert's analysis was ineffectual because they had not analyzed the recording in its "native format" when the Government was responsible for the destruction of the native format. Since the Government by Agent Sotka destroyed the ultimate version of the native format, the sound recording on the device, then it is using its own bad faith destruction as the basis for attacking the defense opinions. Here, the Defendant never had the opportunity to evaluate the actual original because the Government eliminated it before anyone, except FBI Agent Sotka, who was operating alone and against FBI regulation, when he obtained, copied and destroyed said original. One limitation on the spoliation doctrine is that evidence that is destroyed be relevant to the litigation. *See, e.g., United States ex rel. Aflatooni v. Kitsap Physicians Service*, 314 F3d 995, 1001 (9th Cir. 2002) (in the absence of awareness that the destroyed evidence was relevant to the litigation, a finding of spoliation is not justified). Here, Agent Sotka well knew of the relevance of the recordings he destroyed.

Thus, to meet his burden to establish spoliation of the sound recordings on the device

carried by Informant Larry Fairfax on June 9th and 10th, it was necessary for Mrs. Steele to chronicle the details of Agent Sotka's lies in this case, which necessarily shows by implication his bad faith. The argument is that if he has no regard for the truth in dealing with the victim, then, why should he have any regard for integrity when it came to destroying the only item of true original evidence that could possibly prove Defendant innocent.

(d) **Failure to Offer Defendant's Theory of Defense in Jury Instruction**. Mr. McAllister had an obligation to offer a jury instruction containing the defendant's theory of defense. That instruction was never offered because Mr. McAllister apparently did not understand that it was by government misconduct that Mr. Steele was investigated, charged and prosecuted.

(4) ***McAllister's closing was pathetic***. Mr. McAllister's closing argument was utterly deficient and pathetic, as Mr. Amendola said in his Affidavit at ¶ 13, McAllister's closing was "terrible;" and it was terrible because McAllister had been so ineffective in assisting Mr. Steele that he had not introduced any evidence in the trial on which to base a theory of defense, which would then allow him to make a cogent argument; and 3) In looking at the record it appears that Mr. McAllister systematically ignored the opportunity to present evidence that favored Defendant, missing opportunity after opportunity to "prove Defendant's innocence;"

2.15 ***Informant contributed to cabal***. In an attempt to absolve himself of responsibility, the Informant eventually told the FBI about the "car bomb," but only after it had been found on June 15th. In fact, the jury was told that the Informant and his cousin, James Maher, had traveled to Oregon 15 days before the "car bomb" was found (that is on May 31, 2010) to examine Mrs. Steele's vehicle to see if the pipe bomb was still attached to her car. The cousin, James Maher, an uncharged accomplice, stated that he had looked under Mrs. Steele's car and did not see a bomb, casting doubt on whether a bomb had ever been transported in interstate commerce in the first place and raising the question as to when and how the bomb got there that eventually was found

on June 15, 2010 at oil change garage. All of this information could have been gleaned from the Informant on June 10th once the words "car bomb" had been heard during the morning meeting with two FBI Agents and an assistant US Attorney.

2.14 ***FBI irresponsible not to arrest Fairfax.*** Because Mr. Fairfax was still at large and not incarcerated on June 13, 14 or 15th as Mrs. Steele returned to Idaho, the Informant was free to install another "car bombs" on Mrs. Steele's vehicle. The fact that no bomb was seen on May 31st and then one was found on June 15th raises a fair inference that it was attached just prior to June 15th just after Mrs. Steele returned to Idaho on June 13th. Certainly, Fairfax the bomb manufacture was on the loose and he knew her vehicle and had the opportunity to install the bomb on her car. Unless there was proof that the bomb actually traveled from Idaho to Oregon on May 27, 2010 after it allegedly was installed, then there is no interstate commerce jurisdiction for this count either. Either Mr. Peven or Mr. McAllister could have raised this argument earlier, but failed, because they both were ineffective.

2.19 ***Prosecutorial eavesdropping made privilege unpredictable.*** Following this incident, AUSA Whalen engaged in eavesdropping on telephone calls between Mr. Steele and private lawyers he was interviewing to represent him. While the Court erroneously ruled (Dkt #90) that Mr. Steele had "waived" the attorney/client privilege by proceeding to speak with private attorneys on a phone line after a recording announced that the call "may be monitored or recorded." The Court was never asked to reconsider its ruling based on the fact that the so-called "waiver" was not either knowing or voluntary. The Government was relying upon an unconstitutional, unwritten policy of the US Marshal's Service for the District of Idaho as the party responsible for the custody of Mr. Steele. It was the US Marshal who had decreed that the only lawyer with whom Mr. Steele (and other federal detainees) could have a confidential call on a "private" line was the lawyer who had been first approved by the Court and entered an appearance

in Court as Defendant's "attorney of record." (See statement to the Court of US Marshal Glen Morgan, July 6, 2011 and Affidavit of Edgar Steele, ¶16(d).) The case of *Jaffee v. Redmond*, 518 U.S. 1, 18 holds that in order for the attorney client privilege to be effective, it must be predictable. Nothing is predicted about an unwritten policy in the US Marshal's office.

2.20 ***Non-voluntary waiver***. The ruling was erroneous because the supposed "waiver" was not voluntary as it was the only phone line on which the U.S. Marshal's Office allowed Mr. Steele to make calls to anyone, including private lawyers with whom he discussed the possibility of representation; thus Mr. Steele was forced to use the recorded line, which was an involuntary use of said line when calling private lawyers. Involuntary waivers have been held invalid. *Montejo v. Louisiana*, 07-1529, pg. 7, _ US _, 129 S.Ct. 2079, _ (2009); *Michigan* v. *Jackson*, 475 U. S. 625, 633; *Patterson v. Illinois,* 487 U.S. 285, 292, at n. 4 (1988). "A waiver of constitutional rights is voluntary if, under the totality of the circumstances, it was the product of a free and deliberate choice rather than coercion or improper inducement." *Comer v. Schriro*, 480 F.3d 960, 965 (9th Cir. 2007) (citing *Whitmore v. Arkansas*, 495 U.S. 149, 165 (1990); accord, *Berghuis, Warden v. Thompkins*, _ US _, 08-1470 (U.S. 6-1-2010) 130 S.Ct. 2250, _). Here should be is a presumption of non-voluntariness from his restricted movement due to incarceration and from the lack of other phone line choices for him as a Federal detainee.

2.23 ***Enabling improper conduct is bad faith***. The informant, Fairfax, was enabled to conduct his recorded conversation with Mr. Steele with out surveillance because of FBI Agent Sotka would not follow the rules. , acting without the aid of another FBI agents according to the testimony of Agent Sotka; which is a violation of FBI regulations for handling such matters. No evidence as to the existence of those regulations and what requirements they placed on Agent Sotka was introduced in evidence at trial because of the IAC of defense attorneys.

2.24 ***Government opened the door.*** Since the jury heard the tape recorded phone calls to family members by Mr. Steele on June 13, 2010, stating that he believed the recordings were fabricated, the subject of governmental misconduct was introduced by the Government; which raised the issue. Preventing Defendant from pursuing questions on this topic was erroneous and a new trial should be granted.

a. **Non-Disclosure of destruction of original recording in bad faith mandates new trial be granted.** In his testimony at trial, FBI Special Agent Sotka disclosed for the first time that he destroyed the recorded information on the device (TR 360:3-7) of the recordings of June 9th and 10th, 2010 (see Trial Exhibits 21 and 22, purportedly exact copies of another copy of the original). It was prosecutorial misconduct not to disclose the destruction of the recorded sound on the device until Defendant had an adequate opportunity to prepare effectively for that hearing. Instead, the prosecution conducted a charade pretending that the it still had the recording in its "Native Format." At trial, Agent Stoka stated that the copy he down loaded to the CD was the original, when clearly, the actual original was on the media in the device, which was deleted by him. The second generation copy was the hard drive on his dedicated computer with proprietary software. The Third generation copy was the copy on the CD that he had mad, which was twice removed from the actual original. This charade misdirected the Defendant as to the source of the Government's recording, which all believed was the original. Since it was not until trial that Defendant learned from Agent Sotka that the original recordings were destroyed, again, Defendant was ill prepared to defend this case. Further, Agent Stoka disclosed for the first time at trial that he did not independently verify that the original recordings were exactly, bit-for-bit, the same as the copies he made on his computer with the proprietary software. There are tools that can make the comparison, but apparently he did nothing to check to see that what was on the recording device was transferred.

b. ***No proof of authenticity-Government does not sustain its burden.*** The prosecution represented in trial that the copies it played for the jury were exactly identical to what was recorded on the device carried by Fairfax, but that was without verification and the prosecution had the burden of proof, having not met that burden, a new trial must be granted.

c. ***Assumption does not provide sufficient evidence of guilt.*** It turned out that this was an assumption based on representations by Agent Sotka's who supposedly downloaded the recording to his computer without verification. Because there was no verification that the copy was identical to the original recording, the best interpretation of Agent Sotka's testimony is that he assumed that they were identical. Convicting a person on an assumption is offensive to fundamental Constitutional principals of fair trial under the Sixth Amendment. In the universe of criminal law, where the standard is Beyond a Reasonable Doubt, assumptions, especially false assumption cannot be the basis of any action. *Townsend v. Burke*, 334 U.S. 736, 741 (1948).

d. ***Government's Burden of Proof.*** However, neither Agent Sotka nor the Government offered any proof that the recordings on his computer, from which copies supposedly were generated, were an exact duplicate of the sound on the device. (See Disclosure of Herbert Joe, Ex. I) The entirety of the prosecution's case depended upon its representation that they were authentic. Without the recordings, the prosecution had no case. In fact, the only evidence offered by Agent Sotka was that he did not compare the accuracy of what was on his computer with the recording on the device before he destroyed it. Because he could not testify that he was able to verify that the recording on his computer was an exact clone and identical to the recording on the device carried by Larry Fairfax before that recording was destroyed, there is a gap in the evidence and a missing link in the chain of proof. Thus, this case must be dismissed for lack of sufficiency of proof that the recording played for the jury was an exact duplicate of the original recordings allegedly made June 9th and 10th, 2010 as represented by the prosecution.

Additional References:

Cyndi knew Ed's voice (Aff Cyndi Steele, ¶ 7(b)). Cyndi would have testified about Ed's health and the impossibility for him to engage in plotting against anyone (Aff Cyndi Steele, ¶ 8(a)). Cyndi comments on the 10 year old divorce information (Aff Cyndi Steele, ¶ 10, 7(e)); Cyndi there was no word "car" in the recording she listened to on June 21, 2010, only the word "bomb" ¶12(c); Cyndi was cut off and was not able to explain to the jury about the barn noises, train, bird noises and the significance of each ¶ 12(b); Cyndi, Mr. McAllister started reading the answer to the question he was supposed to ask ¶ 11; Cyndi Stable marriage after 2000 divorce was resolved ¶ 10; Cyndi, Mr. McAllister was not truthful when he said Edgar did not want subpoena and paying to buyout the vacation of Dr. Papcun ¶ 13; Cyndi could have impeached Mr. Fairfax, about leaving the door open on 05-27-10 if she had been allowed to testify ¶12(a); Cyndi did cooperate with FBI in Oregon, refuted testimony of Agent Sotka ¶ 9(c)&(d); Cyndi personally cooperate with the Government, but decided to hire attorney when the FBI said they would refused to protect her on 06-15-10 ¶ 9(a); Cyndi was ready to listen to recordings from the first moment she heard about them ¶ 8(b); Cyndi knew nothing of Mr. McAllister's problems, he not take steps to withdraw ¶ 5.

WHEREFORE, Defendant moves this Honorable Court for a new trial on all issues.

Respectfully submitted this 15th day of July, 2011.

LAW OFFICES OF WESLEY W. HOYT
By:

/s/ Wesley W. Hoyt
Attorney for Defendant, Edgar J. Steele

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the following on this __ day of July, 2011 by the following method:

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David Hammerquist David Claiborne Attorneys for Cyndi Steele, Victim Ringert Law Chartered P.O. Box 2773 Boise, Idaho 83701	[__] U.S. First Class Mail, Postage Prepaid [__] U.S. Certified Mail, Postage Prepaid [__] Federal Express [__] Hand Delivery [__] Facsimile: 208-342-4657 [X] ECF Electronically Served

_____/s/Wesley W. Hoyt_____