No. 12-30005

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EDGAR J. STEELE.

Defendant-Appellant.

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

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

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STATEMENT PURSUANT TO FED. R. APP. P. 35(b)

Pursuant to Federal Rules of Appellate Procedure 35 and 40, and Ninth Circuit Rules 35-1 and 40-1, Defendant-Appellant Edgar Steele respectfully petitions for rehearing en banc or, alternatively, panel rehearing of its published decision in the above titled appeal issued October 24, 2013 (see Exhibit A to this petition, *United States v. Steele*, 733 F.3d 894 (9th Cir. 2013). The decision affirmed Mr. Steele's convictions for murder-for-hire and victim tampering arising from Steele's purported plan to kill his wife and mother-in-law.

En banc review is necessary to resolve questions of exceptional importance. Specifically, the panel's opinion holds that where a defendant in a criminal case files a timely motion for a new trial based on ineffective assistance of counsel (IAC), a district court *should* consider the motion, provided certain conditions are satisfied. The opinion then purports to adopt, but badly misconstrues, Second Circuit authority concerning the nature of those conditions. The result is a Ninth Circuit rule that, permitted to stand, will both unfairly defer the resolution of such claims and gravely undermine the court's interest in judicial economy.

Review by the panel is also in order insofar as it significantly misconstrues the record as to the facial plausibility of petitioner's IAC claim. An accurate construction of the record would likely have altered the panel's conclusion that the

district court acted properly in deferring resolution of the claim.

QUESTIONS PRESENTED

I. DID THE PANEL'S OPINION CORRECTLY FORMULATE THE CRITERIA THE DISTRICT COURT SHOULD CONSIDER IN DECIDING WHETHER TO CONSIDER A TIMELY IAC CLAIM PRESENTED BY A CRIMINAL DEFENDANT PRIOR TO JUDGMENT?

II. DID THE PANEL'S OPINION CORRECTLY CONCLUDE THAT DEFENDANT'S CENTRAL IAC CLAIM WAS NOT FACIALLY PLAUSIBLE?

STATEMENT OF THE CASE

A. Developments at Trial

On July 20, 2010, the United States filed a superseding indictment charging appellant Steele with use of interstate commerce facilities in the commission of murder for hire (18 U.S.C. § 1958) (Count One); aiding and abetting use of explosive materials to commit a federal felony (18 U.S.C. § 844(h)) (Count Two); possession of a destructive device in relation to a crime of violence (18 U.S.C. § 924(c)(1)(B)(ii)) (Count Three); and tampering with a victim (18 U.S.C. § 1512(b)(3)) (Count Four). (Dkt. 25)

At trial, the government sought to prove that Steele, an Idaho defense attorney known for taking on controversial and unpopular causes, had hired Larry Fairfax, a handyman, to carry out the murder of Steele's wife by using and

possessing an explosive and a destructive device. Fairfax at some point came to authorities with a story that implicated Steele and falsely exonerated himself. But the government relied heavily on recordings of conversations between Steele and Fairfax, purportedly made by the latter at law enforcement's direction, that, if authentic, implicated Steele.

The single most important defense challenge to the prosecution's case rested on the contention that the recordings were fabricated. Robert McAllister, defendant's trial counsel, retained George Papcun, a distinguished and qualified forensic expert, who was prepared to testify that the recordings were not authentic. The defense thereafter laid the lay-witness foundation required by the trial judge to introduce this expert evidence, but, as a result of his patent incompetence, McAllister failed to secure Papcun's presence at trial. Contrary to the panel's account of the facts, the district court recognized that Papcun was a key defense witness (ER 236 [RT 1360]). And that court repeatedly chastised the defense's failure to ensure the admission of Papcun's testimony as "a problem of the defense's own making." (ER 236-238 [RT 1360-67])

The jury convicted Steele on all counts. (Dkt. 505) After the conviction, the district court authorized new counsel, Wesley Holt, to replace McAllister in light of the revelation that McAllister was the continuing subject of state

disbarment proceedings. Holt thereafter timely filed a supplemental new trial motion under Fed.R.Crim.P. 33(b), alleging, among other things, ineffective assistance of counsel based in large part on McAllister's failure to present the vital and available expert evidence from Papcun. The district court, however, declined to entertain the IAC claim, ruling that it should instead be heard by means of a motion under 28 U.S.C. section *after* the conclusion of Steele's appeal. The new trial motion was denied. (ER 18-19; Dkt. 512)

Following the entry of the judgment, a host of other facts surfaced bearing on trial counsel McAllister's deficient performance, all of which would have been subject to exploration had the IAC claim been developed and heard by the district court. These facts were shocking: throughout the time that he represented Steele before, during, and after trial, Steele's trial counsel had not only been the subject of disbarment proceedings, but had also been under investigation and indictment for serious federal crimes. The government concealed the fact of the federal investigation and indictment for the duration of the district court proceedings at Steele's trial. Immediately after the judgment against Steele was entered, however, the government announced its case against McAllister, unsealing and trumpeting the indictment against him. McAllister, by then disbarred, was later convicted and sentenced to federal prison.

B. The Panel's Opinion

On appeal, Steele argued, *inter alia*, that the district court had abused its discretion in refusing to entertain the IAC claim raised by substitute counsel Holt in his timely new trial motion. Steele contended that in so ruling, the court had believed itself bound by legal rules applicable to IAC claims raised for the first time *after* judgment, either on appeal or as purported "new evidence"—circumstances that had no application to Steele's timely pre-judgment claim.

Steele further contended the Court should have heard the claim since it was timely presented and new counsel was in place to challenge the effectiveness of another counsel's performance. *See* appellant's opening brief, at 40, et seq., citing *United States v. Brown,* 623 F.3d 104, 113 (2nd Cir. 2010) (ruling that district court should consider such a claim where doing so will not significantly disrupt proceedings and the defendant is advancing a "facially plausible" claim); *United States v. Cobas*, 415 Fed. Appx. 555 (5th Cir. 2011); *United States v. Woods*, 812 F.2d 1483 (4th Cir.1987); *United States v. Jensen*, 2010 WL 380998, (9th Cir. 2010); *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039 (1984); *United States v. Del Muro*, 87 F.3d 1078 (9th Cir. 1996); *United States v. Howard*, 2010 WL 276236 (9th Cir. 2010); *United States v. Moses*, 2006 WL 1459836 (9th Cir. 2006). *See also Brown,* 623 F.3d at 113 ("We are perplexed by the assertion that a

trial court must invoke an appellate court's rubric and require a defendant to use his one § 2255 motion to raise an ineffective assistance claim post-judgment, particularly when the district court is in a position to take evidence, if required, and to decide the issue pre-judgment.")

As a preliminary matter, the panel's opinion recited the competing concerns bearing on the exercise of the district court's discretion to hear a timely IAC claim prior to judgment. On the one hand, postponing consideration until appeal is concluded might cause the defendant to serve "months" in prison and might deprive the defendant of his right to appointed counsel which he would maintain were the claim heard prior to judgment. *Steele*, 733 F.3d at 897-98. On the other hand, hearing the claim prior to judgment could result in "disruption" of the proceedings, as when the court must interrupt the proceedings to relieve the defendant's attorney and appoint new counsel to present the IAC claim. *Id.*, at 898.

The panel then purported to adopt the rule in *Brown*. Quoting that decision, the panel stated that, " 'when a claim of ineffective assistance of counsel is first raised in the district court prior to the judgment of conviction, the district court may, and at times should, consider the claim at that point in the proceeding.' " *Steele,* 733 F.3d at 897 (quoting *Brown*, 623 F.3d at 113).

Again referring to the analysis in *Brown,* the panel reasoned that the district court had properly exercised its discretion in refusing to consider Steele's IAC claim because (1) the claim had multiple bases and was not fully developed on the existing record, and thus required exploration at a substantial hearing; (2) the central IAC claim involving McAllister's failure to present the Papcun evidence was of "limited probative value" insofar as Papcun's proffered, pre-trial testimony "did not include a claim that the tapes were fabricated;" and (3) the district court, "alerted to issues of ineffectiveness following [McAllister's] legal troubles," at one point stated that "with respect to ethical lapses, 'certainly nothing in the courtroom gave me any pause or concern in that regard.' " *Steele*, 898-99.

I. EN BANC REVIEW IS IN ORDER BECAUSE THE PANEL'S OPINION MISREADS RELEVANT EXTRA-CIRCUIT PRECEDENT AND ENCOURAGES UNREASONABLE AND UNFAIR DELAY IN RESOLVING CLAIMS ALLEGING INEFFECTIVE ASSISTANCE OF COUNSEL

As noted, the panel's opinion professes to follow the Second Circuit's decision in *Brown* in identifying the factors that should guide a district court's decision to hear timely, pre-judgment claims alleging ineffective assistance of counsel. But as to one factor, the panel misconstrues *Brown* and thereby establishes Circuit precedent that will undermine the judicial process.

Specifically, the panel says the district court may defer hearing on the claim

to avoid the disruption that would be caused by a substantial hearing. In this case, the central IAC claim advanced by Steele was, in fact, highly developed on the record.[1] But that point aside, the kind of disruption *Brown* cited as justification for deferring the claim was the need to relieve defendant's original counsel and substitute new counsel—a need that obviously did not arise in Steele's case. On the other hand, *Brown* actually *contemplated* the necessity of a substantial hearing to determine whether the defendant's IAC allegations could be proven. Thus, as *Brown* stated at the close of its discussion,

> Had the district court held a hearing . . . it would have created a record from which this Court could have decided the merits of the claim on direct appeal. Absent such a hearing, this Court's ability to address an ineffective assistance claim on direct appeal is decidedly limited.

623 F.3d at 114. The Court in *Brown* accordingly declared that it had "no trouble concluding that the district court should have considered [the defendant's IAC] claim prior to the imposition of the sentence," and remanded the matter to the district court with instructions that it engage in appropriate fact-finding as to the merits of the defendant's claim. *Id.*, 623 F.3d at 113-14.

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[1] Again, during trial, the district court expressly found that the failure to present testimony from "key defense witness" Papcun had been a "problem of the defense's own making." (ER 236 [RT 1360-61])

The central point of *Brown* is that disposition of a timely, pre-judgment IAC claim, *including* an evidentiary hearing as to facially plausible underlying allegations, is warranted whenever the defendant and his or her claim are situated just as they would be were the claim presented for the first time in a motion under 28 U.S.C. section 2255. Those are precisely the circumstances under which Steele presented his claim to the district court. By disregarding this essential fact and requiring Steele to defer his IAC claim until after his appeal, the district court needlessly committed him to spending years, and not mere "months," in prison before he receives a fair adjudication of his claim.

The panel's opinion deviates from the test set forth in *Brown* and undermines compelling interests in judicial economy and due process as it does so. Rehearing en banc is in order.

II. REVIEW BY THE PANEL IS IN ORDER BECAUSE THE PANEL'S OPINION PATENTLY MISCONSTRUES THE RECORD AS TO THE FACIAL PLAUSIBILITY OF APPELLANT'S IAC CLAIM

A. The Evidence Affected by Trial Counsel's Deficient Performance Had Very Substantial Probative Value

It is true that, under *Brown,* one of the factors that may weigh in a district court's determination whether to hear a timely, pre-judgment IAC claim is whether the claim can be characterized as "facially plausible." 623 F.3d at 114. The

panel's opinion effectively concludes that Steele's central IAC claim concerning the failure to present the Papcun evidence does not meet this description because the district court deemed it of "limited probative value" and because it did include an opinion that the challenged recordings were "fabricated." *Steele,* 733 F.3d at 898.

This conclusion rests on grave misreading of the record. The district court stated that Papcun evidence would be of "limited probative value" *in the absence of corroborating or foundational lay testimony placing the authenticity of the recordings into question*. SER at 335-336 (Daubert Hearing, Day 2, RT 323-24.) But, as the panel opinion partially notes elsewhere, 733 F.3d at 896, Steele's wife, Cyndi, and his daughter, Kelsie, provided that very lay testimony questioning the recordings' authenticity during trial. (ER 247-49 [RT 1240-45, 1247-48 [Kelsie Steele]; ER 255-57 [RT 1274-82][Cyndi Steele]) And this was precisely why, near the close of the evidentiary phase, the district court ruled that it would permit Papcun—whom the court now regarded as a "key" defense witness (ER 234, RT 1360)—to challenge the veracity of the recordings before the jury. (ER 258-59 [RT 1304-09]; ER 261-62 [RT 1318-21]) In the end, the district court very clearly did not come to view Papcun's testimony as bearing "limited probative value."

The panel's related attempt to downplay the potential significance of the

Papcun testimony on the grounds that he had not opined that the recordings were "fabricated" is equally indefensible. During the *Daubert* hearing, Papcun had repeatedly identified defects and anomalies on the recordings that would have supplied the basis for a very compelling expert challenge on these grounds. (ER 283 [4-20-11 RT 45, locating "defect[s]" in recordings]; ER 284 [4-20-11 RT 49, stating that roughly 50 "events" on recordings could indicate editing of recordings]; ER 287-88 [4-20-11 RT 60-63, stating conclusion, *inter alia*, that "there are serious questions with respect to the authenticity of the recordings" and that there are apparent "defects in the recordings that would render them inauthentic"]; ER 289 [4-20-11 RT 67, stating that the recordings "don't accurately and completely reflect whatever happened when it was being recorded;"] ER 292 [4-20-11 RT 80, affirming statement that recordings are not a true and valid representation of reality and are unreliable]. *See also* ER 305-06 [Papcun report, introduced as gov't Exhibit A during *Daubert* hearing and again stating, at p. 2, that the June 9th and June 10th recordings "do not represent a true and valid representation of reality and . . . are unreliable."])

Whether or not he found an outright "fabrication," Papcun's opinions that, among other things, there were "serious questions" concerning the recordings' authenticity and that the recordings were not reliable would have provided a very

powerful rebuttal to the prosecution's repeated and emphatic claims of accuracy. Indeed, the *prosecution's* repeated statements in the district court leave no doubt as the potential importance of such opinions. (*See*, e.g., Dkt. 305 (government's new trial response), at 43 (prosecution describes recordings as the "critical pieces of evidence."); *see also* RT 303-04 (in opening statement, prosecutor states, "[Y]ou're going to have to listen carefully to those recordings, because they are the key to this case"); RT 300, et seq. (prosecutor's opening statement repeatedly characterizes recordings as corroboration of Fairfax's claims; ER 208-16, 223-26 (in both phases of closing argument, prosecution repeatedly plays recording excerpts and urges jury to accept them as authentic and reliable).

The panel's conclusion concerning the "limited probative value" of the Papcun testimony is contravened by the record and all reasonable inferences to be drawn therefrom.

B. The District Court Never Found or Suggested that Trial Counsel' Performance Was Constitutionally Adequate under *Strickland*

The panel's opinion seeks to minimize the plausibility of Steele's IAC claim more generally by suggesting that the district court actually found that trial counsel had represented Steele competently throughout the trial. Thus, the opinion notes that

> the district court, alert to issues of ineffectiveness following Steele's counsel's subsequent legal troubles, expressed on the record that, with respect to ethical lapses, "certainly nothing that occurred in the courtroom gave me any pause or concern in that regard."

Steele, 733 F.3d at 898. But in referring to "ethical lapses," this comment, made in the course of a hearing wherein Mr. Hoyt was substituted as counsel for Steele, simply meant that the court had not seen any conduct of the type—e.g., stealing from clients, etc.—that had led to his *disbarment*. ASER at 9 (7-6-11 RT 15-16). The question of McAllister's effective assistance *vel non* under *Strickland*[2] was simply not before the court at the time.

Finally, any question as to whether the district court ever reached the merits of the IAC claim is set to rest by the new trial order. There, the court expressly stated that, as to the issue of effective assistance, including the alleged failure to present the Papcun evidence, ". . . *the Court will not consider this argument*." (ER 18-19; Dkt. 312, at 17-18). In short, the record does not support *any* district court finding that undermines the facial plausibility of the Papcun IAC claim.

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[2] *Strickland v. Washington*, 466 U.S. 668 (1984).

CONCLUSION

For the foregoing reasons, appellant Steele respectfully requests that this Court grant his petition for panel rehearing or, in the alternative, that the Court rehear the case en banc.

Dated: December 12, 2013

Respectfully submitted,

RIORDAN & HORGAN

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By /s/ Dennis P Riordan
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CERTIFICATION REGARDING BRIEF FORM

I, Donald M. Horgan, hereby certify that the foregoing petition is proportionately spaced, has a typeface of 14 points, and contains 2,941 words.

Dated: December 12, 2013

/s/ Donald M. Horgan
DONALD M. HORGAN

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Signature: /s/ Jocilene Yue
Jocilene Yue

****

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733 F.3d 894
United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America,
Plaintiff–Appellee,
v.
Edgar J. STEELE, Defendant–Appellant.
No. 12–30005. | Argued and Submitted July 8, 2013. | Filed Oct. 24, 2013.

Synopsis
Background: Following jury verdict convicting defendant of murder-for-hire and victim tampering, but prior to judgment, defendant moved for new trial on ground of ineffective assistance of counsel. The United States District Court for the District of Idaho, B. Lynn Winmill, Chief District Judge, 2011 WL 5403076, denied motion for new trial, and defendant appealed.

[Holding:] The Court of Appeals, Christen, Circuit Judge, held that district court did not abuse its discretion by declining to consider defendant's ineffective assistance of counsel claim.

Affirmed.

Attorneys and Law Firms

***894** Dennis P. Riordan (argued); Donald M. Horgan, Riordan & Horgan, San Francisco, CA, for Defendant–Appellant.

***895** Syrena C. Hargrove (argued); Wendy J. Olson, United States Attorney, Boise, ID, for Plaintiff–Appellee.

Appeal from the United States District Court for the District of Idaho, B. Lynn Winmill, Chief District Judge, Presiding. D.C. No. 2:10–cr–00148–BLW–1.

Before: HARRY PREGERSON, MARY H. MURGUIA, and MORGAN CHRISTEN, Circuit Judges.

Opinion

OPINION

CHRISTEN, Circuit Judge:

This opinion considers when a trial court should determine the merits of an ineffective assistance of counsel claim presented in a prejudgment motion for a new trial. A federal jury convicted Edgar Steele of murder-for-hire and victim tampering arising from Steele's plan to kill his wife and mother-in-law.[1] Steele argues that the district court erred by denying his prejudgment motion for new trial without reaching the merits of his claim of ineffective assistance of trial counsel. Although consideration of a prejudgment ineffective-assistance-of-counsel claim is appropriate in some cases, here the district court did not err by deferring consideration of Steele's ineffective assistance claim to collateral review, when a complete record would be available.[2]

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, and we affirm the district court's order denying the motion for new trial.

I. BACKGROUND

According to the evidence presented by the government at trial, Larry Fairfax worked as Edgar Steele's handyman and Steele, himself a criminal defense attorney, hired Fairfax to kill Steele's wife and mother-in-law. The government presented evidence that Steele instructed Fairfax to create two pipe bombs and place one on his wife's car and the other, as a decoy, on his own car so that Steele would look like an intended victim. Fairfax created the pipe bombs and installed them so the cars' exhaust pipes would serve as the ignition sources, but the device on Cyndi Steele's car failed to explode. At Steele's behest, Fairfax investigated what happened and erroneously concluded that the bomb had fallen off. He then dismantled the decoy bomb and removed it from Steele's car. But Steele was not ready to shelve his plans. He threatened to hire another hitman and add Fairfax to the list of targets if Fairfax did not follow through with the

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killings.

This threat appears to have backfired. Instead of going through with a second murder attempt, Fairfax turned to the FBI and told them about Steele's offer to pay him for the murders.[3] The FBI arranged for Fairfax to wear a recording device and Fairfax recorded two subsequent ***896** conversations with Steele. The Fairfax–Steele recordings consist of discussions that took place outside or in a barn at Steele's ranch; discussions of horse care are interspersed with plans for a second murder attempt, this one designed to look like a car accident. On the day Steele and Fairfax had agreed upon for the second murder attempt, law enforcement officials came to Steele's home and falsely informed him that his wife was dead so they could measure his reaction. They subsequently told him that she had not been killed, and they arrested him. Meanwhile, Cyndi Steele was informed of the circumstances of the charges against her husband, and asked to hear the Fairfax–Steele recordings. Apparently aware of this, Steele spoke with his wife from jail on a recorded telephone two days later. He told her that the police would try to use her to authenticate his voice on the recordings with Fairfax, and he said,

After you hear this tape tomorrow, no matter what you hear, no matter what you think, no matter what you feel, you have to say the following: 'No, that is not my husband's voice.' And then like a rhinoceros in the road, you have to stand your ground and refuse to say anything but that.

The recorded conversation between Steele and his wife formed the basis for the government's victim tampering charge against Steele.

The government's case against Steele included the Fairfax–Steele recordings, Fairfax's testimony, physical evidence of the bomb placed on Cyndi Steele's car, the dismantled bomb, testimony of the police and FBI agents involved in Steele's arrest, and the jailhouse recording of Steele telling Cyndi that she needed to deny that the voice on the recordings was his. Steele's defense was that he was framed and that the recordings of his conversations with Fairfax were fabricated.

At a pre-trial *Daubert* hearing, Steele's trial attorney attempted to qualify two forensic experts to discredit the government recordings of the conversations between Fairfax and Steele. The district court's rulings on the qualifications of those experts have not been appealed. One of the witnesses was willing to testify the tapes had been fabricated, but the district court ruled the witness was not qualified. The other witness, Dr. George Papcun, was qualified by the court, but was not prepared to testify that the recordings had been fabricated. He opined that the recordings had an unusually large number of gaps, "electronic signatures," and "electronic transients" that could have been caused by a number of things—equipment anomalies, equipment malfunctions, inadvertent starts and stops of the recording, ambient noise, *or* purposeful editing. He was prepared to testify that the electronic disturbances in the recordings signified that "whatever is on these recordings is not entirely whatever occurred in the real environment being recorded." The court ruled that Papcun's testimony was not likely to be relevant at trial and that Dr. Papcun could not testify without a factual predicate being established. Because Dr. Papcun's testimony was deemed to be "of very limited probative value," the district court ruled that it would only be allowed if there was evidence introduced at trial that something on the recordings was not said, or that something said was not on the recordings.

Once the trial was underway, the jury heard testimony from Steele's wife that the voice on the recordings was not Steele's and the district court ruled that Dr. Papcun would be permitted to testify. But Dr. Papcun was not available; he was on a pre-planned vacation in Bora Bora ***897** and Steele's trial counsel, Robert McAllister, had not subpoenaed him. The district court declined to allow Dr. Papcun to testify by video and only permitted a one-day continuance, explaining: "this is a problem of the defense's making, not the court's. And I think that if they made a tactical or otherwise made a decision to not keep Dr. Papcun available, then that's the choice they made." Steele was convicted on all charges.

About a month after the jury verdict, McAllister acknowledged taking over $100,000 of client funds for his personal use in a different case. McAllister eventually plead guilty and was sentenced on conspiracy and bankruptcy fraud charges.

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Steele responded by engaging substitute counsel, and his new attorneys filed a motion for new trial alleging that McAllister and another member of the defense team had rendered ineffective assistance. The district court declined to take up the ineffective assistance argument, ruling that consideration of it would be proper in a habeas petition where a factual record could be developed. The court denied the motion, and this appeal followed.

II. DISCUSSION

[1] [2] The standard this court applies to decide whether to review ineffective assistance of counsel claims raised on direct appeal is well established. Such claims are "generally inappropriate on direct appeal" and should be raised instead in habeas corpus proceedings. *United States v. Ross,* 206 F.3d 896, 900 (9th Cir.2000). We consider them only "where the record is sufficiently developed to permit review and determination of the issue, or the legal representation is so inadequate that it obviously denies a defendant his Sixth Amendment right to counsel." *United States v. Rivera–Sanchez,* 222 F.3d 1057, 1060 (9th Cir.2000) (internal quotation marks omitted).

[3] [4] Though district courts have heard prejudgment ineffective assistance of counsel claims on occasion, *see, e.g., United States v. Del Muro,* 87 F.3d 1078, 1080 (9th Cir.1996), we have not previously articulated the standard a *district court* should apply to decide whether to rule on such a claim. We agree with the Second Circuit's decision in *United States v. Brown,* that a district court need not "invoke an appellate court's rubric and require a defendant to use his one § 2255 motion to raise an ineffective assistance claim post judgment, particularly when the district court is in a position to take evidence, if required, and to decide the issue prejudgment." 623 F.3d 104, 113 (2d Cir.2010). We adopt the rule in *Brown* that "when a claim of ineffective assistance of counsel is first raised in the district court prior to the judgment of conviction, the district court may, and at times should, consider the claim at that point in the proceeding." *Id.* This decision is best left to the discretion of the district court. *See United States v. Miskinis,* 966 F.2d 1263, 1269 (9th Cir.1992) (remarking in context of appellate review that "the decision to defer resolution of an ineffective assistance of counsel claim is a discretionary one and depends upon the contents of the record").

Requiring a defendant to wait for post-conviction relief has several consequences, including that a defendant may serve months in prison waiting for post-conviction arguments to be heard. Lengthy delays necessarily entail concomitant weakening of memories and aging of evidence. Additionally, a defendant might be without representation in post-conviction proceedings but entitled to substitute counsel if the claim is heard before entry of final judgment. *See Del Muro,* 87 F.3d at 1080–81 (requiring appointment of new ***898** counsel when district court grants evidentiary hearing on ineffectiveness claim).

But "[w]e are mindful that district courts face competing considerations in deciding whether it is appropriate to inquire into the merits of [ineffective assistance] claims prior to judgment, including ... the ... disruption of the proceedings." *Brown,* 623 F.3d at 113. "The decision to interrupt the prejudgment proceedings to inquire into the merits of an ineffective assistance of counsel claim may depend on, among other things, whether the court would need to relieve the defendant's attorney, or in any event, to appoint new counsel in order to properly adjudicate the merits of the claim." *Id.* The district court's decision may also depend on the existence of evidence already in the record indicating ineffective assistance of counsel, or upon the scope of the evidentiary hearing that would be required to fully decide the claim.

[5] In this case, we have no trouble concluding that the district court did not abuse its discretion by declining to consider Steele's ineffective assistance claims prior to the imposition of judgment. Steele focuses his appeal on his argument that McAllister was ineffective for failing to secure Dr. Papcun's presence at trial. But in the district court, Steele's substitute counsel named seven different "possible sources" of McAllister's ineffective assistance in his motion for a new trial.[4] In addition to the arguments regarding McAllister's allegedly ineffective performance, the motion argued that another attorney from Steele's defense team had failed to render adequate legal assistance. Unlike in *Brown,* Steele's claim was broad-based and the evidentiary record to consider it was sorely lacking.[5] Even if the motion Steele presented to the district court had been as focused as the argument raised on appeal, the record before the trial court did not include a clear explanation of McAllister's decision to forgo subpoenaing Dr. Papcun's testimony. The trial record shows that the subpoena was not overlooked; defense

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counsel made the conscious decision not to subpoena this witness. But apart from statements McAllister made in discussions held out of the presence of the jury, the record lacks an explanation from McAllister regarding this trial strategy. Coupled with the important fact that the district court had already determined, after a pre-trial *Daubert* hearing, that Dr. Papcun's testimony did not include an opinion that the tapes were fabricated and would be of limited probative value, this under-developed record informs our decision that the district court did not abuse its discretion by failing to take up the motion. Moreover, the district court, alert to issues of ineffectiveness following Steele's counsel's subsequent legal troubles, expressed on the record that, with respect to ethical lapses, "certainly nothing that occurred in the courtroom gave me any pause or concern in that regard."[6]

Steele argues that the district court's ambiguously worded order denying his motion for new trial reveals that the court erroneously understood it lacked the discretion ***899** to hear his prejudgment motion. *See United States v. $11,500.00 in U.S. Currency,* 710 F.3d 1006, 1011 (9th Cir.2013) ("A district court abuses its discretion if it does not apply the correct legal standard...."); *Miller v. Hambrick,* 905 F.2d 259, 262 (9th Cir.1990) ("A district court's failure to exercise discretion constitutes an abuse of discretion."). Here, the district court's order explained that the "proper procedure for challenging the effectiveness of counsel is by a collateral attack on the conviction." When taken out of context, this language could be read as referring to a general standard rather than as an assessment of Steele's particular motion. Steele's assertion that the district court misunderstood its authority is belied by the record. First, we note the district court's unambiguous assertion of its authority to consider Steele's motion in its entirety. At the outset of its order, the district court followed its recitation of all seven of Steele's claims by observing its discretion to consider and to grant the motion for a new trial pursuant to the Federal Rules of Criminal Procedure. The district court's plain assertion of its discretion to consider a motion for a new trial, without further qualification based on the nature of the claims asserted, is telling.

Further, in direct support of its ruling that Steele's ineffectiveness claim was better addressed in a collateral attack on conviction than in a post-trial motion, the district court cited an unpublished decision, *United States v. Ross,* 442 Fed.Appx. 290 (9th Cir.2011), recognizing that a district court does have the discretion to hear an ineffective assistance of counsel claim before collateral proceedings are commenced. *Ross* states, "there is no fixed rule against determining the ineffectiveness [of counsel] question on direct appeal where the record so permits. Rather, the decision to defer resolution of an ineffective assistance of counsel claim is a discretionary one and depends upon the contents of the record in a particular case." *Id.* at 293 (internal quotation marks and citation omitted). The district court's citation to *Ross* shows that the district court understood it had the discretion to entertain Steele's ineffective assistance claim without waiting for the initiation of collateral proceedings.[7]

The circumstances of Steele's request, including the lack of a significant record necessary to adequately consider his broad-based motion, make plain that the trial court was best suited to decide whether the interests of justice and judicial economy would be served by delaying the trial proceedings to conduct an immediate hearing on an under-developed motion. The district court's ruling was well within its discretion.

AFFIRMED.

Parallel Citations

13 Cal. Daily Op. Serv. 11,723, 2013 Daily Journal D.A.R. 14,174

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Footnotes

1 Steele was convicted of violating 18 U.S.C. § 1958 (use of interstate commerce facilities in the commission of murder-for-hire), 18 U.S.C. § 844(h) (use of explosives to commit a federal felony), 18 U.S.C. § 924(c)(1)(B)(ii) (possession of a destructive device in relation to a crime of violence), and 18 U.S.C. § 1512(b) (tampering with a victim).

2 We address Steele's other claims in an unpublished memorandum disposition filed concurrently with this opinion.

3 Fairfax initially omitted any explanation about actually building and planting the two pipe bombs, but a fortuitously-timed oil change led to the discovery of the pipe bomb on Cyndi Steele's car, charges against Fairfax, and Fairfax's agreement to testify against Steele.

4 His motion argued that McAllister was also ineffective by failing to: (1) formulate a defense theory; (2) conduct effective cross-examination; (3) make objections; (4) prepare defense witnesses and introduce documentary evidence; (5) move for a mistrial; and (6) make a meaningful closing argument.

5 In *Brown,* the defendant's attorney failed to communicate the government's plea offer to the defendant. *See* 623 F.3d at 113–14.

6 Because the relief Steele requests on appeal is a remand for evidentiary development, not a decision on his ineffective assistance claim, we do not evaluate the merits of his ineffective assistance claims.

7 Although it is not binding authority, we note that Judge Winmill, in particular, understood the district court's discretion to consider a prejudgment ineffective assistance of counsel motion; he granted one in an unpublished decision in 2006. *See* *United States v. Moses,* No. CR–05–061, 2006 WL 1459836 (D.Idaho 2006).

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