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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AMR MOHSEN, Defendant.	No. CR 03-0095 WBS **UNITED STATES' RESPONSE TO AMR MOHSEN'S *PRO SE* MOTION FOR NEW TRIAL** Date: June 23, 2006 Time: 10:30 a.m. Courtroom: D, 15th Floor

INTRODUCTION

In addition to the motion for a judgment of acquittal and/or a new trial brought by his appointed attorneys, the defendant Amr Mohsen also has moved *pro se* for a new trial on the ground that those attorneys rendered ineffective assistance of counsel for failing to take certain actions with respect to several aspects of Phase One of the trial. The defendant also requests that the Court appoint additional counsel to research and brief his ineffective assistance of counsel motion. The defendant's motion should be denied in its entirety.

DISCUSSION

Although "[t]he customary procedure for challenging the effectiveness of defense

counsel in a federal criminal trial is by collateral attack on the conviction under 28 U.S.C. § 2255," *United States v. Miskinis*, 966 F.2d 1263, 1269 (9th Cir. 1992), there does not appear to be a prohibition on raising ineffective assistance of counsel as a ground in a Rule 33 new trial motion brought within the time limits set out in that rule.[1]

Nevertheless, the defendant's *pro se* motion should denied, without appointing counsel to brief the issue. To put it simply, the fact that the defendant was convicted of 17 of the 18 charges against him is not the result of any ineffectiveness on the part of his court-appointed counsel. Rather, the defendant's convictions are the result of the overwhelming evidence of his own criminal acts.

As an initial matter, the government notes that the defendant complains only of his counsel's actions with respect to *Phase One* of the trial. Because the defendant's motion does not point to any deficiencies in counsel's performance with respect to *Phase Two* of the trial, and because the defendant was acquitted of the most serious charge brought against him in that phase, there is no basis to grant the defendant's new trial motion based on anything counsel did or did not do in the second phase of the trial.

As noted above, however, the defendant *does* complain about counsel's performance in Phase One. With respect to the first phase of the trial, counsel for the defendant were given the unenviable task of defending an indefensible case. The weight of the evidence against the defendant in that part of the trial was overwhelming. It would be extremely difficult for any serious, competent, and ethical lawyer to stand in front of a jury and claim (1) that the 1988 Notebook actually existed before 1995; (2) that the defendant's explanations for the theft of the 1988 Notebook and 1989 Notebook (and their subsequent miraculous return by "FL") should be believed; or (3) that Aly Mohsen's explanations as to why he signed blank pages of the 1988 Notebook held any water.

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[1]Although Rule 33 states that motions for a new trial must be filed with seven days of the verdict, the defendant's motion appears to be timely because court-appointed counsel requested an extension of time to file post-trial motions, which the Court granted. *See* Fed. R. Crim. P. 33, advisory committee notes to 2005 amendments.

Another 10 or 20 indefensible facts could be added to this list.

Instead of taking positions or presenting evidence that would cause the jurors to tumble out of their seats in fits of laughter, counsel defended Phase One by focusing on the largely legal issue of "materiality." Although the jury ultimately rejected this defense, counsel was not deficient in taking that approach.

Accordingly, for the reasons set forth above, the defendant's *pro se* motion for a new trial should be denied. In the alternative, and in the event that this Court decides to appoint counsel to research and brief the issue of trial counsel's effectiveness, the United States may request that the Court deem the defendant to have waived the attorney-client privilege with respect to any communications with his attorneys pertaining to the issues raised in his *pro se* motion. Under that scenario, the United States may request that the Court order appointed counsel to provide the United States with relevant copies of their correspondence with the defendant and relevant notes of their meetings with the defendant. The United States may also request that the Court unseal the transcripts of the relevant proceedings that were conducted outside of the presence of government counsel, which the United States assumes pertained to the defendant's disputes with his attorneys regarding their legal strategy. *Cf. Bittaker v. Woodford*, 331 F.3d 715, 716 (9th Cir. 2003) ("It has long been the rule in the federal courts that, where a habeas petitioner raises a claim of ineffective assistance of counsel, he waives the attorney-client privilege as to all communications with his allegedly ineffective lawyer."); *United States v. McDaniel*, 995 F. Supp. 1095, 1096 (C.D. Cal. 1998) (holding that defendant's motion for appointment of substitute counsel, in which he claimed ineffective assistance of counsel, impliedly waived attorney-client privilege). The United States would not request copies of *all* correspondence, notes, and transcripts, only those that relate to the legal strategy regarding the conduct of the trial.

CONCLUSION

Based on the foregoing, the United States respectfully requests the Court to deny defendant Amr Mohsen's *pro se* motion for a new trial and for appointment of counsel to

research and brief that motion.

Dated: May 12, 2006

Respectfully Submitted,

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