

1 AMR MOHSEN
2 Defendant
3 UKU 326
4 North County Jail
5 550 6th Street
6 Oakland, CA 94607

7 PRO SE

8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION

11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 v.

14 AMR MOHSEN,

15 Defendant.

) No. CR 03-95-WBS

) DEFENDANT AMR MOHSEN'S REPLY
) TO GOVERNMENT'S OPPOSITION TO
) HIS PRO SE MOTION FOR NEW TRIAL

) Date: June 23, 2006
) Time: 10:30 a.m.
) Hon. William B. Shubb

16 INTRODUCTION

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18 The government argued in its opposition that the Court should not appoint new
19 counsel and should deny Dr. Mohsen's pro se motion for a new trial because his
20 convictions were due to overwhelming evidence that was not the result of any ineffective
21 assistance of counsel. As discussed below, the government's argument totally misses the
22 point of Dr. Mohsen's motion. The Court should recognize the defendant's constitutional
23 right to effective assistance of counsel. Dr. Mohsen acknowledges that he has made
24 mistakes for which he has already been severely punished through tragic losses financially
25 and professionally. Dr. Mohsen's motion asks for a fair trial to judge whether his actions
26 constitute federal crimes. The Court should grant the request for a court-appointed counsel
27 to research, investigate, and prepare a memorandum of points and authorities for the
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1 ineffective assistance of counsel, new trial motion.

2 DISCUSSION

3 As an initial matter, the government has misread Dr. Mohsen's pro se motion.
 4 Defendant Amr Mohsen is requesting appointment of counsel and additional time to
 5 submit a memorandum of points and authorities and supporting materials, which will
 6 include declarations and legal arguments to show counsel's performance was deficient and,
 7 if counsel had performed at a reasonably competent level and had conducted adequate
 8 investigation, there is a reasonable probability that the result of trial for all counts of
 9 conviction would have been different. Thus, a new trial is justified under Fed. R. Crim. P.
 10 33.

11 The government's reference to the apparent overwhelming evidence actually points
 12 to the deficient performance of counsel in the trial, who didn't expose the blatant falsities,
 13 inaccuracies, and discrepancies of the government's evidence¹ and legal argument.² The

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 15 ¹ Such an example is the highly prejudicial evidence and charges related to the
 16 Lobo meeting and note, where due to the lack of knowledge of the facts of the case and
 17 failure to conduct adequate investigations, counsel did not know how to expose what was
 18 inaccurate or false in the evidence. Counsel could not provide adequate defense and said
 nothing about it in the closing argument. Counsel did not raise necessary objections to
 protect Dr. Mohsen's 6th Amendment (fair notice) and 5th Amendment (uncharged
 conduct) rights.

19 ² An example where counsel failed to expose the falsities and inaccuracies of
 20 the Government's legal argument is the materiality of the 1988 notebook to the patent case
 21 and perjury charges. During the trial, the Court provided extensive and insightful
 22 discussion concerning the materiality jury instruction. Specifically, the Court emphasized
 23 that the materiality test is an objective test that does not depend on how any person or
 24 entity behaves. In blatant defiance to the Court's jury instruction on materiality (RT 1238),
 25 the prosecutors irresponsibly misled and inflamed the passion and emotion of the jury (RT
 26 1116:72-1207:30) by repeating the false criteria of materiality used by Judge Alsup in his
 27 ruling of 6/14/2000, namely what Aptix and Quickturn's attorneys said and what Dr.
 28 Mohsen may have thought, behaved, or gained by the earlier conception date. The
 prosecutor effectively ignored the guidelines of the Court that none of the *subjective*
 factors of what anybody thought or did are relevant to the *objective* materiality test the
 Court defined. RT 1059. To put it simply, the erroneous criteria for the materiality test
 argued by the prosecution and Judge Alsup would effectively nullify or make redundant
 the necessary materiality element in many criminal statutes and court-sanctions under
 inherent power or unclean hands doctrines. Such criteria (what lawyers said in their
 adversarial confrontations, what an opponent might allege falsely without any burden of
 proof, or how a defendant behaved or might have gained) would make every misconduct
 material. This is not the law intended by Congress, interpreted by the Supreme Court, and
 practiced for hundred of years in our judicial system.

1 deficient performance extended not only to defense strategy, but also to basic counsel
2 obligations,³ legal opinions,⁴ failure to conduct necessary investigations,⁵ and present
3 adequate legal arguments.⁶ Any knowledgeable observer of the case, and probably most of
4 the jury after understanding the case, were stunned by counsel's flagrant lack of knowledge
5 of critical aspects of the case and glaring inabilities to present coherent defense argument,
6 of course to the obvious satisfaction of the prosecutors. The government seemed to be
7 embroiled in irrelevant minutia, details, and misleading arguments with their overzealous
8 prosecution, missing the broader purpose of justice in their duties as officers of the court.

9 The supporting materials and the memorandum will provide undisputed evidence
10 that, had counsel performed adequately, there would have been a reasonable probability
11 that the trial would have resulted in a different result, including, for example:

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14 ³ Counsel obviously did not meet the obligations defined by Justice White (*U.S.*
15 *v. Wade*, 388 US. 218, 256-57 (1967)): “. . . to put the State to its proof, to put the State
16 case in the worst possible light, regardless of what he thinks or knows to be the truth . . . “
17 Due to the lack of knowledge of the case, counsel failed to adequately cross-examine most
18 of the government witnesses.

19 ⁴ One of the many examples is the legal opinion of counsel that the test of
20 materiality for fraud is the same as for perjury. This was presented in the Trial Brief (Dkt
21 # 462), and the Notice and Motion to Dismiss Counts 1-4 and 10-19 (Dkt # 369), and the
22 Reply to Government's Opposition (Dkt # 390). The legal opinion was erroneous and
23 inconsistent with the Ninth Circuit's Model Jury Instruction for fraud (8.101) to which
24 counsel surprisingly agreed to readily in the trial. RT 706. Such ineffective legal
25 counseling obviously affected the defense strategy, investigations, and preparation of
26 exculpatory evidence.

27 ⁵ In spite of the strong advice of the prior criminal counsel and Dr. Mohsen's
28 requests, counsel failed to conduct adequate investigations, such as investigations about the
fundamental manipulation of Quickturn related to the patent case, which are relevant to the
defense of the mail fraud charges.

29 ⁶ The legal arguments of counsel about materiality were blatantly deficient (RT
1173:94 and Dkt # 369, 390, & 462), in lacking significant facts and failing to consider the
context of materiality tests, validity presumption, invalidity burden of proof, and decisions
set forth in patent statutes and case law. Undisputed evidence will be provided to prove
that as a matter of law, the 1988 notebook was not material in 1998, 1999, and 2000, based
on the Court's Jury Instruction (including the suppressed evidence set forth in footnote 7),
irrespective of what attorneys, experts, government witnesses, and Judge Alsup said, or
how Dr. Mohsen behaved or what he could have gained. The fact that the 1988 notebook
was not material as a matter of law at the time of the alleged offenses is an important
exculpatory fact that should have been argued to the Jury, especially in view of how the
prosecution misled the jury as described in footnote 2.

1 (1) The 1988 notebook was never used in any proceedings related to the merits of
2 the case during the litigation and was not material as a matter of law;

3 (2) All of Quickturn's alleged invalidating prior art were bogus and never could
4 have invalidated the claims of the '069 patent at any time since its issuance in 1996;

5 (3) The actions of Quickturn related to the 1988 notebooks were unreasonable
6 and fraudulent manipulations to influence the outcome of the meritorious patent
7 infringement case;⁷

8 (4) The materiality conclusion of Judge Alsup in the evidentiary hearing in May
9 2000 was erroneous and inconsistent with well-established case law, as well as the court's
10 jury instructions about the materiality test.⁸ This is relevant as the purpose and result of the
11 evidentiary hearing was read to the jury in a stipulation;

12 (5) The materiality conclusion of Judge Alsup's 6/14/2000 ruling was not
13 reviewed specifically in the appeal to the Fed Circuit Court. However, the Federal Circuit
14 reversed the interpretation of Judge Alsup of his controlling authority, which leads to the
15 conclusion that his materiality conclusion was erroneous.⁹ This is relevant as the Court
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17 ⁷ Undisputed evidence will be provided to prove Quickturn violated the patent
18 discovery rules set forth in Trial Exhibit 2 by failing to disclose relevant evidence and
19 documents that proved Quickturn knew (i) that the alleged invalidating arts were different
20 from the '069 patent, thus not invalidating its claims as a matter of law; and (ii) that the
21 drawing with the conception and filing dates in trial exhibit 33(c) was not a Quickturn
22 invention, it was already disclosed by other publications many years before 1988. Such
suppression of relevant information and submission of false invalidation claims were
unreasonable fraudulent manipulation by Quickturn on the Court to influence the outcome
of the patent case, and not for the purpose of "to get to the bottom of it" as referred by
defense expert Blakely (RT 1084), who obviously meant for legally justifiable reasons and
with full honest disclosures.

23 ⁸ The materiality test for the unclean hands doctrine defined in *Keystone v. Gen.*
24 *Exc.*, 290 U.S. 240 (1933), which was reviewed by the Court in its ruling of 12/5/05, is
25 essentially the same as the materiality test set forth in the Court's instruction to the jury.
RT 1238.

26 ⁹ In its published opinion, the Federal Circuit wrongly assumed in its opinion in
27 *Aptix v. Quickturn*, 269 F.3d 1369, 1372 (Fed. Cir. 2001) that the '069 patent would be
28 invalid without the 1988 notebook, due to the limited record submitted with the appeal and
the inadmissible opinion of the Aptix attorney in the hearing of 9/15/99, which was
wrongly assumed to be a fact. This unfortunate misunderstanding led to the affirmance of
the district court's erroneous dismissal order. However, the Federal Circuit, *id.* at 1378,
reversed the conclusion of Judge Alsup that the dismissal in "*Keystone I*," *Keystone v. Gen.*

1 made references in the trial (RT 697-700) and the pretrial motion ruling (Dkt # 407, at 11)
2 to the Federal Circuit opinion in justifying the reasoning behind some of its decisions;

3 (6) The prosecutors misled witnesses in a way that caused them to testify
4 falsely;¹⁰

5 (7) Testimonies of government witnesses and forensic experts are contradicted by
6 other witnesses and forensic experts and their combined analysis is conclusive;¹¹

7 Dr. Mohsen also requests that the appointed new lawyer provide representation for
8 all further proceedings, including the other post-trial motion for acquittal and new trial also
9 filed on April 14, 2006 and sentencing proceedings. Serious conflicts of interest with the
10 present counsel have become apparent after the filing of the motion for new trial on the
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13 *Exc.*, 290 U.S. 240 (1933), was with prejudice and included a finding of patent
14 unenforceability. The federal circuit cited "*Keystone II*," *Keystone v. N.W. Eng.*, 294 U.S.
15 42 (1935), which was suspiciously missing in Judge Alsup's ruling (*Aptix v. Quickturn*,
16 2000 U.S. Lexis. 8408), where the same patent in *Keystone I* was adjudicated again a few
17 years later. Judge Alsup had concluded that the misconduct in *Keystone I* of suppression
18 of prior use of the Patent and Trademark Office (PTO) was similar to the alleged
19 misconduct in the *Aptix* case in that both were intended to strengthen the patent validity
20 and both were found not to have affected the patent validity. Since the Supreme Court
21 affirmed the dismissal in *Keystone I* under the unclean hands doctrine, judge Alsup
22 wrongly concluded that the misconduct could be material even if it did not affect the patent
23 validity, justifying his decision of materiality and dismissal in the *Aptix* case. However,
24 the fact that the Supreme Court adjudicated the same patent with the same misconduct of
25 prior use at the PTO in *Keystone II*, and the Federal Circuit's reversal of judge Alsup's
26 interpretation of *Keystone I* (dismissal with prejudice and patent unenforceability) are very
27 significant as it leads directly to the reversal of his conclusion about materiality. This is
28 further confirmation of established case law that such misconduct in litigation is not
material when it does not affect patent validity and hence could not have influenced the
case merits on validity and infringement, irrespective of how the lawyers or patentee
behaved. Judge Alsup had surprisingly ignored the explicit statements by the Supreme
Court (290 U.S. at 249) and the Sixth Circuit (62 F.2d 48, 50 (6th Cir. 1932)), and on
rehearing en banc (64 F.2d 39 (6th Cir. 1933)), that the dismissal was due to the use of a
decree from a prior Byers case (*Keystone v. Byers*, 4 F.Supp. 159 (N.D. Ohio 1929))
obtained through fraud in the application for injunction in *Keystone I*, and if that decree
was not used there would have been no dismissal. The re-opened Byers case (*Keystone v.*
Byers, 4 F.Supp. 159 (N.D. Ohio 1932)) reached the same conclusion that since the prior
use suppression at the PTO did not affect the patent's validity, it was not material and
hence did not justify dismissal.

10 One example is that the prosecutor misled one of the Avery-Dennison
witnesses in a way that caused him to testify falsely.

11 An example is the test results of the government's ink expert on the 1988
notebook are contradicted by several other ink experts.

1 grounds of ineffective assistance of counsel. Some of the necessary activities and
2 arguments for the post-trial proceedings revealed ineffective assistance of counsel, causing
3 unresolvable conflicts of interests.

4 To the extent any reliance on attorney-client privileged document or ex parte session
5 transcripts in the ineffective assistance of counsel motion is necessary to resolve this
6 motion, the Court should discuss appropriate releases to the government with new counsel.

7 Dr. Mohsen accepts full responsibility for his actions and mistakes and has already
8 been severely punished with tragic losses financially and professionally (his personal
9 bankruptcy, Aptix's bankruptcy that wiped out over \$16 million in investments, and loss of
10 his home and all his financial assets, etc.). This motion is intended to exercise his
11 constitutional rights for effective assistance of counsel and a fair trial in judging whether
12 his actions are crimes according to our legal system, before he is sentenced to prison for
13 practically the rest of his life.

14
15 **CONCLUSION**

16 For all these reasons, the Court should grant Dr. Mohsen's request for appointment
17 of counsel and should grant a new trial on all counts.

18 DATED: June 7, 2006

19 Respectfully submitted,

20
21 /s/ Amr Mohsen
22 AMR MOHSEN
23 DEFENDANT, PRO SE
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