

**No. 07-10059**

**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

AMR MOHSEN,

Defendant-Appellant.

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**BRIEF FOR THE UNITED STATES AS APPELLEE**

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
DISTRICT COURT NO. CR-03-0095-WBS

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**JOSEPH P. RUSSONIELLO**  
United States Attorney

**BARBARA J. VALLIERE**  
Chief, Appellate Section

**AMBER S. ROSEN**  
**ROBIN L. HARRIS**  
**KYLE F. WALDINGER**  
Assistant United States Attorneys  
150 Almaden Blvd., Suite 900  
San Jose, CA 95113  
Telephone: (408) 535-5046  
**Attorneys for Plaintiff-Appellant**  
**UNITED STATES OF AMERICA**

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**BRIEF FOR THE UNITED STATES AS APPELLEE**

**INTRODUCTION**

Defendant was the Chief Executive Officer and founder of a successful technology company, but he threw it all away in an effort to fraudulently obtain money and then avoid the consequences of his actions. First, he tried to win a civil patent lawsuit through lies and false evidence. Then, after his civil suit was thrown out for his misconduct and he was charged with conspiracy, perjury, subornation of perjury, mail fraud, and obstruction of justice, he tried to avoid prosecution by fleeing to a foreign country, harassing witnesses, soliciting arson of a witness's car, and even contemplating killing the federal judge who presided

over his case. The jury, after a bifurcated trial, convicted him of all charges except solicitation to commit murder, as the evidence was overwhelming. The district court sentenced him to the reasonable and deserved sentence of 204 months' imprisonment. Defendant received a fair trial and his convictions and sentence should be upheld.

### **JURISDICTION AND BAIL STATUS**

The district court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). The district court entered its judgment and commitment order on January 16, 2007. CR653.<sup>1</sup> On January 12, 2007, defendant filed a timely notice of appeal. CR656; *see* Fed. R. App. P. 4. Defendant is currently serving the sentence imposed in this case and his expected release date is January 16, 2019. *See* [www.bop.gov](http://www.bop.gov).

### **ISSUES PRESENTED**

I. Whether the district court plainly erred in failing to instruct the jury

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<sup>1</sup> "CR" refers to the clerk's record. "ER," "AOB," "SER," and "PSR" reference, respectively, the Excerpts of Record, the Appellant's Opening Brief, the Government's Supplemental Excerpts of Record, and the presentence report, filed separately under seal.

regarding substantive patent law, where defendant never proposed any patent law instructions and the jury learned the patent law it needed to evaluate the criminal charges from undisputed expert testimony.

II. Whether (A) the district court abused its discretion in denying defendant's motion to sever the witness tampering and solicitation counts (Phase II) from the conspiracy, perjury, mail fraud, obstruction of justice, and contempt counts (Phase I), where the counts were properly joined and needed to be bifurcated only to prevent the spillover effect of evidence admissible on some, but not all of the counts; and (B) the prosecutor improperly vouched during the rebuttal argument on the Phase I charges when he asked the jury to convict defendant of all the charges in the indictment and said "I think" a few times.

III. Whether the United States constructively amended the indictment when it argued that the falsity of the notebook was material not only to the question of the validity of defendant's patent, but also to proving the falsity of the "Keith Lobo" notes which were part of defendant's scheme to obtain more money.

IV. Whether the district court judge's answering "no" to the jury's request to see the indictment during deliberations without first consulting the parties was harmless, where the answer did not likely affect the verdict, consultation with the parties likely would not have lead the court to give a different answer, and

evidence of defendant's guilt was overwhelming.

V. Whether the district court erred in upholding defendant's perjury convictions on Counts 2 and 3 because his answers were not literally true, where defendant answered "no" when asked whether he had his "notebooks" tested and out of his possession when he had only one "notebook" tested and out of his possession.

VI. Whether the court properly rejected defendant's claims that the contempt of court conviction for applying for a new passport should be reversed for (A) lack of prosecuting authority, where this Court holds that the prosecutor may initiate a contempt charge; (B) evidentiary error, where exhibit 97A is not a privileged marital communication because its contents were not communicated by defendant to his wife, and where the note was not obtained in violation of defendant's right to counsel; and (C) lack of sufficient evidence, where the evidence established that defendant was planning to flee the country, had documents necessary to obtain an Egyptian passport, visited the Egyptian consulate, withdrew large amounts of cash, and had a note in his jail cell indicating he had applied for a passport in 2004.

VII. Whether reversal of Counts 1-4 and 10-20 would require reversal of Counts 21 and 22, where there was overwhelming evidence of defendant's predisposition

to commit witness tampering and solicitation to commit arson independent of the Phase I convictions.

VIII. Whether the prosecutor (A) improperly vouched for the credibility of the government informant, Manny Primas, by specifically warning the jury that Primas was a criminal and arguing that his testimony was corroborated by taped conversations with the defendant; and (B) violated the advocate-witness rule by virtue of her presence at one meeting with the informant, his attorney, and the FBI, where she elicited no information about her involvement in the meeting, acknowledged Primas's self-interest in cooperating, and asked Primas's attorney only one question to establish that the government made no promises to Primas in exchange for his cooperation.

IX. Whether a claim of ineffective assistance of counsel should be heard on direct appeal, and if so, whether defendant's trial lawyers were ineffective in failing to investigate defendant's prior counsels' alleged request that defendant be moved away from the informant Manny Primas, when no request was ever made.

X. Whether the district court clearly erred in determining that the amount of loss attributable to defendant's scheme was more than \$40 million, where defendant asked for damages of almost \$25 million in his fraudulent civil lawsuit and attempted to treble those damages by fabricating evidence to establish the

other side's willful infringement.

XI. Whether the district court abused its discretion in denying defendant's motion to substitute counsel for purposes of his new trial motion where the first counsel defendant wanted had a severe conflict of interest and the second attorneys chose not to substitute in for the new trial motion because the district court allowed only a one-month, rather than two-month continuance.

### **STATEMENT OF THE CASE**

Defendant and his brother, Aly Mohsen, were initially indicted on March 25, 2003, on charges related to defendant's attempt to falsify evidence in a civil patent suit he had brought against a competitor. CR1. Prior to trial, defendant attempted to flee the United States, so he was remanded into custody and the United States filed a superseding indictment on April 16, 2004, adding a contempt of court count. CR98. While in jail, defendant paid another inmate to harass witnesses and commit arson and discussed hiring the inmate to murder Judge Alsup, the federal district judge in charge of his case. As a result, the United States superseded again on March 15, 2005, and added witness tampering, solicitation to commit arson, and solicitation to commit murder. CR268. On January 24, 2006, the United States superseded the indictment for a final time. CR473. In this indictment on which defendant was tried, he was charged with conspiracy (Count

1 – 18 U.S.C. § 371), perjury (Counts 2-4 – 18 U.S.C. § 1621(1)), subornation of perjury (Count 10 – 18 U.S.C. § 1622), mail fraud (Counts 11 through 18 – 18 U.S.C. §§ 1341 and 2), obstruction of justice (Count 19 – 18 U.S.C. §§ 1503 and 2), contempt of court (Count 20 – 18 U.S.C. §§ 401(3) and 3148), attempted witness tampering (Count 21 – 18 U.S.C. § 1512 (b)(1)), solicitation to commit arson (Count 22 – 18 U.S.C. § 373), and solicitation to commit murder (Count 23 – 18 U.S.C. § 373). ER304-25. Aly Mohsen was charged with defendant in Counts 1 and 19 for conspiracy and obstruction of justice, respectively, and in Counts 5-9 for perjury.<sup>2</sup> *Id.*

Because defendant contemplated having Judge Alsup murdered, the judge recused himself from the case on June 21, 2004. CR141. The case was reassigned to out-of-district Judge William Shubb on August 3, 2004. CR162.

At a pretrial hearing on November 21, 2005, the court entertained defendant's motion to sever Counts 1 through 20 from Counts 21 through 23 to prevent evidence obtained from a government informant on the tampering and solicitation charges from being heard in the trial on the fraud, perjury, obstruction of justice, and contempt counts. SER61-94. The court raised the issue of

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<sup>2</sup> Aly Mohsen pleaded guilty to all counts with which he was charged on January 24, 2006. CR469.

bifurcating, rather than severing the trial, and allowed the parties time to brief the issue. SER93-94. On December 20, 2005, the district court denied defendant's motion to sever Counts 1 through 20 from Counts 21 through 23, and instead ruled that it would bifurcate the trial so that one jury would hear the case in two phases, thereby preventing the information elicited by the informant on the witness tampering and solicitation charges from being heard by the jury as it considered defendant's guilt on the conspiracy, perjury, mail fraud, obstruction, and contempt charges. ER267-68.

The trial began on January 31, 2006. CR481. In the first phase of the trial, the jury heard evidence of and deliberated on Counts 1-4 and 10-20. On February 21, 2006, at the close of the government's case on these counts, the defendant moved for a judgment of acquittal on various bases, including that the court should grant a judgment of acquittal on the perjury counts in Counts 2 and 3 because defendant's answers were literally true. CR505; SER529-31. The district court denied defendant's motion, finding instead that the jury should decide whether his answers violated his oath. SER531C-532. At the end of the case, defendant moved again for severance and made a renewed motion for judgment of acquittal. CR513. Both were denied. CR513. On February 27, 2006, after less than one-and-a-half hours of deliberation, the jury found defendant guilty of each

of the counts 1-4 and 10-20. CR523; ER205.

On March 6, 2006, trial began on Counts 21-23. CR531. On March 15, 2006, the jury found defendant guilty of witness tampering and solicitation to commit arson, but acquitted him of solicitation to commit murder. CR556.

On April 14, 2006, defendant filed his Motion for Judgment of Acquittal and for a New Trial. SER828-54. Again, he argued that the perjury convictions on Counts 2 and 3 should be reversed because his answers were literally true. SER841. Defendant also claimed that a judgment of acquittal should be granted on Count 20, the contempt of court charge, because it was not supported by sufficient evidence, and that he should receive a new trial on counts 1-4 and 10-19 because the court did not consult trial counsel regarding the jury's note requesting to see a copy of the indictment. SER848, 851. The district court denied these claims orally at a hearing on September 15, 2006. ER402, 409-10.

On June 19, 2006, after filing his motion for new trial, but before it was heard, defendant noticed his intent to substitute counsel for the fourth time. CR584. After a thorough inquiry, the court denied the request finding that the lawyers defendant wanted to substitute in had a conflict of interest that could not be waived, as they also represented defendant's sister, who had testified under a grant of immunity for the government at defendant's trial. ER146-48. Then on

August 25, 2006, defendant asked to substitute in Dennis Riordan and Marc Zilversmit. ER124-25. Although the court was willing to allow the substitution, counsel refused the appointment after the court agreed only to continue the hearing on the motion for new trial for one month, rather than two as counsel requested. ER131; SER942-50. Riordan and Zilversmit filed a notice substitution of counsel on December 29, 2006 and represented defendant at his sentencing on January 5, 2007. CR646. They continue to represent defendant on appeal.

On January 5, 2007, defendant was sentenced to 204 months' imprisonment. CR655.

## STATEMENT OF FACTS

### I. OFFENSE CONDUCT FOR THE CONSPIRACY, PERJURY, MAIL FRAUD, SUBORNATION OF PERJURY, AND OBSTRUCTION OF JUSTICE CHARGES

#### A. Mohsen Brings a Civil Patent Lawsuit

Defendant, Amr Mohsen, was an engineer and the founder, CEO and president of Aptix Corporation, a high-technology company in Silicon Valley. SER170-71. On approximately February 26, 1998, Aptix, and its licensee Meta Systems, sued competitor QuickTurn Design Systems in Federal District Court in the Northern District of California for civil patent infringement, claiming that QuickTurn made products which infringed its patent number '069. SER170, 176.

To prevail on the patent claim, Aptix had to demonstrate that its patent predated QuickTurn's products, thereby giving it the right to exclude QuickTurn from practicing the invention. SER174-75. The presumed date of Mohsen's invention was September 20, 1989, the filing date for patent '069. SER181. Mohsen could claim an earlier date for his invention, such as the date of conception, by, for example, presenting engineering notebooks documenting the making of the invention. SER177, 181-82. If, on the other hand, QuickTurn could prove it had "prior art" – technology, reduced to practice, from before the date of defendant's patent or date of conception – then it would not be infringing on defendant's patent. SER176, 182-83.

Prior to filing his lawsuit, defendant knew about a patent application filed in October 1988 by Michael Butts, a QuickTurn employee. SER264; *see also* SER743 (depo\070699\_672-23.wmv, clips 1 and 2).<sup>3</sup> He had also looked at Figure 6, a drawing that was part of Butts's patent application (the "Butts drawing"), which was dated August 1988. SER743 (depo\070699\_682-04.wmv and 070699\_683-18.wmv).

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<sup>3</sup> Trial exhibits 53 and 117, SER743 and SER793, respectively, are compact discs with audio and video clips contained in various files. The citations are to the SER cite, followed by the file name in parentheses and either the clip number, where the citation is not to the first clip of that file, or the time, where the clip is more than a few minutes long.

Under the local rules for the Northern Judicial District of California, Mohsen was required to disclose to QuickTurn the date of conception of his patent within 45 days of filing his lawsuit and to do so before QuickTurn was required to disclose any claims of prior art. SER182-84. On April 13, 1998, QuickTurn received an engineering notebook, dated beginning July 7, 1989 (the “1989 notebook”), related to the “research, design, and development” of the ‘069 patent, and a statement that plaintiffs were unable to provide the date of conception at that time because Mohsen, the inventor of the patent, was out of the country. SER185, 188. Then, on May 4, 1998, QuickTurn received a copy of an engineering notebook beginning on July 30, 1988 (the “1988 notebook”) and an accompanying document stating that the date of conception for patent ‘069 was July 31, 1988. SER191-94.

Engineering notebooks are generally witnessed, or signed, by a disinterested person, to meet the legal requirement that inventive activity be corroborated. SER186. Defendant’s 1989 notebook was witnessed by two Aptix engineers. SER189-90. Defendant’s 1988 notebook, on the other hand, was witnessed by his brother, Aly Mohsen. SER198, 206. Aly lived in Missouri and was a practicing physical rehabilitation doctor. SER743 (depo\052599\_07-02.wmv and depo\052599\_10-02.wmv).

QuickTurn was suspicious of the authenticity of the 1988 and 1989 notebooks. The date 1988, as written several times in the 1988 notebook, appeared to have been overwritten from what was originally written as 1998, the year the notebook was turned over. SER194. In addition, QuickTurn had received an engineering notebook from the attorney who had prosecuted the '069 patent for Mohsen in 1989. This notebook did not have all of the information in it that appeared in the 1989 notebook that Mohsen had provided to QuickTurn in April 1998, suggesting that Mohsen had made additions to that notebook after-the-fact. SER195.

On August 20, 1998, QuickTurn asked Aptix for the two notebooks so that it could conduct forensic testing of them to determine their authenticity. SER205. Aptix initially refused, then imposed conditions that were unacceptable to QuickTurn, such as requiring that their lawyers be present during the testing. SER210-13.

B. Mohsen Secretly Hires Forensic Experts

During the time that QuickTurn was trying to obtain the notebooks for testing, defendant, unbeknownst to anyone else at the time including his own lawyers (SER336-37), hired experts to conduct testing of the notebooks. He first hired Robert Kuranz, a forensic ink analyst in Wisconsin. SER310-11. On

September 9, 1998, defendant flew to Wisconsin and provided Kuranz with the 1988 engineering notebook, or pages from the notebook, and asked him to date-test the inks used in it. SER312-13. To do the tests, Kuranz took ink plugs from the pages. SER314. The fear of “destructive” testing was one of the bases Aptix claimed for contesting turning the notebook over for testing by QuickTurn. SER209. Kuranz was not able to conclude at the time that the ink was not available in 1988. SER321-22.

Mohsen also hired a forensic document examiner, David Moore, whom he first contacted in August, 1998. SER339-40. On September 19, 1998, just before midnight, defendant left the 1988 notebook at Moore’s house. SER341. Defendant told Moore that he was involved in a lawsuit, that he wanted to use the notebook as evidence that he had done things in 1988, but that because he was afraid the other side might alter it, he wanted Moore to examine the notebook to establish that it was made in 1988. SER345. He left the original notebook with Moore for approximately one week. SER344-45. From the examination, Moore concluded that the notebook “was not genuine, that it was a fabrication, that it had been more likely created in 1998 or 1999.” SER349.

Moore told defendant his findings on September 26, 1998, detailing for him all of the reasons for his conclusion. SER347-48. These included that only two

different inks were used throughout the notebook even though the entries spanned approximately one-year, that the notebook's label had been carefully torn off, removing any identifying features, and that dates had been altered, information erased, and glue added, as if the notebook had been put back together. SER348. He also informed defendant that the date on page 2 had been changed from July 31, 1998 to July 30, 1988. SER346.

In mid-October 1998, Mohsen sent Kuranz additional pages from the 1988 notebook and asked him to do further testing. SER323-29. Kuranz concluded that some of the areas on the pages had been overwritten, which he explained is often seen with dates and is generally done to obliterate. SER326-29.

Meanwhile, because Aptix refused to turn over the notebooks for testing, QuickTurn filed a motion to compel in the district court on November 24, 1998. SER217. The date set for the hearing on the motion to compel was December 29, 1998. SER220.

On December 14, 1998, two weeks before the hearing on the motion to compel, defendant filed a police report, claiming that the 1988 and 1989 notebooks were stolen from his car. SER220.

On January 30, 1999, defendant contacted Moore again and asked him whether it was possible to date when photocopies were made, to which Moore told

him it was not. SER351-54. Soon thereafter, in April, 1999, defendant provided QuickTurn with photocopied pages from the 1988 notebook that he said his brother Aly had made in 1988. SER225-28.

One month prior to defendant's disclosure of the photocopy, on March 1, 1999, defendant sent Moore his 1989 day-timer and asked him to pay particular attention to the weeks of December 25, 1988, March 20, 1989, June 28, 1989, and August 3, 1989, and to examine the coffee stains in it. SER355-56. Moore found a number of questionable items. He found that the coffee stains appeared to have been purposeful. SER360. He found several places where the word "notebooks" was overwritten to appear as "notebook." SER360-62. He also found that a similar, if not the same, writing instrument, was used to make entries about similar subjects, even when on different dates. SER363. When Moore examined the day-timer it was complete, with no dates missing from it. SER363. Moore mailed the day-timer back to Mohsen on March 4, 1999. SER364.

On April 29, 1999, defendant provided QuickTurn with the 1989 day-timer. SER231-33. QuickTurn was also suspicious of the authenticity of the day-timer because it was missing pages March 9 through March 15. SER239-40. Moore had found that one of the fake coffee stains had appeared on March 15th. SER376.

C. The Depositions

On that same day, April 29, 1999, Mohsen was deposed. In his deposition, he denied ever having the notebooks out of his possession or ever having the notebooks examined by an independent expert, despite having had both Kuranz and Moore examine the 1988 notebook, and despite having left the 1988 notebook with Moore for a week. SER743 (depo\042999\_339-15.wmv and depo\042999\_349-24.wmv).

On May 25, 1999, defendant's brother Aly was deposed. He testified at the deposition that he had signed and witnessed the 1988 notebook in 1988 and told other similar lies that formed the basis of defendant's subornation of perjury charge. SER743 (depo\052599\_092-12.wmv and *see generally* depo\052599.asx).

D. The Return of the Stolen Notebooks

Because of the photocopies that Aly had supposedly made of the 1988 notebook, Aptix was trying, as of January 2000, to obtain admission of the photocopies of the notebook. SER249. But QuickTurn claimed that first Aptix had to show that the originals were not lost in bad faith. SER250. While a motion was pending on that issue, defendant claimed parts of the original 1988 and 1989 notebooks were mailed back to him in January 2000. SER251-52.

According to defendant, missing pages of the notebooks were mailed back

with a letter from “FL” in which “FL” claimed that he found the pages in his backyard and, because they appeared to be important, he was mailing them back to Mohsen. SER252, 256. Apparently, “FL” knew where to send the pages, because in addition to pages of the notebooks, there were some invoices with Mohsen’s home address. SER255-57. The pages were mailed to defendant at his home address with the zip code 95030, the correct zip code for the address in 2000. However, the only invoice with a zip code on it had the zip code 95032, a different zip code from the one used to mail the package back to defendant. SER258. As it happens, the zip code for the address was changed from 95032 to 95030 on July 1, 1997. SER378.

On February 18, 2000, Mohsen was again deposed and stated that the last entry he made in this 1988 notebook was June, 1989. SER743 (depo\021800\_996-18.wmv).

In March of 2000 Moore did some further analysis for Mohsen. SER365-72. At that time, Moore told defendant that he thought he was testing him so that he could create false documents. SER374.

E. Damages and the “Keith Lobo” Notes

While the parties continued to spar over the notebook, defendant went forward with another aspect of the lawsuit – damages. Defendant claimed that he

gave notice to QuickTurn that it was infringing the '069 patent during a meeting with Keith Lobo, QuickTurn's CEO, on August 19, 1996. SER243-46. To help establish this, on June 25, 1999, he provided notes he claimed he wrote to document what transpired at the meeting. SER244-45. The meeting defendant claimed to have had was critical to setting the amount of damages, as notice of infringement starts the clock for when damages begin. SER247. Aptix claimed the damages from QuickTurn's infringement, assuming it began August 19, 1996, was 22 to 24 million dollars. SER262. Moreover, the notice to Lobo would allow Aptix to possibly recover treble damages. Treble damages are possible if a plaintiff can establish that a defendant's infringement is willful, as when the defendant does nothing after receiving notice of the infringement. SER248.

Not surprisingly, before defendant turned over to QuickTurn the notes of the meeting he supposedly had with Keith Lobo, he sent a different version of the notes to Robert Kuranz in January 1999, to see if Kuranz could date-test the ink. SER331-34; *compare* SER736-37 *with* SER738-41. Kuranz could not remember the result of any testing he did, however. SER334.

F. Dismissal of the Patent Suit and Initiation of Criminal Charges

On May 9 and 10, 2000, Judge Alsup held a hearing on QuickTurn's motion to dismiss Aptix's lawsuit because the 1988 and 1989 notebooks were

falsified and/or tampered with. SER270-71. Aptix opposed the motion, arguing, still, that the notebooks were authentic. SER271-72. On June 14, 2000, Judge Alsup dismissed Aptix's lawsuit against QuickTurn under the court's inherent powers and under the doctrine of unclean hands. SER275.

Defendant's attempts to use the false 1988 notebook not only resulted in dismissal of his lawsuit, but also resulted in criminal charges. On March 25, 2003, the United States first obtained an indictment against Mohsen for conspiracy, perjury, subornation of perjury, mail fraud, and obstruction of justice, all related to this attempts to use the fraudulent notebook to win his lawsuit against QuickTurn. CR1. Judge Alsup, the judge who heard defendant's civil claims, was also assigned the criminal case. CR20.

G. Additional Proof that Defendant Falsified Evidence

In preparing the case for criminal prosecution, the United States obtained more evidence to prove at trial that the 1988 notebook and entries in the 1989 day-timer were false. Antonio Cantu, a forensic scientist with the Secret Service, testified that he examined some of the original pages from the 1988 and 1989 notebooks that had been mailed back to Mohsen from "FL." SER380-82. On four of the pages from the 1988 notebook, ink was used that was not commercially available until 1993, and there were insertions written in that notebook, as well as

alterations. SER387, 391-92. The entries in the 1989 day-timer made on December 26, 1988, March 26, 1989, and June 30, 1989 were all written in the same ink, even though the ink on the latter two dates was different from the ink on the rest of those pages. SER385-86. Witnesses from Avery Dennison, the manufacturer of the 1988 notebook, testified that the 1988 notebook could not have been written in 1988 because the label on defendant's notebook was not available until 1995, the square-cornered paper in the notebook was not available until 1993, and the position of the page numbers was different in 1988 from how it appeared in defendant's notebook. SER394-99. Moreover, an Arabic translator testified that erasures in the 1988 notebook said in Arabic "sign here" or "sign by date" where defendant's brother signed the notebook, further indicating that Aly signed it after the fact, rather than as a contemporaneous witness. SER400-01.

#### H. The Materiality of the 1988 Notebook

At trial, the government also went to great lengths to prove that the false 1988 notebook was material to the civil patent lawsuit. Jay Kesan, a professor of intellectual property, was offered as an expert and stated that if believed, the notebook would have strengthened Mohsen's patent claim in the litigation and rendered some of QuickTurn's defenses unavailable. SER417. He also indicated that once the notebook was introduced as providing a date of conception, it could

have had an impact on QuickTurn's decisions as to what defenses to even raise. SER417. Kasen further stated that sponsoring fraudulent evidence can raise the costs of litigation, by requiring the other side to spend money to determine its authenticity. SER418. In addition, he stated that a phony notebook could influence the outcome of a patent suit, as it did in this case, because "the credibility of the inventor" is "very important to, typically, the fact finder." SER416.

In addition, the government called Jeffrey Miller, the lawyer for QuickTurn. He testified that as of June 1, 1998, the conception date of the '069 patent, as evidenced by the 1988 notebook, "was a big issue" in the lawsuit, because it "determine[d] what is available to the person or party accused of infringement to use as prior art." SER201. He stated that as of October 5, 1998, the authenticity of the 1988 notebook "was a very important issue" in the lawsuit," because whether July 31, 1988 was Aptix's date of conception affected what QuickTurn could claim as prior art, which affected "everything we did in the case." SER215-16. Moreover, Aptix told QuickTurn at this time that the notebook was "important evidence in this case." SER216. Almost a year later, at a status conference in the patent suit, Aptix told the court that it would have a "hard road to hoe to avoid invalidating [QuickTurn's] prior art" if it were not allowed to rely on the 1988

notebook. SER237-38. Even as late of April 2000, after Mohsen's February 18, 2000, deposition where he lied about when he wrote the notebook, the authenticity of the notebook was critical to whether QuickTurn's prior art defense based on Butts' October 1988 filing application would be valid. SER267-68. Moreover, Judge Alsup had to determine the authenticity of the notebook to resolve QuickTurn's motion to dismiss the lawsuit in May, 2000. SER270-71. At that time, defendant was still claiming that the notebook was written in 1988 and even had his brother testify to that fact. SER271-72.

Even defendant's expert, Roger Blakely, testified that an engineering notebook would be relevant in a patent lawsuit when the defendant in the suit presents prior art that predates the filing date of the patent application. SER536. Mr. Miller had already stated that QuickTurn did just that, claiming the Butts drawing as prior art, which preceded the presumed date of invention of September 20, 1989, but not Mohsen's claimed conception date of July 31, 1988. SER264-68. Mr. Blakely further testified that if a plaintiff in a patent suit were required to state a date of conception, and did so by providing an engineering notebook, then the notebook would be relevant at that point in the lawsuit. SER541. Again, Mr. Miller, QuickTurn's attorney, said that Mohsen was required to state a date of conception and did so on May 4, 1998, by providing the fraudulent 1988 notebook

asserting a conception date of July 31, 1988. SER182, 191-93.

## II. OFFENSE CONDUCT FOR THE CONTEMPT OF COURT CHARGE

In Count 20, defendant was charged with contempt of court for violating his conditions of release by applying for an Egyptian passport. Defendant's pretrial release conditions stated that he had to surrender "all passports and visas . . . and shall not apply for any passports or other travel documents." SER448. Defendant was aware of his bond conditions. SER447-52.

Defendant's trial was initially set to begin on March 31, 2004. CR80. On March 23, 2004, just a week before trial, the court denied defendant's request to travel to Florida and return at 10:30 p.m. the night before trial was to begin. CR95; SER453. The prosecution team suspected that defendant was going to flee and put 24-hour surveillance on him. SER454-55. During the surveillance, FBI Agent Moss saw defendant go to the Egyptian consulate at 9 p.m. on March 25, 2004. SER456-57. On March 26, 2004, defendant went to several banks and withdrew approximately \$50,000. *See* SER465, 469-70 (\$10,000 from Bank of America); SER473, 477-79 (\$30,000 from Silicon Valley Bank); SER526-27 (\$10,000 from a different Bank of America).

On March 27, 2004, FBI Agent Richards overheard defendant on the phone making reservations for a chartered flight from Fort Lauderdale, Florida to the

Cayman Islands. SER458-61. During the call, defendant represented that he was Julian Smith, indicated that there would be two traveling, and said that one person would be using an Egyptian passport. SER461-62. Mohsen was also overheard calling US Airways to make reservations from San Jose to Florida. SER463. Representatives from the airlines confirmed what Mohsen was heard saying. Emma Sword, a charter flight broker, testified that she gave a quote for chartering a flight from Fort Lauderdale to the Cayman Islands and from San Jose to the Cayman Islands to a William, rather than Julian, Smith, for flights to leave March 28, 2004. SER485-92. A representative from US Airways stated that on March 27, 2004, two reservations were made, one for A. Abdell Atif, traveling from San Jose to Fort Lauderdale on March 27, 2004, and one for Ame Abdell Atif, flying from San Jose to Fort Lauderdale on March 28, 2004, though they were never ticketed. SER498-502.

Evidence found in defendant's car when he was arrested on March 27, 2004, included (1) documents in the name of William Smith with information for flights from Florida to the Cayman Islands; (2) documents from Emma Sword about chartering a jet; (3) handwritten notes with the name Ame Abdell Latif and references to Cuba, the Cayman Islands, St. Croix, and a Lear Jet; and (4) a photocopy of an expired Egyptian passport in the name Dr. Amr Mohammed

Abdell Latif Mohsen. SER505-20; SER744-769.<sup>4</sup>

After his arrest, defendant was remanded to jail. CR96. Agents executed a search pursuant to a warrant for his jail cell on June 15, 2004. SER521-22.

During that search, agents found a piece of paper with defendant's wife's name written across the top which said "[a]sk for any papers related to the loss of the old Egyptian passport in 95 or 96 and the application for new passport in after 94.

Ask to borrow the originals or get a copy. Not interested in any application in 2004." ER342; SER524-25 (underlining in original).

### III. OFFENSE CONDUCT FOR WITNESS TAMPERING, SOLICITATION TO COMMIT ARSON, AND SOLICITATION TO COMMIT MURDER

While awaiting trial on his conspiracy, perjury, subornation of perjury, mail fraud, obstruction of justice, and contempt charges, defendant was housed at the Santa Rita Jail where he met Manuel Primas, another prisoner awaiting trial on state burglary and robbery charges. SER616-17. Initially, in March, 2004, defendant asked Primas to do some legal research for him, for which he paid him \$6,000, even though defendant was represented by private counsel at the time. SER617-19, 622. Primas's sister received the money from Mohsen's sister. SER660, 669. The research included looking into the crime of witness tampering,

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<sup>4</sup> Mohsen also had on his person a newly issued Egyptian passport when he was arrested, but it was suppressed by the district court. SER48, 51, 59-60.

although defendant was not yet charged with that crime. SER625.

A. Mohsen asks Primas to Intimidate Witnesses

Defendant then asked Primas to intimidate some of the witnesses that were going to testify against him, including David Moore, Robert Kuranz, and witnesses from Avery Dennison, by calling them and saying, “Do not show up for trial. It wouldn’t be healthy.” SER632-33. It was defendant’s hope that the calls would prevent the witnesses from appearing at his trial. SER633. Primas told defendant that he would do it for \$5,000. SER633. Defendant gave Primas the names of the witnesses that he had received in discovery to allow Primas to make the calls. SER627-30.

In addition to asking Primas to call witnesses in an attempt to get them not to testify, defendant asked Primas to find someone to break the windows of the Mercedes that belonged to Tom Huang, an Aptix executive. SER638. Defendant told Primas that he wanted this done so that it would appear that whoever had broken into his car, had really intended to break into Huang’s car over a gambling debt, as Huang’s car was identical to his. SER638. He thought this would lend credibility to his claim that his car had been broken into and the notebooks stolen. SER644. To accomplish this, he asked Primas to have someone break the rear right-side passenger window, the same window broken on his car. SER639. To

insure that the vandalism of the car would be reported to police, defendant also asked Primas to have someone break into Mrs. Huang's car. SER639. To insure that it was understood that the break-in was over a gambling debt, defendant wrote out a sample note that Primas could arrange to have left in Mr. Huang's car. The note said, "Pay your debt. Your other black car is next like years ago." SER640-41.

B. Mohsen Asks Primas to Have Dave Moore's Car Burned

Because defendant was frustrated that the various phone calls were not "getting results," he also asked Primas to have someone blow up Dave Moore's car. SER645. Defendant had initially asked about having Moore's house burned down until Primas told him it could be too dangerous, if for example, children were in the house. SER645. Primas gave defendant the phone number of the person on the outside who was supposed to take care of burning Moore's car and breaking into Huang's car and told him the person's name was Kemo. SER647-49. Kemo was, in fact, undercover FBI Agent David Carr. SER664.

C. Primas Begins Cooperating

Primas testified that it was never his intent to fulfill his end of the bargain, but instead just to take Mohsen's money. SER635-36. But then it got "a little too dangerous." SER636. Primas was concerned, not only that people would get hurt,

but that he could be considered a co-conspirator to defendant's plans. SER646. Primas told his lawyer, Andrew Steckler, about what defendant had asked him to do. SER634-35. At that point, on May 17, 2004, Steckler contacted the United States Attorney's Office. SER606. On May 19, 2004, Steckler, Primas, the FBI, and AUSA Harris had a meeting at which Primas agreed to wear a wire during his subsequent conversations with defendant. SER606-08.

The government admitted taped conversations between defendant and Primas, in which they discussed calling trial witnesses, breaking into the Huang's car and burning David Moore's car. *See generally* SER793 (audio\05-27-04 pocket.asx and video\06-03-04 video.asx). Defendant was anxious for results from the break-in of Huang's car. SER643. Because the FBI would not break the window of the car, Primas had to make up excuses for why defendant was not hearing about the results of that act. SER650-51. To satisfy defendant with regard to the burning of Moore's car, the FBI arranged to make it appear that Moore's car was burned and provided Primas with a photo that he gave to defendant showing a car on fire, which was reported to defendant as Moore's car. SER652-53.

Defendant arranged to have Kemo paid \$2,000 for his work. Originally, defendant had asked his sister, Magda Metwally, to pay Kemo the \$2,000, but she got nervous and arranged for Mohammad Ali Moussa, a friend of defendant's, to

pay Kemo, or FBI Agent Carr, on June 11, 2004. SER658-59 (Moussa); 661-63 (Metwally); 665-67 (Agent Carr).

D. Mohsen Discusses with Primas Killing the Judge

Around June 12, 2004, defendant talked to Primas about possibly killing Judge Alsup, the federal judge assigned to hear his case, telling Primas that “the judge has got to go.” SER654-55. When Primas told him it would cost \$25,000, defendant was upset that it would be so expensive. SER654. Primas told the FBI what defendant asked of him and the next day the FBI placed a wire on Primas and recorded the conversation he and defendant had. SER656. During the videotaped conversation, defendant tells Primas that the judge is named William Alsup. SER793 (video\06-13-04 Video Complete.wmv at 1:30-1:47). When Primas asks him how he wants it done – shooting, knifing, or blowing the judge up – defendant asks him which means is “the least traceable.” *Id.* at 3:05-3:18. After discussing the possibility of using gas, defendant expresses some hesitation and states that he does not feel good about the idea and needs some time to think about it. *Id.* at 4:25-5:00. Mohsen admits that he thinks the judge is his biggest problem, and that he thinks if he got the judge it would scare everyone else away. *Id.* at 6:22-6:48. Later in the conversation, defendant says that “Somebody, somebody has to track him.” *Id.* at 9:10-9:15. At that point, Primas suggests that they follow the judge to

learn his pattern while Mohsen decides what he wants to do. *Id.* at 9:17-9:34. Defendant tells him, “Okay, good.” *Id.* at 9:34-9:36. That is the last time that defendant and Primas spoke to each other, as the next day Primas was sentenced and sent to a different prison facility. ER535-36.

\* \* \*

On February 27, 2006, the jury returned guilty verdicts on Counts 1-4 and 10-20. On March 15, 2006, after hearing the evidence regarding Counts 21-23, the jury found defendant guilty of witness tampering and solicitation to commit arson, but acquitted him of solicitation to commit murder.

On January 5, 2007, defendant was sentenced by the Honorable William Shubb, who took over the case after Judge Alsup recused himself, to a total sentence of 204 months’ imprisonment. CR655.

### **SUMMARY OF ARGUMENT**

- I. The district court did not plainly err in failing to instruct the jury on patent law, where the defense asked for no instructions and where the jury had sufficient information about the issues in the underlying patent lawsuit to determine whether defendant’s proffering of and lies about his fraudulent engineering notebook were material to the lawsuit.
- II. The district court did not abuse its discretion in denying defendant’s motion

to sever and instead bifurcating Counts 1-20 from Counts 21-23. The only basis for the severance motion was to prevent certain evidence relevant to Counts 21-23 from being heard on Counts 1-20. The district court's solution constituted a proper balance of defendant's right to a fair trial and judicial economy. Defendant was not unfairly prejudiced by the jury learning of the charges in Counts 21-23 in voir dire at the start of the first phase of the trial, as the counts were properly joined and the evidence of defendant's guilt on Counts 1-20 was overwhelming.

Nor was defendant prejudiced from the prosecutor stating in closing argument on the Phase I charges that defendant was guilty of all charges in the indictment, as it was clear he was referring only to the charges on which the jury heard evidence and on which it was deliberating. The prosecutor also did not improperly vouch by qualifying a few of his sentences with the words, "I think." It was merely meant for rhetorical emphasis and not to place the prestige of the government behind his argument. In any event, there was no miscarriage of justice from the jury's verdict, as the evidence of defendant's guilt was overwhelming.

III. Defendant now claims for the first time on appeal that the government constructively amended the indictment by arguing that even if the false notebook was not material to defendant's scheme to defraud, the jury could rely on the false

notes about Keith Lobo to find materiality. But the government did not make this argument or suggest to the jury that it did not have to find the defendant's lies about his notebook material to the patent lawsuit. Rather the government argued that although the 1988 notebook was material because it attempted to establish the date of defendant's invention, the jury could also find the notebook material because it provided evidence that the Lobo notes were fraudulent.

IV. Defendant argues the district court erred in not consulting the parties when the jury sent a note, after starting deliberations but prior to receiving the instructions or verdict form, asking to see a copy of the indictment with the specific charges. Even if it constituted error for the court to answer "no" without checking with the parties, it was harmless. The answer the jury received did not likely affect the verdict, consultation with the parties would not have likely affected the answer, and evidence of defendant's guilt on each count was overwhelming.

V. The district court did not err in rejecting defendant's claim that the perjury charges in Counts 2 and 3 should have been reversed because defendant's answers were literally true because he was asked about his "notebooks" when an affirmative answer would only have been correct as to one notebook. Where there is some ambiguity about the particular meaning of a question, it is proper to let the

jury decide if defendant understood the question as it was intended. Here, the jury could reasonably find that defendant understood the question to be asking about either notebook.

VI. Defendant's conviction for contempt of court should be affirmed. As the district court found, a contempt charge can be initiated by either the court or the prosecution. Nor was their error from the admission of exhibit 97A, a note with defendant's wife's name found across the top. The note was not a privileged marital communication because defendant never established it was communicated to his wife. Nor was the note seized in contravention of defendant's Sixth Amendment right to counsel. The exhibit was taken as evidence of defendant's efforts to feign an incompetency defense and none of the information in the search warrant supporting probable cause to believe evidence of that crime would be found in defendant's cell came from the informant. Finally, there was sufficient evidence to support the conviction.

VII. Even if this Court were to reverse the convictions on Counts 1-4 and 10-20, it need not reverse the convictions on witness tampering and solicitation to commit arson. The United States presented sufficient evidence independent of the Phase I convictions to prove defendant was predisposed to commit his crimes, such that he suffered no prejudicial spillover.

VIII. The prosecutor did not improperly vouch for the credibility of the informant nor violate the advocate-witness rule. The prosecutor told the jury that the informant was a criminal who could only be believed because his testimony was corroborated by independent evidence. The prosecutor did not violate the advocate-witness rule where she did not elicit information regarding her participation in a single meeting with the informant nor insinuate that a defense attorney, who testified that the informant was made no promises by the government, should be believed because she was present at the meeting with the informant, his attorney, and the FBI.

IX. Defendant's claim that his trial lawyers provided ineffective assistance by failing to investigate defendant's earlier requests to be moved away from Primas should be denied. An ineffective assistance of counsel claim is more properly brought on habeas where there can be an inquiry into the lawyers' actions and reasons for taking them. In any event, defendant's claim is meritless. He never asked to be moved away from Primas, such that subsequent lawyers could not and should not have thought to raise such a claim.

X. The district court did not clearly err in finding that defendant was responsible for a loss amount of between \$40 and \$80 million dollars. An expert for Aptix and Meta wrote a report concluding that the damages owed to Aptix was

between \$22 and \$24 million, a fact that could not have been unknown to defendant given that he was the CEO of Aptix, the inventor of the patent at issue, and deeply involved in the litigation. Moreover, it was clearly defendant's intent to obtain triple that amount. He asked for treble damages in the complaint and falsified evidence in an attempt to show that QuickTurn's infringement was willful, giving rise to treble damages.

XI. The Court's decision of this appeal should not be deferred pending a remand for new trial motion. Defendant was properly denied the right to substitute in counsels Weinberg and Wilder, as they had a severe conflict of interest from their on-going representation of defendant's sister who testified under a grant of immunity for the government in defendant's trial. Nor did the court improperly deny counsels Riordan and Zilversmit from substituting in for purposes of the new trial motion. The court was willing to allow them to step into the case, but denied their motion for a 60-day continuance. At that point, counsel rejected the appointment, claiming they could not be ready to proceed. This was not an abuse of discretion. Counsels' primary reason for the continuance was to allow them time to submit a supplemental new trial motion. But the court had no jurisdiction to hear any supplemental claims on the motion for new trial. Moreover, the court needed to balance their concerns against the defendant's

request not be held in county jail any longer than necessary, the government's desire to move the case forward, and the inconvenience to the court.

## ARGUMENT

### I. THE DISTRICT COURT DID NOT PLAINLY ERR BY FAILING TO INSTRUCT THE JURY REGARDING SUBSTANTIVE PATENT LAW

Defendant contends that Counts 1-4 and 10-19 must be reversed because the court failed to instruct the jury on substantive patent law, preventing it from being able to assess whether defendant's proffering of and lies about his 1988 engineering notebook were material to the conspiracy, perjury, mail fraud, and obstruction of justice charges. This claim should be rejected. The jury was properly instructed as to what materiality meant for each charge and it was informed of the patent law it needed to know to make its materiality determination.

#### A. Standard of Review

Because the defense never proposed any instructions regarding patent law, defendant's claim must be reviewed for plain error. *See* Fed. R. Crim. Pro. 52(b); *United States v. McCormick*, 72 F.3d 1404, 1409 (9th Cir. 1995). To satisfy that standard, there must be (1) error, (2) that is plain, and (3) that affects substantial rights. *United States v. Ameline*, 409 F.3d 1073, 1078 (9th Cir. 2005) (*en banc*). An error is plain if it is "contrary to the law at the time of appeal." *Id.* To show

that his substantial rights were affected, defendant must establish “that the probability of a different result is sufficient to undermine confidence in the outcome of the proceeding.” *Id.* (internal quotation omitted). If all three conditions are met, this Court may then exercise its discretion to reverse, but only if the error “seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *Id.* Rarely will an improper jury instruction justify a finding of plain error. *United States v. Glickman*, 604 F.2d 625, 632 (9th Cir.1979).

Even if plain error were not to apply, in reviewing jury instructions, the relevant inquiry is whether the instructions as a whole are adequate to guide the jury’s deliberations. *United States v. Munoz*, 233 F.3d 1117, 1130 (9th Cir. 2000). The trial court has substantial latitude so long as its instructions fairly and adequately cover the issues presented. *See United States v. Garcia*, 37 F.3d 1359, 1364 (9th Cir. 1994). Jury instructions are subject to harmless error review. *See Hedgpeth v. Pulido*, – U.S. –, 129 S. Ct. 530 (2008) (per curiam); and *United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1197 (9th Cir. 2000) (*en banc*).

B. Plain Error Review Applies

As defendant concedes, he never proposed any substantive instructions on patent law during the course of his trial. *See* AOB42. Defendant cites to his pretrial motion to dismiss the charges for lack of materiality and the government’s

*in limine* motion to exclude defendant's experts from testifying to the immateriality of the fraudulent notebooks to claim he raised the jury instruction issue below. *See* AOB40-42. But neither motion concerned what instructions the jury should receive. *See* SER32-47 and SER117-25. To the extent there was any discussion of jury instructions, it was over what type of materiality instruction should be given for the various offenses, not about whether the jury should be instructed on patent law. ER238-41. Specifically, the court said, "[w]hy don't you focus on how you want me to instruct the jury . . . and then I can take a look at it . . . to come up with what I think is a correct statement of the law of *materiality* with respect to each one of these alleged claims." ER241 (emphasis added).

While Mohsen, as opposed to his lawyers, did say he believed that materiality had a special meaning within the patent context and asked the court to look at that, he admitted that his lawyers had not raised the issue because they felt "it may not be relevant." ER222. The court then told the defendant to "work through your lawyers" and that if the lawyers wanted to urge an issue on the court, they were "free to do that." ER223. The lawyers choose not to do that, so the present claim was never litigated below. It should now, therefore, be reviewed for plain error.

C. The District Court Did Not Plainly Err in Not Providing Jury Instructions on Substantive Patent Law

For purposes of the criminal case, the jury needed to determine whether, at the time defendant put forth his phony notebook, it was material to the lawsuit, and determine whether, when defendant gave his deposition testimony, the lies he made about the notebook were material to the lawsuit. The jury was instructed on the definition of materiality for each of the different crimes charged, such as perjury and mail fraud. SER598-600. Defendant does not now dispute the propriety of those materiality instructions. Rather, he claims that the jury should have been instructed on patent law to enable it to determine whether the notebook was material to the patent suit. But given the evidence in the case, this is not true.

Defendant is right that for purposes of determining materiality, the jury needed to know some patent law. And it did. Even before trial, the district court acknowledged that it would have to be explained to the jury “what the issues were in the [patent] trial” and stated that “you can have either the Judge do that or you can have a witness do that.” SER141. The parties chose to do it through witnesses and that was sufficient in this case because both sides presented consistent, undisputed testimony on the relevant patent law.

The government and the defense each called experts in patent law, including

some who were not involved in the civil patent suit. The government first called Jeffrey Miller, the patent lawyer who represented QuickTurn. SER168-70. He explained that the first person to invent something is entitled to a patent for that invention and that “a patent gives the person who owns that patent a right to exclude others from practicing whatever is claimed in that patent” and that if someone is “practicing” the invention owned by another, that person would be infringing on the patent. SER174-76. He told the jury that the lawsuit was about Aptix’s claim that QuickTurn was making products that infringed its ‘069 patent. SER176. He explained that the presumed date of invention is the filing date of the patent, which in Aptix’s case was September 20, 1989. SER176-77. Mr. Miller also informed the jury that an inventor can prove an earlier date for the invention than the presumed date by establishing the “date of conception.” SER181-82. He explained that the conception date is when the inventor is “in possession of all the elements of the invention you eventually claim in your patent.” SER181. He told the jury that the date of conception is typically established with an engineering notebook, which documents the inventor’s day-to-day activities while making the invention. SER177, 182. Finally, Mr. Miller informed the jury that “prior art” is “anything that comes before” and “can be used to invalidate a patent.” SER183.

The government also called Jay Kesan, a professor of patent law, who was

not involved in the Aptix lawsuit. SER405. He explained that the patent system is designed to reward the first inventor by allowing that inventor to exclude others from making, using, or selling his invention for a period of time. SER411. He stated that because it is to reward the first inventor, even if you are the first to file a patent, if someone can establish that he invented the invention before you, then he can invalidate your patent. SER415. He testified that people keep engineering notebooks to document and provide proof of their work and that it can be used to show an earlier date of invention than the presumed date, or filing date of the patent. SER409-10, 413-16. He also explained general principles of patent law such as what a presumed date of invention is (“typically the filing date of the patent,” SER412), how a patent can be invalidated (“one of the typical grounds would be . . . by something called ‘prior art’” SER414), and what prior art is (“information that was known before your date of invention”). SER414.

None of these basic principles were in dispute. Defendant did not cross-examine the government’s witnesses on these basic principles of patent law. *See* SER276-308, 419-446. Moreover, the defense called its own expert, Roger Blakely, a patent attorney who was not involved in the patent case. SER534, 539. Mr. Blakely explained, as the government’s experts had, that an engineering notebook “could be used to show a date of invention” earlier than the presumed

date. SER537. He explained, as they did, that prior art is “publications, prior patents, products that were offered for sale or sold . . . that predate[] the date of invention . . . And therefore, if they disclose or render the invention obvious, then the patent would be invalidated based on that prior art.” SER537-38. As his testimony demonstrated, there were no principles of patent law in dispute in the case.

Ironically, Mr. Blakely’s testimony also helped establish that defendant’s notebooks were material to the patent suit. He testified that an engineering notebook would be relevant in a patent lawsuit when the defendant in the suit presents prior art that predates the filing date of the patent application. SER536. Mr. Miller testified that QuickTurn did just that, presenting as a prior art defense Butts’ patent which was dated before September 20, 1989, but after the date put forth in the 1988 notebook. SER201-02, 264-65. Mr. Blakely also said that if a plaintiff in a patent suit were required to state a date of conception, and did so by providing an engineering notebook, then the notebook would be relevant at that point in the lawsuit. SER541. Mohsen was required to state a date of conception and did so by providing the fraudulent 1988 notebook on May 4, 1998. SER182, 191-93.

None of the patent instructions now claimed necessary by defendant would

have made a difference to the verdict. The criminal jury did not need to determine who would have eventually prevailed in the patent suit, as defendant contends, and thus needed no instruction on burdens in patent suits, or on the obviousness or scope of the prior art. *See* AOB40.

Rather, the jury needed to determine whether the notebook was material to the patent suit, *i.e.*, had a “natural tendency to influence the decision of the decision-making body” for the perjury counts, or “would reasonably influence a person, including corporate entities, to part with money or property” for the mail fraud counts. SER598-600. For that, the jury needed to know whether defendant’s alleged date of conception, put forth at the beginning of the suit and continued through his depositions, could have influenced the civil judge or jury in its decision as to whom should prevail in the suit or influenced QuickTurn as to whether to settle the suit. It had the undisputed patent law it needed from witnesses Miller, Kesan, and Blakely to make that determination. There was no need for the judge to give separate instructions telling the jury what the experts for both sides had already told it.

Moreover, the cases cited by defendant are irrelevant. AOB46-47. The government does not dispute that a jury should be instructed as to the relevant law and on all laws necessary to resolve the issues in the criminal case, but that was

done here. That defendant's own patent expert basically testified to the materiality of the notebooks, demonstrates that defendant's convictions should be affirmed.

D. Defendant's Lawyers Were Not Ineffective for Failing to Propose Instructions on Patent Law

Nor should this court entertain defendant's claim that his counsel were ineffective for failing to introduce instructions regarding substantive patent law. Generally, one cannot raise an ineffective assistance of counsel claim on direct appeal. *United States v. Sager*, 227 F.3d 1138, 1149 (9th Cir. 2000). This is because the record made during the course of the initial prosecution will usually lack "a sufficient evidentiary record as to 'what counsel did, why it was done, and what, if any, prejudice resulted.'" *Id.* This Court has repeatedly held that a section 2255 motion is the customary and preferred procedure for bringing such claims. *See United States v. Pirro*, 104 F.3d 297, 299 (9th Cir. 1996) (customary); *United States v. Laughlin*, 933 F.2d 786, 788 (9th Cir. 1991) (preferred).

To the extent a record exists, it shows that defendant's counsel were not ineffective because substantive patent laws, beyond the undisputed ones that the jury learned from experts for both sides, were irrelevant to the issue of materiality.

II. BIFURCATION WAS PROPER AND THERE WAS NO IMPROPER VOUCHING BY THE PROSECUTION

Defendant claims that the district court abused its discretion by denying his

motion to sever, and instead bifurcating the trial, based on the need to prevent the jury from considering evidence obtained from the government's informant while it deliberated on Counts One through Twenty. Defendant's claim should be denied. Because all counts were properly joined, a contention defendant does not dispute, he suffered no improper prejudice from the jury knowing at the outset of the trial each of the crimes with which he was charged.

Defendant further argues that this error was exacerbated by the government's improper vouching in closing. Because there was no prosecutorial vouching, defendant's claim must be denied.

A. Standards of Review

A denial of a motion to sever is reviewed for abuse of discretion. *United States v. Vargas-Castillo*, 329 F.3d 715, 722 (9th Cir. 2003). This Court has noted, however, that the scope of review on severance questions is "extremely narrow," such that the district court's decision is "virtually unreviewable on appeal." *United States v. Mariscal*, 939 F.2d 884, 886 (9th Cir. 1991).

Because defendant failed to object to the comments in the prosecutor's closing arguments now complained of, his claim of improper vouching is reviewed for plain error. *United States v. Williams*, 989 F.2d 1061, 1071-72 (9th Cir. 1993). This Court should reverse "only if a miscarriage of justice would otherwise

result.” *Id.* at 1072.

B. Factual Background to the Court’s Bifurcation of the Trial

While defendant was awaiting trial on Counts 1-4 and 10-20, he solicited another inmate, Manny Primas, to harass government witnesses and even burn one witness’s car, in an effort to dissuade them from testifying against him. SER633; 645. Primas told his attorney what Mohsen wanted done, and the attorney arranged for Primas to cooperate with the United States. Primas agreed to wear a wire during his conversations with defendant. The United States wanted to admit the tape-recorded conversations, both as substantive proof of witness tampering, solicitation to commit arson, and solicitation to commit murder, as charged in Counts 21, 22, and 23, but also as evidence of consciousness of guilt on Counts 1 through 20. SER70.

In response, defendant moved to sever Counts 1-20 from Counts 21-23, claiming that admission of the tapes in defendant’s trial on Counts 1-20 would violate defendant’s Sixth Amendment right to counsel, as laid out in *Massiah v. United States*, 377 U.S. 201 (1964) and its progeny. These cases hold that incriminating statements elicited by a government agent or informant from an indicted defendant are inadmissible on the pending charges, even if the statements concern different or future crimes. *See Massiah*, 377 U.S. 201; *see also Maine v.*

*Moulten*, 474 U.S. 159 (1985); *United States v. Bender*, 221 F.3d 265 (1st Cir. 2000). Defendant claimed that to prevent the jury from considering the taped conversations as proof of guilt on Counts 1-20, the court should sever the two sets of counts from one another.

The court denied defendant's motion to sever and instead ruled it would bifurcate the jury into two phases. ER267. In Phase I, the jury would consider Counts 1-20 and the tape-recorded conversations between Primas and Mohsen would be excluded. After rendering a verdict on those counts, the trial would proceed to Phase II, where the jury would consider Counts 21-23. ER268. The court denied severance primarily because of concerns of judicial economy and hardship to witnesses. ER267. It further held that any concerns the defense may have regarding voir dire of the jurors on issues related to Counts 21-23 could be cured by giving defense counsel "a certain amount of latitude in the questions," and by having "the Court itself tactfully approaching some of the subjects that the defense may be interested in having the jury respond to in voir dire." ER267-68.

During jury selection the indictment, including Counts 21-23, was read to the venire. SER144-60. The venire was also given a limiting instruction regarding the indictment: "[t]he indictment that is going to be read to you is not evidence, and it will not serve any purpose other than acquainting you with the

issues in the case so you can answer my questions.” SER144. After the indictment was read, the venire was again told, “[t]he indictment that was just read to you is not evidence. The defendant is presumed to be innocent of all charges and the burden is upon the United States to prove his guilt beyond a reasonable doubt.” SER160-61.

During voir dire, the only mention of the solicitation and tampering offenses came when defense counsel asked different potential jurors basically the same question. The question, asked approximately 20 times, was whether there was anything the about charges – perjury, solicitation to commit murder, or to kill a federal judge, solicitation to commit arson, and fraud – that would make the juror unable to be fair. *See, e.g.*, ER559-72.

At end of the jury selection process, the jurors were told: “The law requires that this trial be bifurcated. What that means is that the trial will take place in two separate phases. The first phase will involve the charges of conspiracy to commit perjury and obstruct justice, perjury, obstruction of justice, subornation of perjury, mail fraud, and contempt of court.” SER163. “You can put Counts 21 through 23 that you heard read at the beginning of the jury selection out of your minds for now. You don’t have to even think about them until we get to the second phase of the trial.” SER164. They were then told that only “after you have either reached a

unanimous verdict on the charges in Phase I or for some reason unable to reach unanimous verdict that we will then commence with Phase II.” SER166.

C. The District Court Did Not Abuse its Discretion in Deciding to Bifurcate, Rather than Sever the Trial

Defendant faced no undue prejudice from having the charges bifurcated, rather than severed. The witness tampering and solicitation counts were properly joined with the perjury and fraud counts, a fact defendant does not dispute on appeal. When counts are joined, a jury will hear all the charges at the trial’s start and will even hear evidence of each crime before deciding guilt on any of them. The Third Circuit has recognized that a defendant is not entitled to separate trials on all charges simply because he claims he will suffer prejudice if the jury hears evidence regarding more than one charge in a given trial. *See United States v. Joshua*, 976 F.2d 844, 848 (3rd Cir. 1992), *abrogated on other grounds by Stinson v. United States*, 508 U.S. 36 (1993). In that case, the Court affirmed the district court’s bifurcating, rather than severing, defendant’s felon in possession charge from his other charges. It found defendant was not prejudiced when the jury, in determining whether he had been a felon in possession, knew the evidence supporting charges of armed bank robbery and receipt of a weapon with an obliterated serial number. Rather, the court held the prejudice complained of –

that the jury had evidence regarding other crimes when it was deciding guilt of a different crime – is “the same potential for prejudice that every criminal defendant faces when multiple counts are tried together.” *Id.* Absent a *Massiah* problem, Mohsen would not even have had a basis for moving for severance.

Moreover, here, the district court properly balanced defendant’s concern of prejudice and his right to effectively voir dire the jury, with the court’s concern for judicial economy. Had the court severed, rather than bifurcated the trial, it would have required a second trial, significantly increasing the time it would take to try defendant and causing hardship to “the very people that the Court is concerned about.” ER 267. Defendant was able to and did voir dire the venire regarding the ability to be fair given all the crimes charged. The court also worked to minimize any prejudice defendant might face by having all the charges known. It read the full indictment only once, reminded the jury several times that the indictment was not evidence, and did not refer to the charges in Counts 21-23 again until one month later when the second phase of the trial began.

Defendant’s claim of a biased jury is unfounded and the cases he cites to are wholly inapposite. *See* AOB59-61. Defendant largely relies on cases involving extrinsic evidence, pretrial publicity, or prior convictions, to argue that defendant was prejudiced by the jurors learning of the witness tampering and solicitation

charges against him at the beginning of the trial. What defendant fails to acknowledge is that the other crimes with which he was charged were not extrinsic evidence, are not like pretrial publicity, and are not prior convictions. The tampering, solicitation for arson, and solicitation for murder charges were the crimes for which defendant was on trial and were the crimes the jury was there to consider. This is wholly different from learning of a prior conviction from which a jury could conclude that defendant likely acted in a similar manner. And it is different from learning information about a defendant that will not be tested by cross-examination, as happens in cases where the jury hears pretrial publicity or learns of extrinsic evidence. Because the charges were all properly joined, there was no problem from the jury learning of the charges at the beginning of the first phase of the trial. The jury was there to sit in judgment of defendant for all of his crimes, not just some of them.

Rather than being like the cases cited by defendant, this case is more akin to *United States v. Matus-Leva*, 311 F.3d 1214 (9th Cir. 2002). In that case, the defendant had moved to sever, or alternatively to bifurcate, the counts charging him with smuggling aliens resulting in death from his other charges of smuggling aliens for financial gain. This Court held that the district court's denial of defendant's motion to sever or bifurcate was proper both because severance or

bifurcation would have been judicially inefficient and because it was not necessary to give defendant a fair trial. *Matus-Leva*, 311 F.3d at 1217. As this case demonstrates, a defendant is not entitled to separate trials on individual counts just because some of his crimes are worse than others.

In any event, any prejudice, even if suffered, was harmless. As this Court pointed out in *United States v. Nguyen*, 88 F.3d 812, 817 (9th Cir. 1996), the concern over prejudice is reduced when the evidence of the crimes is overwhelming. Here, the evidence of defendant's conspiracy, perjury, obstruction of justice, mail fraud, and contempt of court was overwhelming, such that the jury's knowledge that he was also charged with witness tampering and solicitation to commit arson and murder would have made no difference to the verdict.

D. The Government Did Not Engage in Improper Vouching

Defendant next claims that the prejudice from the jury learning of the Phase II charges in voir dire was exacerbated by the prosecutor's "vouching" in closing argument that "defendant is guilty of each and every charge in the indictment." AOB62. This is baseless. When the prosecutor made this comment, the jury was only considering the charges in Counts 1-20. These were the only crimes proved at trial or talked about in the closings. There was no mention of witness tampering or either of the solicitation charges or any evidence related to those charges in the

closing statement of AUSA Waldinger. SER575-97. Moreover, the judge had made it clear to the parties that the jury was not going to get a copy of the indictment with the additional charges. SER531. Given that the trial had been going on for an entire month, focusing solely on Counts 1-20, the jury could not have been confused that the prosecutor was asking them to find defendant guilty of anything other than those charges.

Nor did the prosecutor improperly “vouch” for the case by using the words “I think” during his closing argument. Defendant cites three examples that he claims constituted improper vouching:

1. So hands down, I think hands down, the defendant is guilty of conspiracy to obstruct justice and to commit perjury, and hands down, he’s guilty of obstruction of justice. SER583.
2. I think the evidence shows that Amr Mohsen thought that it was not a hands-down issue. SER588.
3. I think, again, materiality in that context is a nonissue. SER589.

Improper vouching occurs when the prosecutor places “the prestige of the government behind a witness through personal assurances of the witness’s veracity, or suggest[s] that information not presented to the jury supports the witness’s testimony.” *United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir. 1993). This is not what happened here. The use of the words “I think,”

functioned here, as they did in *Williams*, “as rhetorical emphasis for the inferences the prosecutor was urging the jury to draw rather than a meaningful personal assurance that the defendants were guilty.” 989 F.2d at 1072.

In analyzing the effects of vouching, the court looks to: “the form of the vouching; the degree of personal opinion asserted; how much the vouching implied that the prosecutor had extra record knowledge of the witness’s truthfulness; and the importance of the testimony in the overall context of the case.” *Id.* Here, the “vouching” took the form of a verbal pause, and hardly indicated an intent to place the prestige of the government behind the prosecutor’s words. The use of the words “I think” neither implied extra record knowledge, nor asserted much in the way of personal opinion. Perhaps, most importantly, the evidence of defendant’s guilt was so overwhelming that there would be no miscarriage of justice were the verdict to stand.

### III. THE GOVERNMENT DID NOT CONSTRUCTIVELY AMEND THE INDICTMENT IN CLOSING ARGUMENT

Defendant claims that the United States constructively amended the indictment by arguing to the jury in closing that it could convict defendant if it found material the false notes he turned over indicating he gave notice of infringement to Keith Lobo, regardless of the materiality of the 1988 notebook.

AOB66. The United States did not make this argument, however, and it did not constructively amend the indictment. The United States proved what it charged and this Court should affirm the convictions.

A. Standard of Review

Because defendant did not object to the argument he now claims constructively amended the indictment, his claim must be reviewed for plain error. *See United States v. Dipentino*, 242 F.3d 1090, 1094 (9th Cir. 2001).

B. Plain Error Review Applies

Defendant did not object during the government's closing argument when the alleged error was made. Thus, he gave the district court no opportunity to address his contention. Nor did defendant raise a constructive amendment claim in his motion for new trial. *See* SER828-54. In his reply on the motion for new trial, defendant, in claiming that the court failed to consult counsel regarding a note from the jury, for the first time stated that the government's argument about the Keith Lobo notes resulted "in a 'constructive amendment' of the indictment." SER859-62. This is insufficient, however, to warrant *de novo* review. *United States v. Adamson*, 291 F.3d 606, 612 (9th Cir. 2002). Though defendant mentioned constructive amendment in his reply brief, his claim was of error from the court's failure to consult counsel on the jury's note. Defendant understood

that this was the nature of his claim. At the hearing on the motion, defendant never asked the court to rule on a constructive amendment claim and the court never did. ER347-417. Because the constructive amendment claim was not properly raised in the district court, it must now be reviewed only for plain error.

C. There Was No Constructive Amendment

“A constructive amendment exists if there is a complex of facts presented at trial distinctly different from those set forth in the [indictment], or if the crime charged in the indictment was substantially altered at trial, so that it was impossible to know whether the grand jury would have indicted for the crime actually proved.” *United States v. Bhagat* , 436 F.3d 1140, 1145 (9th Cir. 2006) (internal quotation omitted).

The United States charged defendant with falsifying an engineering notebook to establish an earlier date of conception for his patent, in an effort to prevail in his civil patent lawsuit, and with lying about the authenticity of the notebook in the course of that lawsuit. The United States did not, and does not dispute that the mail fraud and perjury charges required it to prove that the 1988 notebook was material to defendant’s scheme to defraud QuickTurn and that defendant’s lies about the notebook were material to his lawsuit.

Accordingly, the United States argued at great length the significance the

phony notebook had to the patent lawsuit in its opening closing argument. SER544-51. It argued that the notebook was material to the lawsuit at the time it was first proffered because it was dummed up to create a date of conception earlier than the date of Butts' drawing, what defendant expected would be QuickTurn's prior art. SER544 ("Figure 6 [of the Butts drawing] is dated August of 1988. That is why Amr Mohsen conjured up the phony notebook to date back to July 31st 1988); SER549 ("why Amr Mohsen came up with the phony July 31st date . . . to beat Figure 6"); SER551 ("on May 4th, 1998, Aptix finally gives its supplemental initial disclosure, and this is where they first start the fraud against QuickTurn. This is where the first mention of the July 31st, 1988 date is mentioned, May 4th, 1998"). It argued that the notebook was material to the civil lawsuit when Mohsen was having forensic examiners look at it. SER556 ("These notebooks are critical to this lawsuit and he knows it."). The government argued that the notebook was still material at the time of the status conference in the civil suit on September 15, 1999. SER573-74. At that time, Aptix's own lawyers told the judge that they "would have a tough road to hoe to try and invalidate QuickTurn's prior art" if they "are not permitted to rely on the 1988 notebook." SER574. The United States also spent a significant portion of the rebuttal argument explaining that the notebook was material to the lawsuit. SER584-89.

Not surprisingly, the evidence at trial also focused on how the notebook was material to the patent suit. Over and over again, the government put forth testimony establishing the materiality of the 1988 notebook. *See, e.g.*, SER201 (as of June 1, 1998, date Mohsen conceived of his invention “was a big issue” in the lawsuit); SER215 (as of October 5, 1998, the authenticity of the 1988 notebook “was a very important issue” in the lawsuit”); SER218 (as of December 9, 1998, the 1988 notebook was “crucial evidence”); SER237-38 (as of September 15, 1999, “hard road to hoe to avoid invalidating prior art” without notebooks); SER272 (authenticity of notebook had to be decided to resolve QuickTurn’s motion in May 2000); SER416 (a phony notebook could influence the outcome of a patent suit because “the credibility of the inventor” is “very important to, typically, the fact finder”). In contrast, and as defendant concedes, the Keith Lobo notes were a small part of the trial evidence. AOB66-67; *see also* SER146-52, 331-33.

The Lobo notes were also a small part of the government’s closing statements. In its opening closing, the United States argued that the Lobo notes were falsified and that they were created in an attempt to obtain greater damages from QuickTurn should Aptix win its lawsuit. SER563-65, 571-73; ER191. This was entirely proper. The government may discuss evidence of the fraud admitted

at trial and evidence of how defendant tried to obtain money through his fraud, even if that evidence is not referenced in the indictment. *See Bhagat*, 436 F.3d at 1146 (“evidence not referenced in the indictment may be admitted for ‘impeachment or other legitimate purposes,’ without effecting any changes to the indictment”). Not surprisingly, defendant does not assert this worked a constructive amendment. *See* AOB67.

Defendant claims that the government’s comments about the Lobo notes in its rebuttal constructively amended the indictment by telling the jury that it could find defendant guilty if it found the Lobo notes material to the scheme and lawsuit, rather than the notebook. AOB66. But this is not what the government argued. The government introduced its argument about the fake Lobo notes by saying, “even if Aptix would have won the lawsuit, the 1988 notebook and the fact that it was a completely fraudulent notebook is still relevant and still material in that patent litigation, and here’s why.” SER591. Then the prosecutor went on to explain how the evidence showed the Lobo notes were phony. SER591-93. After establishing that the Lobo notes were fake, the prosecutor returned to the connection between the notes and the materiality of the notebook: “If Aptix would have won the lawsuit and then relied on these notes, I know what I would do if I were QuickTurn, I would say to whoever it was, the judge or the jury, these are

fake. And [the Lobo notes] are fake because [Mohsen] faked up the 1988 notebook. So the 1988 notebook, even if Aptix won [the lawsuit], is relevant to the issue of whether these notes are real.” SER593.

Defendant does not quote that section, but instead quotes what the prosecutor said next:

And so they are material both in the perjury context because again, whether the ‘88 notebook is real becomes relevant. If Amr Mohsen faked up the ‘88 notebook, it’s likely that he faked up the Keith Lobo notes. They are also material to the scheme to defraud. Again, . . . the defendant produces the Keith Lobo notes. He testified that he gave these to Howrey & Simon, Aptix’s attorney, to turn over in the litigation. These are absolutely relevant to whether QuickTurn would reasonably part with money. . . .

This scheme to defraud was to get money out of QuickTurn. Either QuickTurn would have lost in the lawsuit and had to pay more damages, or QuickTurn may have decided to settle if they see these notes. It’s all material. The materiality is not an issue.

SER593-94.

The prosecutor was not saying here that the jury could convict if it found the Lobo notes material, but not the notebook. The prosecutor had already acknowledged to the jury that the Lobo notes were not “charged” in the indictment. SER592. Rather, he argued that the notebook was material because it provided evidence that the Lobo notes were fraudulent. At worst, he argued that both the notebook and the notes were material. At the end of this argument he

said, “it’s *all* material,” indicating that both the notebook and the notes were material. Never did the government suggest to the jury it could defendant guilty even if it did not find the notebook material.

Defendant even conceded that the prosecution’s argument was that the engineering notebook was material because it provided evidence of the Lobo notes’ falsity. In his reply brief on his motion for acquittal or new trial, defendant says that the government argued in rebuttal that the “the Lobo notes somehow made the 1988 notebook material,” thus acknowledging that the prosecution’s argument was *not* that the Lobo notes were material *instead* of the notebook. SER861, n.12.

Finally, even if the government did argue a different theory of materiality than was in the indictment, it would constitute a variance, not a constructive amendment. Whereas a constructive amendment usually involves a complex of facts, a variance involves proof of only a single, though materially different, set of facts, as alleged here. *See Adamson*, 291 F.3d at 615. The difference is significant, as a constructive amendment always requires reversal, but “a variance requires reversal only if it prejudices a defendant's substantial rights.” *Id.* Defendant’s substantial rights were not prejudiced by an argument which never suggested the notebook did not have to be material and which constituted but a

few moments of a several-hour argument. Moreover, the evidence of the materiality of the notebook was overwhelming. The jury convicted in less than an hour-and-a-half (ER205) and asked no questions related to the issue of materiality. Defendant's convictions should be affirmed.

IV. ANY ERROR FROM FAILING TO CONSULT THE PARTIES ABOUT THE JURY'S NOTE ASKING TO SEE THE INDICTMENT WAS HARMLESS

At the start of deliberations, before the jury had even received the evidence, instructions, or verdict form, the jury sent a note to the court asking "is there a copy of the indictment with the specific charges that we can see." ER8. Without consulting the parties, the court answered "no." ER8. Defendant claims this was error, as it deprived defendant of his Sixth Amendment right to be represented by counsel for purposes of answering the jury's question. *See United States v. Barragan-Devis*, 133 F.3d 1287, 1289 (9th Cir. 1998). This Court does not need to decide if it were error, for it was harmless in any event. The district court's answer did not likely affect the verdict, consultation with the parties would not likely have changed the court's answer, and given the overwhelming evidence of guilt, receipt of the indictment would not have changed the jury's verdict.

A. Standard of Review

\_\_\_\_ Even where, as here, defense counsel makes no objection when learning that

the court answered a jury's question without advising the parties, this Court reviews the district court's actions for harmless error. *Barragan-Devis*, 133 F.3d at 1289 (reviewing for harmless error where counsel "did not make any objections, nor did he then make a motion for new trial").

B. The Court's Answer Was Harmless

This Court has reiterated the Supreme Court in holding, that "[j]ury messages should be 'answered in open court and . . . petitioner's counsel should [be] given an opportunity to be heard before the trial judge respond[s].'"

*Barragan-Devis*, 133 F.3d at 1289 (citing *Rogers v. United States*, 422 U.S. 35, 39 (1975)). This Court need not decide whether the district court's answer, where the parties had already agreed not to give the indictment to the jury (SER531), constituted error, for it was harmless.<sup>5</sup>

In applying harmless error, a court should consider (1) the probable effect of the message sent to the jury; (2) the likelihood that the court would have sent a

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<sup>5</sup> Defendant's claim that such an error is structural error defying harmless error analysis is meritless. All of the cases cited by defendant dealing with the error at issue here have applied harmless-error analysis. *See, e.g., Rogers v. United States*, 422 U.S. at 40; *Barragan-Devis*, 133 F.3d at 1289; *United States v. Frazin*, 780 F.2d 1461, 1470 (9th Cir. 1986). Even the case defendant cites for his claim supports a harmless-error analysis. The majority in *Bradley v. Henry*, 510 F.3d 1093, 1098 (9th Cir. 2007), applied harmless error to the defendant's denial of her right to assistance of counsel and denial of right to counsel of choice.

different message had it consulted with the parties; and (3) whether any change in the message that appellant might have obtained would have affected the verdict. *Barragan-Devis*, 133 F.3d at 1289. Each of these factors demonstrates that the error was harmless.

First, there is no basis to believe that the effect of the court's response – that the jury could not see the indictment – had any effect on the jury's deliberations. The jury sent the note asking to see the "specific charges," before it had received copies of the instructions and the verdict form. ER372. Both the instructions and the verdict form indicated the specific charges the jury was to consider. SER794-826, 827-827B. As the district court stated in ruling that any error was harmless, "it was obvious to me that if the jury would just take one look at the verdict form that they hadn't seen by the time they wrote the note, they would have been able to see what the specific charges are, because they are differentiated in the verdict form." ER373. As the court pointed out, once those documents were provided to the jury, it would have had its question answered. Moreover, the judge's answer did nothing to suggest what the jury's verdict should be. The court simply declined to give them a written copy of what had been read, in relevant part, to them at the beginning of the trial, and of what had been summarized, in relevant part, for them in the jury instructions. Moreover, the jurors embraced the verdict

(SER601), suggesting that the judge's answer did not affect it. *See Barragan-Devis*, 133 F.3d at 1290 (when polled, no juror expressed dissatisfaction with the result).

Second, even if the court had consulted with counsel, it is likely it would have sent the same answer to the jury. Judge Shubb stated that he would have likely given the same answer regardless of any argument by the parties, because the timing of the request indicated that the jury had not had any substantive deliberations when it sent the note and because the parties had already agreed not to give the indictment to the jury. ER407-10. Defendant claims that had he known the jury's question he could have alerted the court to the problem of the government's alleged constructive amendment and he could have told the jury to "ignore any information they had concerning the charges in the indictment not before them." AOB78. Yet, these claims are both speculative and misguided.

In the court below, the defense conceded that "we don't know exactly what the jury was asking for when they [sic] asked for a copy of the indictment." ER392. As pointed out in Section III of the Argument, there was no constructive amendment to alert the court to, and there was nothing in the jury's note to indicate that it had any question regarding the Lobo notes. Nor is there any reason to think defendant would have even thought to raise a constructive amendment

claim at that time, as he did not first raise it until his reply on his motion for new trial, filed several months later. CR582. Additionally, had the defense believed that the jury was confused over what charges to consider, it seems only more likely it would have agreed that the indictment should *not* go to the jury, given its current argument that the jury was rendered partial by knowing of the indictment's latter charges.

Finally, there is no basis to believe that any change in the answer the defense could have obtained would have changed the verdict given the overwhelming evidence of defendant's guilt. The jury deliberated on the 15 charges before it for less than an hour-and-a-half. ER205. The sheer speed of the verdict suggests the overwhelming nature of the evidence. Moreover, the jury sent no further questions, indicating that its concern, whatever it was, was addressed.

V. DEFENDANT'S PERJURY CONVICTIONS SHOULD BE AFFIRMED AS HIS ANSWERS WERE NOT LITERALLY TRUE

Defendant claims that his perjury convictions on Counts 2 and 3 must be reversed because his given answers were literally true. Because there was no confusion about the meaning of the questions, despite the use of the plural rather than the singular, defendant's answers were not true and his convictions should be affirmed.

A. Standard of Review

Defendant's claim of insufficiency of the evidence is reviewed *de novo*. *United States v. Camper*, 384 F.3d 1073, 1075 (9th Cir. 2004). There is sufficient evidence, however, if, viewing the evidence in the light most favorable to the government, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.*

B. Because Defendant's Answers Were Responsive and False, His Perjury Convictions Should Be Affirmed

Defendant claims that his answers "no" to the questions of whether he "ever deliver[ed] the original notebooks to [Aptix's attorneys] or an independent expert so that they could do an independent test on those notebooks to see what the tests would show" and of whether "the original of those notebooks [were] ever out of your possession" were literally true because in each case he had only delivered one notebook and had only one notebook out of his possession, rather than "notebooks." To support his claim that "literally true" answers cannot support a perjury conviction, he cites *Bronston v. United States*, 409 U.S. 352, 361-62 (1973). But *Bronston* cannot be read to cover the circumstances of this case. In *Bronston*, the defendant was asked if he ever had any bank accounts in Swiss banks, and the defendant answered, "[t]he company had an account there for about

six months, in Zurich.” *Id.* at 354. As such, his answer was not untrue, but simply unresponsive. The Court found that because he had evaded the question, rather than lied in response to it, the perjury statute did not apply. As the Court stated, the perjury statute does not cover “answers unresponsive on their face but untrue only by ‘negative implication.’” *Id.* at 361.

Whereas Brontson’s answer was true, but unresponsive, defendant’s answers were responsive, and false. This Court has recognized the difference and specifically limited the holding of *Bronston* to cases where the statement is “indisputably true, though misleading because it was unresponsive.” *Camper*, 384 F.3d at 1076. *Brontson* does not apply.

More analogous to the facts here are cases where the meaning of the question is somewhat unclear – did the question mean to elicit information only about both notebooks or was it asking about either notebook? This Court holds that the existence of some ambiguity in a falsely answered question will not shield the defendant from a perjury prosecution. *United States v. McKenna*, 327 F.3d 830, 841 (9th 2003) (rejecting defendant’s claims that her answers were literally true and that the questions were too vague to sustain a perjury conviction). A perjury conviction will stand where the jury could conclude beyond a reasonable doubt that the defendant understood the question and that so understood, the

defendant's answer was false. *Id.*

Where a defendant raised the same claim made here – that because the question was asked in the plural, rather than the singular, the answer given was literally true – it was rejected.<sup>6</sup> In *United States v. Williams*, 552 F.2d 226, 229 (8th Cir. 1977), the Eighth Circuit rejected defendant's contention that his answers were literally true because the question referred to "lawyers" and "liens" when the evidence demonstrated that only one lawyer and one lien were involved. Rather, the court held that "when viewed in context, it is clear that [defendant] understood the use of the plural to include the singular." *Id.* The Eighth Circuit stated that it was for the jury to decide the meaning of the question and answer and that because the jury was properly instructed that it could not convict defendant for a false statement made mistakenly or accidentally, the evidence was sufficient to uphold the conviction. *Id.* As the Ninth Circuit did in *McKenna*, the *Williams* court

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<sup>6</sup> Defendant's reliance on *United States v. Martellano*, 675 F.2d 940 (7th Cir. 1982) and *United States v. Abrams*, 568 F.2d 411 (5th Cir. 1978) is misplaced. AOB81. Although in *Martellano* the questions underlying the perjury charge did ask questions in the plural rather than the singular, that was not the basis for reversing the perjury conviction. Rather the court reversed the perjury conviction because the context and meaning of the question was unclear, not because the answer was literally true. Similarly, the perjury convictions in *Abrams* were reversed because the questions asked "general hypotheticals" rather than specific questions about the conduct at issue, not because they were asked in the plural rather than in the singular. 568 F.2d at 423.

looked to the underlying context of the question and answer and asked whether, given the parties understanding of the question, the answer was false. *See McKenna*, 327 F.3d at 841.

That is what should be done here. It was for the “jury to decide which construction the defendant placed on [the] question.” *McKenna*, 327 F.3d at 841. Here, it was clear that defendant was being asked whether either of his notebooks had ever been out of his possession or tested by an independent expert. Defendant was asked in the deposition to state if he did not understand a question and he said he would. SER743 (depo\042999\_321-19.wmv). Defendant was asked to and did explain that the notebooks spoken of were his engineering notebooks from 1988-1989 and 1989-1990. SER743 (depo\042999\_325-09.wmv). Defendant also explained that the two notebooks were important to the lawsuit because they had entries “related to ideas and engineering implementations” of the patents at issue in the lawsuit. SER743 (depo\042999\_330-04.wmv at 2:36-3:10). He acknowledged that he understood that QuickTurn wanted to test the notebooks because it believed the dates in them were phony. SER743 (depo\042999\_333-13.wmv at 0:28-1:10). It was in this context that defendant was asked if he had ever delivered the notebooks to an expert for testing, to which he answered “no,” (SER743 (depo\042999\_339-15.wmv)), and in which he was asked whether the

notebooks were ever out of his possession, to which he also answered “no.”

SER743 (depo\042999\_349-24.wmv). It is clear from the context of the questions that defendant meant to deny that he had ever tested or had out of his possession either notebook. Moreover, as in *Williams*, the jury was specifically instructed that it had to find defendant testified falsely “knowingly and intentionally and not through ignorance, mistake or accident.” SER599. Defendant’s perjury convictions should be upheld.

VI. THERE ARE NO LEGAL ERRORS REQUIRING REVERSAL OF THE CONTEMPT CHARGE AND THE EVIDENCE OF IT WAS SUFFICIENT

In Count 20, defendant was charged with contempt of court for violating his conditions of release by applying for an Egyptian passport. ER322. Defendant makes myriad claims that his conviction for this crime should be reversed including (1) that the prosecutor was not authorized to bring to charge; (2) that a government exhibit used to help prove the charge should have been excluded as a confidential marital communication and as having been seized in violation of *Massiah*; and, (3) that in any event, there was insufficient evidence to support it. Each should be denied.

A. Factual Background

On June 15, 2004, the government obtained a search warrant to search

defendant's jail cell for evidence of the crimes of witness tampering, solicitation of a crime of violence, and obstruction of justice. SER15-29. The evidence supporting probable cause that defendant was obstructing justice was based on defendant's "feigning incompetence" to delay his trial. SER17, ¶ 2. None of the evidence supporting probable cause to believe that evidence of obstruction of justice would be found in defendant's cell came from Manny Primas. SER25-27, ¶¶ 21-24.

Pursuant to the portion of the warrant allowing the government to take "any and all notes, papers, documents, books and other written materials referring to any mental, emotional, or psychiatric condition . . .," the government seized a series of notes, mostly concerning psychiatric disorders. *See* ER19-20; SER29, 96-114. Exhibit 97A was the first page from those notes. *See* ER342 and SER97. On that page, defendant had written, "ask for any paper related to the loss of the old Egyptian passport in 95 or 96 and the application for new passport in 94. Ask to borrow the originals or get a copy. Not interested in any application in 2004." ER342 (underlining in the original). At the top of the note, it said "Mervat," defendant's wife's name. *Id.* The district court had held that even though 97A was not relevant to defendant's feigning of incompetency, because it was part of the larger series of notes properly seized under the warrant, it was within the scope

of the warrant. ER19-20.

Defendant first moved to exclude Exhibit 97A on the basis that it was subject to the marital communications privilege because the note was “addressed” to his wife, Mervat, and was intended to be confidential. SER10-11. The district court disagreed, holding that the privilege did not apply for three independent reasons. ER67-69. It first found that because defendant did not dispute that no communication of the content of the note in fact took place, the privilege did not apply, as there was no communication between the spouses. ER67. It then found, citing *United States v. Madoch*, 149 F.3d 596, 602 (7th Cir. 1998), that because defendant was incarcerated at the time the note could have been communicated by defendant to his wife, the privilege did not apply because any communication from jail was subject to monitoring, and thus could not have been confidential, even had it occurred. ER68. It lastly held that papers, properly seized during a warranted and lawful search, should not be suppressed under the marital communications privilege “merely because one of those papers has defendant’s wife’s name at the top.” ER68. It found that to so hold would overly expand the privilege. ER68.

Defendant filed a second motion to suppress evidence from the jail cell, raising various other bases for suppression. ER9. He never claimed, however, as he does now, that exhibit 97A should have been excluded because it was seized

using information from Primas regarding pending charges, in violation of *Massiah*. See AOB86. Rather, at the hearing on the motion, defendant claimed that the words “including books on psychosis,” in paragraph 20 of the affidavit should have been “stricken because they amount to information about defendant’s trial strategy which should be suppressed under *Massiah*.” ER26. But this is not the same claim he raises now. The district court denied his second motion to suppress on all bases. ER26-27.

After trial, defendant claimed that Count 20 was not supported by sufficient evidence to sustain the conviction. SER848-49. This claim was also denied. ER114.

B. A Prosecutor Is Authorized to Bring a Contempt of Court Charge

Defendant first contends that Count 20, the contempt charge, must be dismissed because only a judge, and not a prosecutor, is authorized to bring a contempt charge pursuant to 18 U.S.C. § 401(3) and 18 U.S.C. § 3148(c).

Because this Court has squarely rejected this, defendant’s conviction on Count 20 should be affirmed.

1. Standard of Review

Questions of statutory interpretation are reviewed *de novo*.<sup>7</sup> See *United States v. Armstrong*, 781 F.2d 700, 702 (9th Cir. 1986).

2. Contempt of Court Charges Can Be Brought by Indictment

This Court has squarely, and repeatedly, held that federal prosecutors can initiate contempt charges. See *Armstrong*, 781 F.2d at 703-04 (“the power of the grand jury to initiate contempt charges without any prior action by the court has long been recognized”) (citations omitted); *Steinert v. United States District Court for the District of Nevada*, 543 F.2d 69, 70-71 (9th Cir. 1976) (holding contempt under 18 U.S.C. § 401 can be charged by way of indictment, citing the Supreme Court’s decision in *Green v. United States*, 356 U.S. 165 (1958)); see also *United States v. Doe*, 125 F.3d 1249 (9th Cir. 1997) (implicitly affirming prosecutor’s authority to charge contempt under § 401 by way of indictment where court affirmed district court’s refusal to dismiss the charge based on outrageous government conduct); *NLRB v. A-Plus Roofing*, 39 F.3d 1410, 1417 (9th Cir. 1994) (“judges and grand juries may initiate criminal contempt proceedings”).

In making his argument that only a judge may initiate contempt

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<sup>7</sup> Defendant raised this claim below and the district court denied it in a written order filed December 22, 2005. ER37-41.

proceedings, defendant utterly ignores this Court's precedent and instead relies on a district court case from the Northern District of Texas and an unpublished case from the Eastern District of New York. Both should be rejected. In *United States v. Herrera*, 29 F. Supp.2d 756 (N.D. Tex. 1998), the court was not even deciding the question of who had authority to initiate contempt proceedings, but rather was determining whether a pretrial services officer had the authority to initiate a revocation of release proceeding, and found that he did not. That in the course of that decision the district court stated that "§ 3148(c) empowers only the judicial officer to commence a prosecution for contempt" is not determinative of the issue here. *Herrera*, 29 F. Supp.2d at 760. The court's statement was dicta, was supported with no analysis, and contained no examination of precedent, congressional intent, or other potentially controlling statutes. *See id.* at 758-760. Similarly, while *United States v. Bronson*, 2007 WL 2455138 (E.D.N.Y. 2007), appears to have interpreted § 3148(c) as defendant suggests, it is an unpublished case with no precedential effect on this Circuit, and thus cannot supplant the holdings of this Court.

C. Exhibit 97A Is Not Subject to the Marital Communications Privilege

Defendant next argues that his contempt conviction should be reversed because the district court improperly admitted exhibit 97A, a document the

prosecution relied on to help prove defendant was in contempt of court.

1. Standard of Review

The admission of evidence is reviewed for abuse of discretion. *United States v. Marashi*, 913 F.2d 724, 729 (9th Cir. 1990).

2. The Marital Communications Privilege Does Not Apply to Exhibit 97A

The marital communication privilege provides that “[c]ommunications between the spouses, privately made, are generally assumed to have been intended to be confidential, and hence they are privileged.” *United States v. Vo*, 413 F.3d 1010, 1016 (9th Cir. 2005). This Court has stated that the marital communications privilege “(1) extends to words and acts intended to be a communication; (2) requires a valid marriage; and (3) applies only to confidential communications, i.e., those not made in the presence of, or likely to be overheard by, third parties.” *United States v. Montgomery*, 384 F.3d 1050, 1056 (9th Cir. 2004). Because the privilege “obstructs the truth-seeking process,” it must be construed narrowly, particularly in criminal proceedings. *Marashi*, 913 F.2d at 730.

Defendant contends that the court’s ruling that 97A was not covered by the privilege was error, arguing that because the government referred to the exhibit as a “note to his wife” during trial, it cannot now claim that the note was not a

privileged marital communication. AOB87. The government's characterization of 97A as a note was not a concession that it is a privileged communication. Calling something a note does not mean that its contents were communicated or that they were confidential. It only means there was an indication of the intent to communicate. For the privilege to apply, there first must be a communication.

Defendant claims that his intent to communicate the contents of the note is sufficient for the privilege to apply. *See* AOB87 (“the privilege extends not only to actual communications”). But where there is no communication between the spouses, there is no privilege. Defendant cites language from *Vo*, where the Court says that the privilege applies “to words or acts intended to be a communication,” to suggest that so long as one spouse eventually meant to tell the other spouse something, then that something would be subject to the privilege. But that is not what is meant by this phrase. *Vo* speaks to the intent that the words or acts be a communication, not to the intent to communicate words in the first place. This is made clear by other cases. As stated by this Circuit, “this privilege applies only to utterances or expressions intended by one spouse to convey a message to the other.” *United States v. Bolzer*, 556 F2d 948, 950 (9th Cir. 1977). Both *Vo* and *Bolzer* presuppose that there was an utterance or expression to begin with.

While defendant may have hoped to one day convey the message in the note

to Mervat, he never established that he did convey it. The “intention” to convey a message to her is simply insufficient for the privilege to apply. There are no cases holding the privilege applicable where there is no actual communication between the spouses.

Moreover, even had there been a communication of the content of the note to Mervat, the privilege would not apply because it would not have been confidential. The privilege does not apply unless the communication is confidential, “i.e., [] not made in the presence of, or likely to be overheard by, third parties.” *Vo*, 413 F.3d at 1016. Because defendant was in jail at the time, any communication by him was likely to be observed or overheard. *Madoch*, 149 F.3d at 602 (communication was not confidential when made while husband was in jail because of the “well-known need for correctional institutions to monitor inmate conversations”); *see also United States v. Harrelson*, 754 F.2d 1153, 1169-70 (5th Cir. 1985) (marital communications privilege does not apply to prison visit where eavesdropping could reasonably be expected to occur). The evidence showed that all inmate calls are recorded at Santa Rita Jail and that the visiting area of Santa Rita Jail is also subject to monitoring and recording. SER603-05. Defendant conceded prior to trial that mail at the jail is “always inspected.” SER116.

Because defendant did not prove he communicated the note, and even if he had, shown it was done confidentially, the privilege does not apply and the district court did not abuse its discretion in admitting the note found in defendant's jail cell.

D. The Government's Seizing of Exhibit 97A Was Valid Pursuant to the Search Warrant and Did Not Constitute a *Massiah* Violation

1. Standard of Review

Defendant also claims the note should have been excluded under *Massiah*. Because defendant never raised *Massiah* as a basis for excluding exhibit 97A, this claim can only be reviewed for plain error. Fed. R. Crim. P. 52(a).

2. Exhibit 97A Was Not Seized in Violation of *Massiah*

Even if the search warrant affidavit were excised of all information obtained from the informant, there would still be probable cause to search defendant's cell for evidence of obstruction of justice based on defendant's intent to fabricate incompetence to stand trial. Evidence of defendant's attempt to obstruct justice came from recordings of Mohsen's telephone calls from the jail, primarily to his daughter. As relayed in the affidavit, all calls from the jail are recorded and the inmates are informed of this fact. SER25, ¶ 21. The government learned that Mohsen was contemplating either an insanity or incompetency defense on May 17,

2004 in open court based on statements made by defendant's attorneys. SER 25, ¶ 21. From recorded phone calls Mohsen made to his daughter, the affiant learned that Mohsen was asking her about the symptoms of different psychiatric disorders, as she was studying psychology in college, and to provide him with copies of books discussing different disorders, such as "A Beautiful Mind," "Psychotropic Drugs-Fast Facts," "Sybil," and the "Diagnosis Manual of Mental Disorder IV." SER25-27, ¶¶ 21-24. The daughter confirmed in a phone call on May 24, 2004, that she had sent the books requested. SER27, ¶ 24.

Based just on this information, there was probable cause for the agents to search defendant's cell for "any and all notes, papers, documents, books and other written materials referring to any mental, emotional, or psychiatric condition, including, the 'Diagnosis Manual of Mental Disorder IV;' 'A Beautiful Mind;' 'Sybil;' and 'Psychotic [sic] Drugs-Fast Facts.'" Because exhibit 97A was part of the notes seized in the warrant pursuant to this paragraph, it was not seized in violation of *Massiah* and there was no error from its admission at defendant's trial on contempt charges.

E. Evidence of the Contempt Charge Was Sufficient

Defendant's final claim with respect to Count 20 is that even assuming the admission of 97A was proper, the government presented insufficient evidence to

prove that defendant violated the terms of his pretrial release by applying for an Egyptian passport. This claim must be rejected as the evidence was more than sufficient to prove the charge, even though the actual passport defendant had applied for and obtained was suppressed prior to trial.

1. Standard of Review

A conviction will be not be reversed on the basis of insufficient evidence if, based on a review of the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Archdale*, 229 F.3d 861, 867 (9th Cir. 2000).

2. The Evidence Was Sufficient to Support the Contempt Charge

The evidence was more than sufficient for a rational juror to find defendant applied for an Egyptian passport, in violation of his bail order. The evidence established that defendant obtained quotes from Executive Jet Management for travel from either San Jose or Fort Lauderdale to the Cayman Islands, a foreign country. SER485-92. The FBI overheard defendant making those reservations on a payphone, and faxed reservation confirmations were found in his car at the time of his arrest. *See* SER461-63, 503-07, 744-53. Defendant was also overheard asking a reservations agent what he needed in terms of “passports,” SER484,

suggesting his knowledge that he would need a passport to travel to the Cayman Islands. Although she could not remember if she told Mr. Mohsen, Emma Sword of Executive Jet Management stated that its passengers are required to have passports to enter the Cayman Islands from the United States. SER493-96. Found in defendant's car at the time of his arrest were notes with the notation "passport #," supporting the conclusion that defendant knew he needed a passport. SER513, 767. Copies of defendant's American passport and an expired Egyptian passport were also recovered from his car and introduced at trial. *See* SER518-20, 770-84. Trial testimony from Brian Anderson, whose company hosted the San Francisco Egyptian Consulate's web site during 2004, established that these passport documents (current American passport and expired Egyptian passport) were consistent with the documents an Egyptian citizen was required to provide to obtain a replacement for a lost or stolen Egyptian passport. SER480-83, 785-91. As previously discussed, the notes recovered from defendant's jail cell said that he was "not interested in application in 2004," SER524-25, suggesting that he had applied for a passport in 2004. The evidence further established that FBI agents saw Mohsen go to the Egyptian Consulate in San Francisco, where an Egyptian citizen would get an Egyptian passport. SER456-57, 790-91. That defendant was attempting to flee the country could not very well have been disputed given this

evidence and the evidence that defendant was liquidating the funds in his bank accounts in the 72 hours before his arrest. SER466-70, 476-79, 526-27. Taking all of this evidence together, a rational juror could have found that defendant applied for an Egyptian passport prior to his arrest.

VII. THE WITNESS TAMPERING AND SOLICITATION TO COMMIT ARSON COUNTS NEED NOT BE REVERSED EVEN IF THE PHASE ONE CONVICTIONS ARE REVERSED

Because there are no reversible errors in the Phase I convictions, there is no improper spillover requiring reversal of the Phase II convictions. But even if the Phase I counts were reversed, there is no need to reverse the convictions on witness tampering or solicitation to commit arson, as the evidence of defendant's predisposition to commit those crimes was sufficient without reliance on the Phase I convictions.

While the government did refer to evidence from Phase I to argue defendant's guilt of the Phase II charges, it also relied on evidence independent of the Phase I convictions to defeat sufficiently defendant's entrapment argument. The government urged that defendant's phone call to his sister while he was in jail telling her to say she convinced him not to flee showed predisposition to tamper with witnesses. SER673. The government argued that defendant's hiring of Primas to research witness tampering before he was even charged with it showed

his predeposition. SER674-75. The United States also pointed to the taped conversation of May 27, 2004 between defendant and Primas where defendant “berates Manny,” tells him how the harassing phone calls should be made, and instructs him how to commit the arson of Dave Moore’s car, to argue that defendant, and not Primas, was running the show. SER685, 705-06. The government also repeatedly pointed to the lack of credibility in defendant’s claim that he was entrapped. It reminded the jury that Primas did not even have a high-school diploma, that defendant was the more sophisticated of the two, and that all of the crimes being solicited were to help defendant in defendant’s case, not help Primas in his case. SER718-21. Given the overwhelming evidence of guilt and the United States’ reliance on evidence independent of the Phase I convictions to demonstrate defendant’s predisposition, the Phase II convictions should be upheld regardless of any other trial errors.

#### VIII. AUSA HARRIS DID NOT IMPROPERLY VOUCH OR VIOLATE THE ADVOCATE-WITNESS RULE

Defendant claims that AUSA Harris acted improperly by vouching for Primas’s credibility and by acting as a witness by arguing facts about a meeting she attended. She did no such thing.

A. Standard of Review

Because defendant did not raise these claims, they are reviewed for plain error. *United States v. Cabrera*, 201 F.3d 1243, 1246 (9th Cir. 2000). Reversal will only be justified if “it appears more probable than not that prosecutorial misconduct materially affected the fairness of the trial.” *Id.* (internal quotation omitted).

B. Factual Background

At trial, the prosecution called Andrew Steckler, Manny Primas’s attorney. AUSA Harris established that Steckler met with Primas and the FBI on May 19, 2004. SER606-07. She did not ask Mr. Steckler whether she was at the meeting, but purposefully left that out. On cross-examination the defense attorney brought out that Ms. Harris was also at the meeting. SER608. Through questions to Steckler, AUSA Harris tried to demonstrate that Primas’s sentencing range of 2, 3 or 5 years was basically established before Primas ever met with the federal government. Steckler testified, for example, that prior to his or Primas having any discussions with the federal prosecutors or the FBI, the state prosecutor offered, though it was not yet a firm commitment, to drop the gun charge against Primas, resulting in a sentencing range of 2, 3, or 5 years. SER613-15; ER543-44. Mohsen’s defense attorney tried to establish that Primas’s promised cooperation

with the federal authorities influenced the sentence he ultimately received. On cross-examination, Steckler testified that though he did not remember, he most likely would have told the state prosecutor at the time of the offer to drop the gun charge that his client was hoping to cooperate with the federal government.

SER607A. Steckler also acknowledged that he asked the federal prosecutors to tell the state prosecutors about Primas's cooperation, and that they said they would. SER609-10. He also stated that after he asked the federal prosecutors to tell the state of Primas's cooperation, he had further discussions with the state prosecutor, which ultimately resulted in Primas receiving a state sentence of three years imprisonment. SER615.

During closing arguments, the government argued that Mohsen hired Primas to tamper with witnesses and solicited him to commit arson and murder of a federal judge. AUSA Harris argued that Primas's testimony was credible because it was consistent with Mohsen's pattern of crime, as proved in the first phase of the trial, because it was corroborated by tape recordings made of Mohsen's and Primas's conversations, and because at the time of trial, which occurred after Primas had already served his sentence for his state crimes, he no longer had anything to gain from cooperating with the United States. SER722-23. AUSA Harris acknowledged that Primas was not a dream witness, stating that Mohsen

had hired him because he was “exactly the type of person that . . . [if] you want criminal behavior solicited on your behalf, you go to.” SER715.

C. AUSA Harris Did Not Improperly Vouch for Primas, Nor Did She Violate the Advocate-Witness Rule

AUSA Harris did not improperly vouch for Primas’s credibility or violate the advocate-witness rule by virtue of her participation in a meeting with the FBI, Primas, and his attorney. As stated in Section III, improper vouching occurs when a prosecutor imparts to the jury her belief that a government witness is credible. *United States v. Sayakhom*, 186 F.3d 928, 944 (9th Cir. 1999). Contrary to vouching for Primas, AUSA Harris emphasized his *lack* of inherent credibility. She told the jury that “[h]e is nobody who I would remotely ask you to embrace. He is a criminal.” SER722. She argued that Primas’s testimony was credible based on the evidence. She stated that “[e]verything that Manny Primas testified to was corroborated. You saw it on videotape and audiotape. And most importantly, we played the phone calls for you that occurred throughout this entire period of time. Phone calls that didn’t involve Manny Primas, that completely corroborate what he’s telling you in court.” SER723. In an attempt to counter the defense argument that Primas was lying in order to secure a more favorable sentence on his state charges, AUSA Harris argued that Primas, at the time of his

testimony at the trial, had no incentive to lie: Primas “has already served his sentence. He has already served his three years, he is done. He has nothing, no more benefits, nothing to gain by coming into this courtroom.” SER723. There was nothing improper about this argument.

Nor did AUSA Harris do anything violative of the advocate-witness rule. That rule prohibits an attorney from appearing as both a witness and an advocate in the same litigation. *Sayakhom*, 186 F.3d at 943. Its purpose is related to a concern that “jurors will be unduly influenced by the prestige and prominence of the prosecutor’s office and will base their credibility determinations on improper factors.” *Id.* Again, AUSA Harris did not mention or allude to her presence at the May 19th meeting at any time to suggest that Primas should be believed. She did not elicit from any witness that she was at the meeting, nor did she use her presence to assert any kind of personal knowledge of Primas’s credibility or to lend credence to Steckler’s claim that Primas was made no promises during the May 19th meeting. Rather, AUSA Harris forthrightly acknowledged that Primas’s motivation in cooperating with the federal government was self-interested: “He was unquestionably motivated to help himself. He thought he could get benefit in his own criminal case . . . he wanted to get something out of this.” SER679. She asked Steckler only one question regarding any promises made to Primas. She

asked, “Did anyone from the Federal Government promise your client, Mr. Primas, anything at that meeting [May 19th]?” SER607. Steckler answered, “Not that I recall, no.” SER607. Nothing regarding promises was ever mentioned again by the government. AUSA Harris never intimated that Steckler’s recollection should be believed because she was present at the meeting. AUSA Harris did not rely on the prestige of her office, but rather on the evidence – Steckler’s testimony, Primas’s testimony, the taped conversations between defendant and Primas, other phone calls defendant made from prison – to argue that defendant was guilty as charged. Accordingly, there was no prosecutorial misconduct of any kind.

Nor, in any event, did AUSA Harris’s actions materially affect the outcome of the case. The evidence of defendant’s witness tampering and solicitation of arson were overwhelming. Mohsen was heard on tape negotiating and talking about his crimes with Primas. Even to the extent there was any violation of the advocate-witness rule, which there was not, there was no error, as proof of Mohsen’s crimes was incontrovertible.

**IX. DEFENDANT’S LAWYERS WERE NOT INEFFECTIVE FOR FAILING TO INVESTIGATE DEFENDANT’S ALLEGED REQUEST TO BE MOVED AWAY FROM PRIMAS**

Defendant claims that Counts 21 and 22 should be reversed because defendant’s trial attorneys, John Balasz and Bruce Locke, were ineffective in that

they failed to “investigate Mohsen’s requests through his prior counsel to have the trial court order him moved away from Primas.” AOB98. Because defendant’s prior counsel never asked for him to be moved away from Primas, this claim must be denied.

Although an ineffective assistance of counsel claim should generally not be heard on direct appeal, here, the Court can quickly dismiss defendant’s claim because the record is clear that there was never a request to have Mohsen moved away from Primas.

On May 17, 2004, defendant’s counsel told the court that Mohsen was having a problem with his medication at Santa Rita Jail, but made no mention of Primas and did not ask that defendant be moved away from him. ER601-02, 616-17. Then on May 21, 2004, defense counsel asked that Mohsen be moved from Santa Rita Jail, but only because of medication issues and issues with Mohsen being locked down for too long during the day. ER589. Counsel made no mention whatsoever of Primas and gave no indication that Mohsen was having problems with any other inmates. Instead, he told the court that the problem was “relevant to Dr. Mohsen’s current medical condition, but also his being incarcerated in Santa Rita, an area where the inmates are sort of locked down the vast majority of the day, may also be having an effect on Dr. Mohsen.” SER2.

The government objected to defendant being moved from a local facility, fearing that moving him would incur delay. ER590.

On May 25, 2004, defendant's counsel again asked that Mohsen be moved from Santa Rita. And again their reasons had nothing to do with Primas. Counsel reiterated their belief that the lock down situation was making defendant's mental condition worse, citing the "level of isolation, the lack of exercise, [and] certain religious insensitivity" at Santa Rita. ER272. The government reiterated its objection asking for an "opportunity to test the validity of whatever facts are being proffered to the court to support that move." ER271-72. The marshal who was in the courtroom at the time told the court that the Federal Detention Center ("FDC"), where defense counsel was asking for Mohsen to be transferred, was unlikely to accept him, because it would not accept people with "serious mental or medical problems" because "they are unable to house them." ER276.

Based on these transcripts there is simply no evidence whatsoever to support defendant's claim. Defendant's prior counsel never asked for Mohsen to be moved away from Primas, but instead asked for him to be moved based on medical needs and the level of isolation at Santa Rita.

Nor is there any evidence to support defendant's claim that either the prosecutor or the marshal purposefully misled the court in saying that the FDC

would not take prisoners with serious mental or medical problems. *See* AOB101. Defendant claims that because Primas went to the FDC at Dublin after Santa Rita, that shows that the FDC can accommodate prisoners with serious mental problems, as Primas was “disabled” from “psychiatric disorders.” AOB101. The fact that Primas went to Dublin says nothing about the accuracy of the marshal’s statement or about the intent with which he made it. The only evidence about Primas’s mental health was that he had received disability based on a psychiatric diagnosis. ER538, 548. There was nothing about whether he suffered any disorder at the time he was sent to Dublin or on whether his condition was serious.

Defendant does not even attempt to show how he was prejudiced from his lawyers’ actions, but asserts merely that the prejudice is “undeniable.” AOB103. Because defendant has not established either deficiency or prejudice, he has failed to state a claim of ineffective assistance of counsel.

#### X. THE SENTENCING LOSS FIGURE WAS ACCURATE

Defendant claims the district court clearly erred in determining the amount of loss he should be held accountable for. He contends that the amount of loss should have been offset by the amount of money he would have obtained in the lawsuit had it proceeded to judgment, thus wiping out any loss at all. AOB105-09. He next argues that the district court relied improperly on an expert report to

determine the amount of loss, presumably requiring a remand for resentencing.

AOB109-10. Because the district court determined that the government proved a loss of between \$40 and \$80 million by clear and convincing evidence, its loss finding should be affirmed.

A. Standard of Review

Loss determinations are reviewed for clear error. *United States v. King*, 257 F.3d 1013, 1025 (9th Cir. 2001).

B. Factual Background

At the time of defendant's sentencing, the United States argued that defendant was responsible for an intended loss amount of approximately \$70,000,000, corresponding to a 17-level increase in guideline level. U.S.S.G. § 2F1.1(b)(1)(R) (ed. 1998).<sup>8</sup> Recognizing that there was no actual loss from defendant's fraud, as the underlying civil patent suit was dismissed, the government argued that intended loss was the accurate measure. SER955-61. It relied on an expert report prepared for the plaintiffs, Aptix and Meta, to demonstrate the intended amount of money Mohsen hoped to recover in the patent lawsuit. SER960-61. The report, written by Michael Wagner, stated that the

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<sup>8</sup> Everyone agreed, due to *ex post facto* concerns, that defendant should be sentenced under the Guidelines effective Nov. 1998. PSR ¶ 62 (filed under seal).

damages from QuickTurn's infringement was approximately \$22-\$24 million. RT165-66. The government also cited the Keith Lobo notes, as evidence that defendant had created a phony document to support his claim that QuickTurn's infringement was willful, which would have allowed for tripling the damages. SER960-61. Accordingly, the government argued that defendant intended his scheme to result in QuickTurn paying approximately \$70 million to Aptix as a result of the lawsuit. *Id.*

Defendant contested this amount arguing first that there was no intended loss because Aptix would have won the lawsuit even without the false notebooks. SER964. He then argued that there was also no actual loss because the lawsuit was dismissed, but that at most the loss should be \$1.3 million, the portion of the \$4.2 million in legal fees attributable to the false notebooks. SER963. To further undermine the government's figure, defendant argued that the loss as stated in Wagner's report was "unrealistic" and that, in any event, it was not evidence of Mohsen's intent because there was insufficient evidence that Mohsen knew what the report said. SER965. Finally, defendant claimed that any intended loss figure should not include any tripling of the damages, because whether damages would have been tripled for willful infringement was too speculative. SER965-66.

The district court agreed with the government and found that the intended

loss, by clear and convincing evidence, was between \$40 and \$80 million. ER84-89. First, it found that the Wagner report established that defendant's intent was to obtain between \$22 and \$25 million from QuickTurn. Based on defendant's lead role in the litigation and the lengths to which he went to prevail in the lawsuit, as well as the court's experience as to how legal proceedings are conducted, the court found it "inconceivable" that defendant would not have known the amount of money claimed owed in Mr. Wagner's report. ER86-88. The court also found by clear and convincing evidence that defendant intended for the damages to be tripled based on the amended complaint, which sought treble damages, the testimony of Jeff Miller, who stated that QuickTurn would have had to pay treble damages if willful infringement had been proved against it, and based on the false notes defendant made up to support his claim of willful infringement. *See* ER88-89; *see also* SER1023 ("whether, in fact, the meeting with Keith Lobo occurred or not, he [defendant] felt that it was necessary to fabricate the evidence in order to persuade the trier of fact that that meeting did occur").

C. The Evidence Supports the District Court's Loss Determination

In determining loss, a court is to consider intended as well as actual loss, and to use intended loss if it exceeds actual loss. U.S.S.G. § 2F1.1, application note 8 (ed. 1998); *see also United States v. Tulaner*, 512 F.3d 576, 578 (9th Cir.

2008) (“the greater of actual or intended loss applies”). The loss need not be determined with precision, but need only be a “reasonable estimate of the loss, given the available information.” U.S.S.G. § 2F1.1, application note 9; *see also King*, 257 F.3d at 1025 (court may make reasonable estimate of loss based on available information where the loss is difficult to calculate with precision). Nor does the intended loss amount need to be “realistic” or even possible. *See Tulaner*, 512 F.3d at 578 (intended loss need not be realistic, “nor must the ‘defendant be capable of inflicting the loss he intends’”); *see also United States v. Blitz*, 151 F.3d 1002, 1010 (9th Cir. 1998) (noting that Ninth Circuit has “roundly rejected” idea that intended loss must be possible); *United States v. Koenig*, 952 F.2d 267, 271-72 (9th Cir. 1991) (§ 2F1.1 does not require a finding that the intentions were realistic).

Defendant first claims that the loss should have been offset by the amount Aptix was entitled to recover as damages from QuickTurn. AOB105. He spends several pages detailing why Aptix would have won the lawsuit against QuickTurn had the case proceeded to trial, even without the fraudulent notebooks. AOB106-09. Whether Aptix might have won the lawsuit against QuickTurn had defendant not engaged in fraud and lies is not only unknowable, but totally irrelevant. The fact is that the patent claims were not litigated and the trial was unable to proceed

because defendant lied, falsified evidence, and obstructed the search for truth.

Defendant committed his fraud scheme to insure a particular outcome and with the intention that QuickTurn pay out a large sum in damages. That he may have had a right to recovery had he not engaged in fraud simply does not matter. The point is that defendant committed fraud with the intention that QuickTurn pay him treble the amount of compensatory damages.

The cases cited by defendant show that where a defendant has a business, for example, which conducts both fraudulent and legitimate services, the loss should not include any monies earned for legitimate services, but should be limited to the fraudulent ones. AOB105-09. This is not the situation here. Defendant performed no services for which he was entitled to be paid. Regardless of whether defendant could have brought a legitimate claim against QuickTurn, through his fraud he rendered it impossible to assess any such claim and instead asserted a fraudulent claim against QuickTurn. The damages he sought to receive as a result of his fraudulent claim is the amount of loss he intended to inflict.

Defendant next argues that the district court should not have used Wagner's expert report to determine the amount of the intended loss because defendant was prevented from seeing the report under a protective order. AOB109-10. Accordingly, he argues that the report could not reflect the amount of loss

defendant intended to inflict. This too is nonsense. First, defendant need not have known the amount in the report for it to reflect his intention. He hired Wagner to determine the loss, and he intended to obtain from QuickTurn whatever amount Wagner determined. A court only need make a “reasonable estimate of the loss,” and it is certainly reasonable to rely on defendant’s own expert to determine the amount of loss he hoped to recover from his lawsuit, particularly where he does not challenge the accuracy of the number. *See* SER974 (“we don’t contest the fact of the report, we don’t really context [sic] the analysis”).

In any event, the district court found that defendant knew the damages stated in the report. The court found it was not credible that defendant would not have known the amount of damages claimed in the report. The report was prepared by an expert hired by the plaintiffs to determine their damages. Even had Mohsen been prevented from seeing some of the proprietary information in the report, there is no reason to think he would not have been told the amount of damages Aptix was seeking in the lawsuit. As the court noted, defendant “was the Aptix employee most directly involved in monitoring the day-to-day litigation for Aptix.” ER86. Moreover, “it is inconceivable that he would not have known the bottom line of Mr. Wagner’s report.” ER86. Based on judicial experience and upon “all the efforts that he went to in order to perpetuate his fraud,” the district

court found that defendant “had to know there was a lot of money involved, and he had to intend to make a big profit off of this.” ER87. It was not clear error to have found that defendant was aware of the damages amount in the report. The district court’s loss finding is supported by the record and it should be affirmed.

#### XI. DEFENDANT IS NOT ENTITLED TO A NEW TRIAL MOTION

This Court should not defer ruling on this appeal and need not remand the case for a new trial motion, as defendant was not denied his counsel of choice.

##### A. Standards of Review

A denial of a motion to substitute counsel is reviewed for abuse of discretion. *United States v. Adelzo-Gonzalez*, 268 F.3d 772, 777 (9th Cir. 2001). The court’s factual findings are reviewed for clear error. *Id.* A denial of a motion for continuance is also reviewed for abuse of discretion. *United States v. Garrett*, 179 F.3d 1143, 1144-45 (9th Cir. 1999) (en banc).

##### B. Factual Background

The final verdict against defendant was returned on March 15, 2006. CR568. The court granted defendant until April 14, 2006 to file a motion for a new trial pursuant to Fed. R. Crim. P. 33. CR526. On April 14, 2006, defendant’s trial counsel filed a motion for new trial raising a multitude of claims. SER828-54. That day, defendant filed a *pro se* motion for new trial on the basis that his

trial counsel provided ineffective assistance of counsel and requested appointment of additional counsel to represent him on the ineffective assistance of counsel claims. SER855-56. In response to the government's opposition, defendant filed a *pro se* reply on the ineffective assistance of counsel claims on June 7, 2006, and requested for the first time a new attorney to replace his trial counsel on all further proceedings. SER867.

On June 19, defendant filed a notice of intent to substitute Doron Weinberg and Nina Wilder as counsel. CR584. The next day, the government filed a letter with the court alerting it to counsel's conflict of interest in representing defendant because they represented defendant's sister, Magda Metwally, who testified against defendant, under a grant of immunity, at defendant's trial. CR585.

On June 23, 2006, the date set for the hearing on the new trial motions, the parties appeared before the court. Mr. Weinberg was present and asked to substitute in as counsel for defendant. SER870. As anticipated, the government objected claiming that Mr. Weinberg and Ms. Wilder could not effectively represent both defendant and his sister. SER873-74. The court asked the parties to brief the issue of whether there was a conflict of interest and, if so, whether defendant and his sister could waive it. SER924-25. It then set a date for hearing on that issue for August 3, 2006. *Id.*

At the hearing on August 3, 2006, the court made an intense inquiry, including conducting a voir dire of Ms. Metwally, to determine the extent of any conflict presented by Mr. Weinberg's representation of defendant. ER425-74. At the conclusion of the hearing, the court agreed with the government that the conflict was too grave to permit defendant and his sister to waive it. ER135-48. Accordingly, it denied defendant's motion to substitute Mr. Weinberg and Ms. Wilder as counsel. ER148. It granted defendant more than three weeks to obtain new counsel and put the case over until August 25, 2006. ER155.

On August 25, 2006, Marc Zilversmit appeared and requested that he and Dennis Riordan be allowed to substitute in as counsel for defendant. ER124-25. The court was willing to permit the substitution, but when Mr. Zilversmit indicated that he and Mr. Riordan would need 90 days to prepare for the hearing on the new trial motion, the government objected to the length of the continuance. ER126-27. It contended that because the deadline for filing a new trial motion had passed, new counsel should not be allowed to file any supplemental motion for new trial, at least not without a showing of good cause. *Id.* The court agreed that Rule 33 did not contemplate supplemental briefing after the time proscribed by the rule had already passed. ER128. Mr. Zilversmit argued that he needed the additional time to "flesh out" the ineffective assistance of counsel claims. ER131.

The court disagreed, indicating that it did not intend to consider those claims because defendant made them *pro se*, even though he had counsel at the time, and because defendant could address them in a collateral attack pursuant to 28 U.S.C. § 2255. SER929.

The court then offered to set the hearing on the new trial motion for September 11, 2006 to allow new counsel time to prepare for argument on the motion. SER930. When Mr. Zilversmit said he could not be prepared on that date, the court offered to delay it until September 15, 2006. SER934, 937. Mr. Zilversmit rejected that date. SER937. The court offered to defer it until September 22, 2006. SER939. Again, Mr. Zilversmit said he could not be ready. *Id.* The government then offered to put off the hearing until September 29, 2006, giving new counsel one month to prepare for the hearing on the new trial motion. *Id.* Mr. Zilversmit insisted that October 20, 2006 was the earliest he could be ready, but the government objected to a two-month delay. SER942-43. The court then set the date for the hearing on September 15, 2006. SER948. Mr. Zilversmit said he could not do it on that date and stated that he would not substitute in. SER950. The court responded, “That is your choice.” *Id.* Mr. Zilversmit and Mr. Riordan subsequently substituted in and represented defendant at his sentencing.

C. The Denial of Defendant's Motion to Substitute Counselors  
Weinberg and Wilder Was Proper Because They Also Represented A  
Government Witness

Defendant's motion to substitute in counselors Doron Weinberg and Nina Wilder was denied because the district court found that the lawyers' joint representation of both defendant and his sister, who testified for the government at defendant's trial, created a conflict that would compromise defendant's representation and the court's "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat v. United States*, 486 U.S. 153, 160 (1988).

The court did not abuse its discretion in denying Weinberg and Wilder from substituting in based on their conflict of interest. Courts have wide latitude to disqualify a defendant's counsel of choice based on a conflict of interest, even where the defendant is willing to waive the conflict. The Supreme Court has explained that "the district court must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses." *Wheat*, 486 U.S. at 163.

When defendant first appeared with Mr. Weinberg on June 23, 2006, the government reiterated its objection to defendant's motion to substitute because Mr. Weinberg also represented Ms. Metwally, an immunized government witness at defendant's trial. SER870. The court was, therefore, required to assess whether Mr. Weinberg could represent defendant. "A court confronted with and alerted to possible conflicts of interest must take adequate steps to ascertain whether the conflicts warrant separate counsel." *Wheat*, 486 U.S. at 160.

The court did not inquire into the nature or extent of the breakdown between defendant and his trial counsel or the timing of defendant's request for new counsel at this hearing because there was no need. Defendant misframes the issue by focusing on these questions. Neither the government, nor the court, was opposing the substitution on the basis that defendant's breach with his lawyer was not sufficiently severe or that the motion was untimely. The only issue for the court was whether Mr. Weinberg could provide the defendant with conflict-free representation. Conflict-free representation is not only a right ensured to a defendant by the Sixth Amendment right to counsel, *see United States v. Wells*, 394 F.3d 725, 733 (9th Cir. 2005), but also one in which the public has an interest. The Supreme Court emphasized in *Wheat* that the Sixth Amendment right to counsel has more to do with ensuring the fairness and integrity of the adversarial

process than with vindicating a defendant's right to be represented by his preferred attorney. *Wheat*, 486 U.S. at 159.

Because of the complexity of the issue, the court put the matter over until August 3, 2006. At that hearing, the district court found that the attorneys had a conflict, whether actual or potential, from representing both Ms. Metwally and defendant. Weinberg and Wilder had represented Ms. Metwally before the grand jury, in her negotiations with the United States, resulting in a grant of immunity, and during defendant's trial where she testified as a witness for the government. ER141. Whether knowingly or not, Ms. Metwally participated in defendant's crimes of attempted witness tampering and solicitation of arson. ER140. Ms. Metwally was paying a substantial portion of Weinberg and Wilder's fee to represent defendant, and she played a major part in recruiting them to represent defendant. ER141.

Against this factual background, the court identified the following problems posed by counsel also representing defendant: (1) if counsel won a new trial for defendant, they would be in the untenable position of representing both him and Ms. Metwally, a witness testifying against him in the trial, or having to withdraw from representing one of them; (2) if they won a new trial for defendant, it would be to the financial detriment of Ms. Metwally, because she is paying; and (3) if

counsel failed to secure a new trial for defendant, defendant could claim on collateral attack that he was represented by counsel who had a conflict, rendering their assistance ineffective. ER140-44. In addition, the court noted that there would be a conflict at sentencing because the United States intended to use Ms. Metwally's testimony in support of a sentencing enhancement. ER145-46. Weinberg and Wilder would not be able to argue against the credibility of Ms. Metwally's testimony, the way a different lawyer for defendant could. *Id.*

The court did not clearly err in finding that Weinberg and Wilder had a conflict of interest. Similar circumstances have been held to create a conflict. For example, in *United States v. Ross*, 33 F.3d 1507, 1522-24 (11th Cir. 1994), the Eleventh Circuit affirmed the district court's disqualification of the attorney where that attorney had represented a person who had pled guilty in a separate case and was to testify against the defendant. Even the payment of a lawyer by a third party, such as here, has been recognized to result in conflicts of interest. *See, e.g., Wood v. Georgia*, 450 U.S. 261, 268-69 (1981) ("Courts and commentators have recognized the inherent dangers that arise when a criminal defendant is represented by a lawyer hired and paid by a third party"); *United States v. Wells*, 394 F.3d 725, 733-34 (9th Cir. 2005) ("theoretical division of loyalties" existed where defendant's lawyer paid by co-defendant).

Nor did the court abuse its discretion in declining to accept a waiver of the conflict by defendant. A defendant may not “demand that a court honor his waiver of conflict-free representation.” *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006). The district court correctly considered that the waiver may not be upheld, the risk that defendant was trying to manipulate the proceedings and create error whichever way the court ruled, and the inability to accurately and completely advise defendant and his sister of the potential consequences of joint representation. SER927C-D; ER144-48. These were all reasonable considerations. The Supreme Court has explicitly recognized that waivers are often pierced by the Courts of Appeals, such that they do not solve the problem: “Nor does a waiver by the defendant necessarily solve the problem, for we note, without passing judgment on, the apparent willingness of Courts of Appeals to entertain ineffective-assistance claims from defendants who have specifically waived the right to conflict-free counsel.” *Wheat*, 486 U.S. at 161-62. In fact, had the court accepted a waiver, it could be grounds for reversal. *See Hoffman v. Leeke*, 903 F.2d 280, 288 (4th Cir. 1990) (disqualification mandated where counsel represented both defendant and one of the state’s main witnesses against him).

Moreover, defendant had already had four sets of attorneys and had “a

history, in this case, of attempting to manipulate the proceedings.” ER144. Nor could the court be certain that a waiver would cover all the potential conflicts that could result, particularly where defense counsel insisted that no conflicts existed and failed to even advise Ms. Metwally of any potential conflicts before agreeing to represent defendant. SER891; ER470-71. As stated in *Wheat*, “conflicts of interest are notoriously hard to predict” and “the willingness of an attorney to obtain such waivers . . . may bear an inverse relation to the care with which he conveys all the necessary information.” 486 U.S. at 162-63.

The district court reasonably and thoughtfully balanced the right of defendant to counsel of choice against the need to ensure the fairness and integrity of the judicial process. Its disqualification of Weinberg and Wilder was a proper exercise of its “discretion to disallow a first choice of counsel that would create a serious risk of conflict of interest.” *Gonzalez-Lopez*, 548 U.S. at 148 n.3.

D. The District Court Did Not Abuse its Discretion in Denying Defendant’s Motion for a Two-Month Continuance

After the court denied defendant’s motion to substitute Mr. Weinberg and Ms. Wilder, it granted defendant more than three weeks, until August 25, 2006, to retain new counsel. ER153. At this hearing, Marc Zilversmit appeared for defendant and represented that he and Dennis Riordan wanted to substitute in as

counsel for defendant. ER125. The court was prepared to allow the substitution, ensuring only that defendant wanted the substitution and that proposed counsel wanted to accept the appointment. ER124-25. As the court explained to Mr. Zilversmit, “You will be counsel of record, if that is what you want to do.” ER131. There was, therefore, again no need for the court to inquire into the nature or extent of the conflict between defendant and his trial counsel and simply no merit to defendant’s claim that the district court failed to consider his request for new trial counsel for purposes of the new trial motion.

It was only when Mr. Zilversmit requested a 90-day continuance of the hearing on the new trial motion that there was any objection. ER126-30. The court agreed with the government that a three-month continuance was excessive, and initially offered a continuance until September 11, then September 15, then September 22, and eventually until September 29, 2006. SER930, 937-39. All offers were rejected. *Id.* When counsel countered with October 20, the court denied a continuance of that length and set the hearing for September 15, 2006. SER950. Mr. Zilversmit refused the appointment. *Id.*

Defendant has framed the issue as one of the court denying defendant’s motion to substitute in Riordan and Zilversmit, thus violating his right to counsel of choice. But not every restriction on a lawyer’s time to prepare violates a

defendant's Sixth Amendment right to counsel. The Supreme Court holds that "broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates the right to the assistance of counsel." *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983) (internal quotation omitted). Here, the court did not deny defendant's motion to substitute counsel, but only the length of the requested continuance. *United States v. Garrett*, 179 F.3d 1143, 1146 n.1 (9th Cir. 1999) (*en banc*).

The facts of *Garrett* are almost identical to those here. Garrett retained private counsel who insisted on a one-month continuance of the trial date. The court offered one week. When the lawyer declined that date, the court denied the motion for the one-month continuance, and the new attorney did not appear for defendant. In affirming the district court's ruling, this Court held that the district court had not denied defendant's motion to substitute counsel, but instead, because the court had welcomed the privately retained attorney, had denied only defendant's motion for continuance. *Garrett*, 179 F.3d 1146, n.1. Similarly here, the district court was willing to allow the substitution and a one-month continuance, but denied the two-month continuance requested by defendant. It was Mr. Zilversmit who refused the appointment.

The district court's denial of a two-month continuance was neither unreasonable nor arbitrary, and thus did not result in a violation of defendant's right to counsel. In denying the continuance, the court was balancing the government's desire to move the case forward (ER126-27), the defendant's request not to be held in county jail any longer than necessary (SER933), and the inconvenience to the court, as the judge was brought in from a different district (SER933), against counsel's claim that he needed additional time because of family obligations (SER934-35), other cases (SER937-38), and the desire to file supplemental briefings (ER126). The court did not abuse its discretion in finding these reasons less than compelling. The five weeks offered were sufficient to accommodate any family obligations (Mr. Zilversmit stated he needed only four days for that (SER935)), and the need to reschedule other cases.

Most important, the court did not have jurisdiction to hear any supplemental bases for the new trial motion, even had it been willing to do so, undercutting any claim for additional time on that basis. Pursuant to Rule 33, a defendant has only seven days, or until the time extended by the court within the seven days, to make a motion for new trial on grounds other than newly discovered evidence. Fed. R. Crim. P. 33(b)(2). That time expired on April 14, 2006. The rule's time constraints are jurisdictional, and not something that could have been extended,

even had the court been so inclined. *United States v. Endicott*, 869 F.2d 452, 457 (9th Cir. 1989). The record does not support defendant's claim that the refusal to grant the two-month continuance was only the court's desire not to delay sentencing. AOB123. There was no abuse of discretion and this Court need not defer its decision on defendant's appeal until a remand of the motion for new trial counsel be heard. Given that defendant's appellate counsel are the same counsel he wanted for his new trial motion, there is no reason to think that they would bring issues before the district court that cannot be vindicated through this appeal.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached answering brief is:

- X Proportionately spaced, has a typeface of 14 points or more and contains 25,950 words; or,
- Monospaced, has 10.5 or fewer characters per inch, and contains \_\_\_\_\_ words or \_\_\_\_ lines of text

Date: March 4, 2009

\_\_\_\_\_  
/s/  
AMBER S. ROSEN  
Assistant U.S. Attorney



No. 07-10059

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

AMR MOHSEN,

Defendant-Appellant.

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GOVERNMENT'S MOTION TO EXCEED  
THE TYPE-VOLUME LIMITATION

Plaintiff-Appellee United States of America hereby moves pursuant to Ninth Circuit Rule 32-2 to exceed the 14,000 word limitation on principal briefs, as set forth in Federal Rules of Appellate Procedure 32(a)(7)(B)(i). This motion is based on the following declaration of Assistant United States Attorney Amber S. Rosen.

Pursuant to 28 U.S.C. § 1746, Amber S. Rosen hereby declares that:

1. I am an Assistant United States Attorney assigned to the Northern District of California. I am the attorney responsible for preparing the government's responsive brief in the above-captioned appeal.

2. I was not the prosecutor below. The bifurcated trial in this matter lasted approximately six weeks. The resulting trial transcripts number approximately 18



CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/

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TYLE L. DOERR  
Appellate Paralegal Specialist