No. 07-10059

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

United States of America,

Plaintiff-Appellee,

v.

Amr Mohsen,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of California
No. CR 03-0095 WBS

APPELLANT'S REPLY BRIEF

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INTRODUCTION

In response to the legal arguments raised in Appellant's Opening Brief, the government's brief is long on outrage at Mr. Mohsen's misconduct, which certainly is a fair target for censure. But the dispositive question for the jury below was not whether Mohsen's actions merited opprobrium–they did–but whether his misbehavior constituted the specific crimes with which appellant was charged. That distinctly different inquiry raised complex and important issues of law and fact which could only be settled by a full and fair trial. The government's brief is markedly short on legal authority and argument directly responding to appellant's very substantial claims that the both phases of his trial below were marred by prejudicial error.

Mohsen presents his claims for reversal in a different order than that of his opening brief for a number of reasons. Since appellant filed his opening brief, a panel of this Court has ruled that the one of the errors committed by the trial court below–responding to an inquiry from a deliberating jury without informing counsel for the parties of the inquiry or consulting opposing counsel on the correct response–constitutes structural error requiring automatic reversal. *Musladin v. Lamarque*, 555 F.3d 830 (9th Cir. 2009). Despite the fact that *Musladin* was decided three weeks before the government filed its responsive brief in this Court,

no citation or discussion of the opinion can be found in the Brief of Appellee (hereafter "GB," for Government's Brief). Given the importance of that decision to case at bar, appellant has presented first the issue of the *ex parte* communication during the phase one jury deliberations.

Next, the government concedes in its brief that this case required instructions on substantive patent law, and that such instructions were not given by the trial judge. While the government had no other course available to it, these concessions facilitate decision of the phase one instructional issue. The government does dispute that the instructional omissions were prejudicial, contending that the absence of judicial instructions on the crucial subject of patent law could be cured by witness testimony. That contention is unsupported by case citation because it is plainly wrong.

Given the strength of these two lead claims, this Court need not reach the other issues concerning the initial phase of the trial, but the constructive amendment and vouching arguments both (1) illustrate why the improper jury communication and instructional omissions were prejudicial, and (2) caused prejudice in themselves. The cumulative prejudicial effect of the phase one errors would require a new trial on the resulting convictions even if no single error did.

Turning to phase two, the use to which the prosecution put the invalid phase

one convictions in presenting its case on the second phase charges mandates a new trial on those convictions as well. The crux of the phase two trial was the issue whether Mohsen was really planning serious criminal violations while awaiting trial in the Santa Rita jail, or whether he was entrapped through coercion into agreeing to the schemes of inmate/informant Primas, who had a history of violence and mental illness. Drawing Mohsen into supposed attempts to intimidate witnesses was Primas's ticket to successfully beating a very long prison term. The improper vouching of prosecutor Harris for the credibility of Primas deprived Mohsen of a fair trial on his entrapment defense. The same is true of the failure of Mohsen's attorneys to present critical exculpatory evidence of the defendant's efforts, dishonestly foiled by the government, to escape Primas's clutches by transferring to a different jail.

In a case in which the jury rejected the sensational centerpiece charge of the government's sting operation–the allegation that Mohsen plotted with Primas to murder a federal judge–the evidence offered in phase two of the trial was far too weak to save Mohsen's convictions in that phase from reversal.

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PHASE ONE ARGUMENTS

I. THE COURT'S FAILURE TO CONSULT WITH COUNSEL BEFORE ANSWERING THE JURY'S QUESTION WAS STRUCTURAL ERROR REQUIRING AUTOMATIC REVERSAL.

As set forth in the Opening Brief, after retiring for deliberations, the jury sent a note to the trial court asking to see the indictment. The court denied the request without consulting with counsel. Shortly thereafter, the jury stated that they had reached a verdict, and the court then informed the parties about the note. (ER[1] 693, 203, 205). At the hearing on the new trial motion, the trial court defended the failure to consult with counsel based upon the inconvenience of reconvening the parties and bringing the defendant to court. (ER 371-374, 408-409).

The government does not dispute that the trial court committed constitutional error by refusing to consult with defense counsel before communicating with the jury; indeed, the one case of this Court upon which the government chiefly relies in its response to this claim clearly holds that the failure to notify defense counsel of a jury note before responding to it violates the Sixth Amendment. *United States v. Barragan-Devis*, 133 F.3d 1287 (9th Cir. 1998)

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[1] Appellant's Excerpts of Record are cited as "ER." The government's Supplemental Excerpts of Record are cited as "SER." The Reporter's Transcript is cited as "RT."

(citing *United States v. Frazin*, 780 F.2d 1461, 1469 (9th Cir. 1986)). Rather, the government argues only that the error was harmless. (GB 63-67). But under this Circuit's recent decision in *Musladin v. Lamarque*, 555 F.3d 830 (9th Cir. 2009), the conceded error must be deemed structural in nature, requiring automatic reversal on direct appeal. *Id.* at 837-843. While the government here disputes that the error was structural (*see* GB 64 n.5), its argument must fail in the face of *Musladin*, 555 F.3d at 837-843.

In *Musladin*, as in this case, the trial court responded to a jury note during deliberations without consulting counsel, and the jury returned its verdict shortly thereafter. *Id.* at 835. As this Court noted, in *United States v. Cronic*, 466 U.S. 648 (1984), the Supreme Court "held that courts are 'require[d] . . . to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial.'" *Musladin*, 555 F.3d at 836 (quoting *Cronic*, 466 U.S. at 659). The Supreme Court has not further defined what is a "critical stage," save to denote that a "critical stage" is "'a step of a criminal proceeding, such as arraignment, that held significant consequences for the accused.'" *Musladin*, 555 F.3d at 839 (quoting *Bell v. Cone*, 535 U.S. 685, 695-696 (2002)). *Musladin* considered whether a trial court's response to a jury note is a "critical stage" of trial.

The *Cronic* Court identified several cases involving structural error,

including *Geders v. United States*, 425 U.S. 80 (1976) (defendant ordered not to consult with counsel during overnight recess), *Herring v. New York*, 422 U.S. 853, (1975) (defense counsel precluded from making closing argument), and *Hamilton v. Alabama*, 368 U.S. 52 (1961) (defendant denied counsel at preliminary hearing). *See Cronic*, 466 U.S. at 659 n.25; *see Musladin*, 555 F.3d at 836 n.4, 839-840. The Court noted that "[r]elying on *Cronic*, the Sixth Circuit has recently held that the deprivation of counsel during jury reinstruction is automatically reversible error. *Caver v. Straub*, 349 F.3d 340, 350 (6th Cir. 2003)." *Musladin*, 555 F.3d at 836. *See French v. Jones*, 332 F.3d 430, 438 (6th Cir. 2003) (delivery of supplemental jury instructions is a *Cronic* critical stage); *Curtis v. Duval*, 124 F.3d 1, 4 (1st Cir. 1997) (finding that "recalling the jury for supplemental instructions after deliberations are underway is a critical stage of a criminal trial" under *Cronic*). *See also Frantz v. Hazey*, 533 F.3d 724, 746 (9th Cir. 2008) (en banc) (Kozinski, CJ, concurring) (error to exclude pro per defendant from conference regarding note, because "[c]onsideration of a jury note in the midst of deliberations is a critical stage of the proceedings where both sides are entitled to express their views"). *But see United States v. Widgery*, 778 F.2d 325, 329 (7th Cir. 1985).

As this Court noted:

> Jury deliberations are the apex of the criminal trial. All the

> evidence and arguments presented to the jury are processed and weighed at that time. Jurors are particularly susceptible to influence at this point, and *any statements from the trial judge–no matter how innocuous–are likely to have some impact.*

Id. at 840 (emphasis added). *See Bollenbach v. United States*, 326 U.S. 607, 612 (1946) ("Particularly in a criminal trial, the judge's last word is apt to be the decisive word."). Thus, even where a judge responds by re-reading previously agreed upon instructions, when the judge fails to consult with counsel before doing so, "it is the missed opportunity to influence the trial court's response to a jury question that is the significant moment." *Musladin*, 555 F.3d at 842.

Musladin made clear "were we reviewing the question before us de novo, we would find that Musladin was denied counsel at a 'critical stage,' thereby triggering *Cronic's* rule of automatic reversal." *Id.* But under the AEDPA's deferential review of a state court's judgment, a state court conviction may be overturned only if a federal court can conclude that the state court's application of federal law was "objectively unreasonable." Because the state trial court in *Musladin* had only referred jurors back to instructions which had already been discussed with counsel, an event which some other federal courts had found not to constitute a critical stage of a trial, this Court could not find on habeas that the state court opinion to the same effect was "objectively unreasonable." *Id.* at 842-843.

Here, however, Mohsen's claim of error on direct appeal *is* reviewed de novo and is not subject to the AEDPA's deferential review. As held by this Court in *Musladin*, following the decisions of the First and Sixth Circuits, the trial court's failure to consult with counsel before responding to the jury question about seeing the indictment deprived Mohsen of his right to counsel at a critical stage and is thus structural error. *Id.* at 842; *see Caver*, 349 F.3d at 350; *Curtis*, 124 F.3d at 4.

Mohsen's trial counsel informed the court that had he been consulted about the jury's request to see the indictment, he could have alerted the trial court to the issue of the constructive amendment in closing argument, and asked the court to inform the jury that the Lobo notes were not part of the fraud charges. (ER 366-371, 374; SER 852-853, 861-862). Additionally, as set forth in the Appellant's Opening Brief, defense counsel could have alerted the court to the improper prosecutorial vouching in closing argument where the prosecutor assured the jury that "the truth is that the defendant is guilty of *each and every charge in the indictment*." (ER 203) (emphasis added). Counsel could have asked for the jury to be admonished both that the prosecutor is not permitted to vouch for the truth of the charges *and* that the phase two charges discussed in voir dire and contained in the indictment should not be considered during deliberations on the phase one charges. As in *Musladin*, this "missed opportunity to influence the trial court's

response" was "the significant moment" and a critical stage in the proceedings. *Musladin*, 555 F.3d at 842. In this direct appeal, the structural error requires automatic reversal of the phase one charges. *Id.*

Moreover, even assuming the error may be proven harmless beyond a reasonable doubt, as the government contends, the government's harmlessness argument is unconvincing. To meet its burden under the *Chapman* standard, the government would have to prove beyond a reasonable doubt that the error did not influence the verdict. *Barragan-Devis*, 133 F.3d 1287 (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). *Barragan-Devis* itself is of no assistance to the government here–indeed it support's Mohsen's claim–because in *Barragan-Devis*, the trial court took no action in response to the jury's note, and therefore did nothing "to influence the jury" (133 F.3d at 1289), while here the lower court responded to the jury by denying its relevant request. Furthermore, *Barragan-Devis* held that, had defense counsel made a timely new trial motion, "the district court would have had the opportunity to explain his decision to ignore the note;" and given counsel's failure, "we are unwilling to assume an inadequate reason for the district court's decision not to respond. . . ." *Id.* at 1290. Here, of course, a new trial motion was made, and the judge explained his actions for not consulting counsel, proffering the wholly inadequate explanation that it would have been

inconvenient to convene a conference concerning the note with counsel and the defendant. (ER 371-374, 408-409).

The government claims the events that the defendant asserts would have followed had his counsel been given notice of the jury note are "speculative" (GB, at 66), and therefore cannot justify reversal. But these likely results are no more, and indeed are far less, speculative than those offered by the government in support of its claim of harmlessness. It is the government that, at a minimum, bears the burden of proof that the conceded constitutional error could not have influenced the verdict, a burden that cannot be met by suggesting scenarios that it cannot possibly demonstrate would have occurred. It is precisely because of the inherently speculative nature of any inquiry as to what would have transpired had the defendant not been denied his right to counsel that the error is properly deemed structural in nature. *United States v. Gonzalez Lopez*, 548 U.S. 140, 150 (2006) (Deprivation of right to counsel, "with consequences that are necessarily unquantifiable and indeterminate," must be deemed structural error) (internal quotations omitted).

The government contends that the verdict form would have shown the jury the charges under consideration and the government speculates that the form therefore answered the jury's questions. But if the verdict form answered the

jury's questions, why did they request the indictment? Neither the verdict forms nor the instructions informed the jury that a finding that Mohsen had falsified the Lobo notes was not a proper basis for finding materiality or fraud, despite the prosecutor's improper arguments to the contrary. (SER 794-827B; *see* ER 197-200 [argument to convict based upon Lobo notes]).

Moreover, the jury expressly asked about seeing the "specific charges" in the "indictment." (ER 693, 205; Dkt. 519). The jury thus referred to the indictment just after the prosecutor improperly vouched that "the truth is that the defendant is guilty of *each and every charge in the indictment*." (ER 203) (emphasis added). The indictment contained the phase two charges which the jury heard about at the beginning of the trial. Reference to the verdict forms did not cure the prosecutor's improper vouching nor the prejudice from the incomplete bifurcation of the charges.

The government then cites the trial court's speculation that he would have given the same answer had he consulted with counsel. (GB 66; ER 407-410). Under the logical extension of the government's position, a court could conduct a court trial without permitting defense counsel to participate and then, after convicting the defendant, render the constitutional error harmless by declaring that nothing that counsel could have said or done would have altered the guilty verdict

rendered by the court. This "harmlessness" argument is as audacious as it is specious. As in *Musladin*, it is the "missed opportunity to influence the trial court's response" (resulting from the failure to notify counsel) "that is the significant moment," and thus the *Cronic* "critical stage." *Musladin*, 555 F.3d at 842.

The government contends that defense counsel would not have thought to raise the constructive amendment issue at the time, because defense counsel did not raise it until the new trial reply. (GB 66-67). Factually, this is incorrect, as the defense specifically argued in the new trial motion that the court should have responded to the jury note by addressing prosecutor's improper closing argument, which suggested that the purported falsity of Lobo notes (which was not charged in the indictment) provided grounds for conviction. (SER 852-853). Again, speculation about what counsel might or might not have done had defense counsel been granted the opportunity they were unconstitutionally denied simply does not constitute proof that the constitutional error did not influence the verdict.

Finally, the government contends that the evidence was overwhelming as demonstrated by the speed of the verdict. (GB 67). But the evidence on the key disputed issue of *materiality* was far from overwhelming; indeed, it was arguably insufficient as a matter of law. The speed of the verdict thus more likely indicates

the *prejudice* from the court's failure to give supplemental instructions clarifying that the Lobo notes were not charged in the indictment, and that the jury should not base its verdict on the prosecutor's vouching that every charge was true. Given the complexity of the arguments regarding the materiality of the notebooks, a speedy verdict indicates that the jury, rather than wading through all of the evidence and testimony, likely took the easier route urged by the prosecutor to base a finding of materiality on the Lobo notes (which the defense never had an opportunity to contest), or upon the prosecutor's own vouching for the truth of all the charges. The speedy verdict could also have been partly attributable to the erroneous failure to properly instruct the jury on patent law. (*See* Argument II, *infra*).

Even if the error is subject to harmless error analysis, the government cannot demonstrate that the error was harmless beyond a reasonable doubt. This Court must thus reverse under either standard of review.

II. COUNTS 1-4 AND 10-19 MUST BE REVERSED BECAUSE THE JURY RECEIVED NO INSTRUCTIONS WHATSOEVER REGARDING THE PATENT LAW ISSUES IN THE CIVIL LAWSUIT.

In his opening brief, appellant contended that for the purposes of determining the materiality element of the fraud and perjury charges, the jury had to be instructed in the underlying patent law. The court's failure to give any

instructions on patent law required reversal because the error was adequately preserved or was plain error, or for ineffective assistance of counsel. The government concedes that the jury had to be informed of the underlying patent law: "Defendant is right that for purposes of determining materiality, the jury needed to know some patent law." (GB 40). It contends, however, that the witness testimony was sufficient to inform the jury of the law. The government cites *no authority* for this novel proposition, nor does the government distinguish *any* of the multiple cases cited by appellant holding that witness testimony is no substitute for the court's instructions on the law. The government thus asks this court to make an unprecedented holding that would conflict with other cases from this and other Circuits. Rather than place itself at odds with these holdings, this Court should follow the cases cited in the opening brief and reverse the phase one convictions.

A. The Error Was Preserved.

In his opening brief, appellant asserted that the failure of the court to give the jury *any* instructions on relevant patent law principles should be reviewed de novo, as a preserved claim of error, because the defense provided the principles to the court pretrial and the court referred to them in its in limine ruling (ER 43-54); because the court stated that it recognized the need to instruct on patent law principles (ER 238-246); and because in an ex parte hearing with the court during

trial, Mohsen himself cited the relevant patent law concepts and the need for the court to instruct on patent law. (ER 216-228).

The government contends, however, that the error was not preserved and is subject to plain error review per Fed.R.Crim.P. 52(b). But Rule 52(b) applies only to claims that were "not brought to the court's attention." Fed.R.Crim.P. 52(b); *see United States v. Alferahin*, 433 F.3d 1148, 1154 (9th Cir. 2006). The government does not dispute that the lack of instructions on patent law was brought to the court's attention. Indeed, it agrees that Mohsen informed the trial court (correctly) that "materiality had a special meaning within the patent context and asked the court to look at that. . . ." (GB 39). Nor does the government discuss or dispute *any* of the cases cited by appellant which hold that errors are preserved where the "court knew of [appellant's] objection" or where an objection was not artfully stated. *See United States v. Jackson*, 72 F.3d 1370, 1375 (9th Cir. 1995) (issued "adequately preserved" even absent objection where "court knew of his objection"); *United States v. Houser*, 130 F.3d 867, 869 n.1 (9th Cir. 1997).

Moreover, as set forth in the opening brief, once the proper patent law instructions are considered, the evidence of materiality was insufficient as a matter of law; thus, this Court is required to *acquit* Mohsen of Counts 1-4 and 10-19. *See United States v. Lake*, 472 F.3d 1247, 1260-61 (10th Cir. 2007). Appellant clearly

preserved this claim by moving for acquittal on this basis at the end of the government's case. (ER 212-213).

The error was adequately preserved.

B. The Failure To Instruct Was Error That Was Not Harmless Beyond A Reasonable Doubt.

In his opening brief, appellant set forth a lengthy explication of the relevant patent law materials replete with citations to the leading cases, as well as to citations to relevant case law explaining why the jury's determination of the materiality of Mohsen's alterations and false statements in a patent suit required instruction on the underlying principles of patent law. The government agrees: (a) "that a jury should be instructed as to the relevant law and on all laws necessary to resolve the issues in the criminal case . . ." (GB 44); and (b) that, as noted above, "[d]efendant is right that for purposes of determining materiality, the jury needed to know some patent law." (GB 40).

The government contends, however, that witness testimony about the law was sufficient, and that it was sufficient that witnesses described what a patent is, and that prior art could invalidate a patent. (GB 40-41). In other words, the government takes the position that required judicial instructions can take the form of testimony of witnesses called by adversarial parties. The government cites no

cases whatsoever to support its claim that, in light of the testimony, the trial court was not required to instruct on the law at issue in the underlying patent suit. (GB 40-44). And it nowhere discusses the authority of this and other Circuits which hold that it is the trial court's duty to instruct on the underlying legal obligations, and that it is error for the court to abdicate that responsibility to witnesses and attorneys. *United States v. Lake*, 472 F.3d 1247, 1263 (10th Cir. 2007); *see United States v. Scholl*, 166 F.3d 964, 973 (9th Cir. 1999); *see also United States v. Woods*, 335 F.3d 993, 1000-01 (9th Cir. 2003); *United States v. Jones*, 909 F.2d 533, 538 (D.C. Cir. 1990).

Furthermore, the testimony of witnesses did not nearly canvass the entirety of the legal principles crucial to a correct determination of this case. The defense contended that QuickTurn's assertions of prior art were wholly unfounded. The defense asserted that QuickTurn's list of prior art was akin to contending that a yo-yo could invalidate a patent on a frisbee because both are toys that are round and spin. The defense contended that the yo-yo and frisbee were so dissimilar that there was no need to inquire into the date of conception of the frisbee; the date of conception was completely irrelevant and immaterial.[2]

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[2] Of course, at that time, the defense did not have the benefit of the prosecution file for QuickTurn's '231 patent ('310 application). As set forth in Alan MacPherson's declaration submitted for sentencing, the same QuickTurn

To understand that issue, the jury had to know that the patent was presumed valid over any claimed prior art, that the burden was a heavy burden of proving invalidity by clear and convincing evidence, and that no defense asserted by the patent assignee (Aptix) would relieve the alleged infringer (QuickTurn) of its heavy burden. *See, e.g., Apotex USA, Inc. v. Merck & Co., Inc.*, 254 F.3d 1031, 1037-38 (Fed. Cir. 2001); *Innovative Scuba Concepts, Inc. v. Feder Industries, Inc.*, 26 F.3d 1112, 1115 (Fed. Cir. 1994); 35 U.S.C. § 282. The jury needed to be instructed that by statute and caselaw, nothing Mohsen, Aptix or Meta did to defend this lawsuit was relevant until QuickTurn had presented clear and convincing evidence that prior art invalidated Aptix's presumptively valid patent. Further, because the prior art asserted by QuickTurn (the Butts drawing) had been reviewed and rejected by the Patent Examiner when it issued the '069 patent, the jury needed to know that the Examiner's ruling was entitled to special deference. *See American Hoist v. Sowa*, 725 F.2d 1350, 1361 (Fed. Cir. 1984); *Continental Oil Co. v. Cole*, 634 F.2d 188, 195 (5th Cir. 1981). There were no instructions on

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attorneys argued in that application that there was *no prior art* that could defeat a hierarchical two-stage global interconnect structure, essentially describing the technology covered by Mohsen's '069 patent. This was exactly the *opposite* of Miller's testimony in the criminal case, and Miller's assertions in the civil suit. In short, QuickTurn was precluded from raising this prior art claim by the doctrines of file wrapper and judicial estoppel, and QuickTurn's claim of prior art in the civil suit brought by Aptix was thus fraudulent.

these issues, nor did the *witnesses* testify about the burdens, presumptions, and deference to the Examiner.

The defense theory was that QuickTurn had managed to bamboozle the trial judge in the civil patent case into putting the cart (conception date) before the horse (whether there was clear and convincing evidence of relevant prior art); once the trial court had construed the patent claims, it was clear that QuickTurn had no potential invalidating prior art, and Aptix withdrew its reliance on the conception date. The conception date never became an issue in the merits of the Aptix civil lawsuit, and had no potential to be an issue on the merits. Yet, the jury had no instructions to set forth these authoritative precepts.

Moreover, the government fails to recognize that the trial court instructed the jury that "the appropriate inquiry is not . . . what those persons actually involved in the case thought." (ER 214, 204). This instruction thus told the jury *not* to credit the witness testimony about the law which the government now cites. According to the court's own instructions, the witness testimony could *not* substitute to explain the patent law concepts which the government concedes the jury needed to know to assess the materiality of the alterations of the notebooks and the false statements.

As in *Lake*, Mohsen's convictions here must be set aside. Further, because

the government presented no evidence whatsoever to suggest that QuickTurn's alleged prior art could have invalidated Mohsen's patent under the applicable patent law, the evidence was legally insufficient and Mohsen is entitled to acquittal on these counts. *Lake*, 472 F.3d at 1260-61; *see Burks v. United States*, 437 U.S. 1, 15-18 (1978).

C. Even If The Error Was Not Preserved, The Error Was Plain And Any Failure To Request Instructions Requires Reversal For Ineffective Assistance Of Counsel.

Even if plain error review applies, the government has offered no argument as to why the failure to adequately instruct on materiality does not require reversal under this Court's holdings. *United States v. Alferahin*, 433 F.3d 1148, 1154 (9th Cir. 2006) (failure to instruct on materiality in false citizenship case was plain error where defense relied upon lack of materiality); *United States v. Perez*, 116 F.3d 840, 846-847 (9th Cir. 1997) (en banc); *United States v. Gaudin*, 28 F.3d 943, 951-52 (9th Cir. 1994) (en banc), *aff'd* 515 U.S. 506 (1995). *See also United States v. Holley*, 502 F.2d 273, 276 (4th Cir. 1974) (it is "plain error for a district judge to fail to relate the evidence to the law").

Additionally, the government offers no cogent argument why failure to request these patent law instructions was not ineffective assistance of counsel. Although, as the government argues, ineffectiveness is generally not considered on

direct appeal, this Court has held that an ineffectiveness claim need not wait for collateral review where, as here, the claim "is limited specifically to this failure to request proper jury instructions." *Alferahin*, 433 F.3d at 1160 n.6.

The government's one sentence argument in opposition contends that trial counsel was not ineffective because any substantive patent law besides the law described by the witnesses was irrelevant. (GB 45). As described above, however, the trial court told the jury not to base their inquiry on what the witnesses stated about the law; and, in any case, the jury was never told about the presumption of validity, about QuickTurn's heavy burden of overcoming the presumption, about the special deference accorded to the Examiner's decision that Butts's drawings did not invalidate the patent, about the principle that any defense asserted by Aptix did not undermine QuickTurn's burden, or about other key legal concepts that would have told the jury that the conception date was immaterial to the patent law suit because QuickTurn had no potential invalidating prior art. The failure to secure instructions on Mohsen's only defense was clearly ineffective. *Alferahin*, 433 F.3d at 1161-62.

Whether the error is reviewed as preserved error that was not harmless beyond a reasonable doubt, as plain error, or as a claim of ineffective assistance of counsel, the lack of instructions on the underlying patent law principles requires

reversal of Counts 1-4 and 10-19.

III. THE COURT'S REFUSAL TO SEVER THE PHASE ONE CHARGES, COMBINED WITH THE PROSECUTOR'S VOUCHING, WAS PREJUDICIAL CONSTITUTIONAL ERROR.

As the government concedes, although the constitution precluded the use of evidence of the inflammatory phase two allegations against Mohsen during the jury's consideration of the phase one charges, the jury nonetheless was told about these charges repeatedly. The indictment including Counts 21, 22, and 23 was read to the jury (ER 556-558), and the court and defense counsel conducted voir dire of potential jurors regarding those inflammatory charges approximately 20 times. (ER 559-572; *see* GB 48-49). The prosecutor concluded his phase one final argument by vouching for the truth of "each and every charge in the indictment." (ER 203).

The government points to some general comments about the phase two charges made by the court at the end of voir dire. As with the rest of the court's novel bifurcation plan, the comments were incomplete and deficient. The court told the jury that it did not "have to even think about the" phase two charges until after the conclusion of phase one, and said that the jury "can" put Counts 21, 22, 23 "out of your minds for now." (SER 164). These comments, however, did not directly and clearly tell the jury that they *must not* consider the discussion of the

phase two charges during phase one of the trial, and that they *must not* be prejudiced against Mohsen on the basis of what they had heard about the phase two charges. Nor did the court repeat those instructions at the end of the trial. Moreover, this Court has expressed "skepticism of the efficacy of such instructions no matter when they are given," particularly when the instructions do not "specifically impress upon the jury its duty to ignore" the prejudicial other crimes evidence in determining guilt. *United States v. Lewis*, 787 F.2d 1318, 1323 (9th Cir. 1986).

The government contends that the cases relied upon in Appellant's Opening Brief are distinguishable because, "absent a *Massiah* problem" (GB 51), the murder solicitation charge and witness tampering charges could have been tried together with the fraud charges, as there was no *additional* prohibition on trying all of the charges together. (GB 51-52). This is a little like asserting that but for the First Amendment the government would be empowered to suppress speech. The charges could *not* be tried together *because of the constitutional prohibition* on doing so.

Furthermore, because the government concedes that the constitution compelled severance of the charges, appellant had no need in his opening brief to cite this Court to additional cases holding that joinder of inflammatory charges

with weak evidence violates a defendant's constitutional right to a fair trial, particularly where the evidence is not cross-admissible. *See, e.g, Bean v. Calderon*, 163 F.3d 1073, 1084-86 (9th Cir. 1998) (joinder of strong murder case prejudicial as to weak murder case); *Lewis*, 787 F.2d at 1321-23 (joinder of felon in possession of gun charge was prejudicial as to murder charge). The sensational but ultimately unproven solicitation of murder charge could not have been fairly tried with the phase one charges, even absent the *Massiah* bar.

The fact that the murder and solicitation charges would be subject to cross-examination at a later and different phase of appellant's trial does not distinguish it from cases in which convictions were reversed because the jury heard about other pending charges which would be later tried at a separate trial. Indeed, in *Mattox v. United States*, 146 U.S. 140 (1892), the Supreme Court found prejudice and reversed a murder conviction where during the defendant's trial, the jury learned that after the current trial, the defendant would be tried for another murder. *Id.* at 142, 149-151.

The only case relied upon by the government is *United States v. Matus-Leva*, 311 F.3d 1214 (9th Cir. 2002). (GB 52-53). It is unclear, however, what point the government seeks to make by this citation. In *Matus-Leva*, the trial court denied severance and bifurcation because the constitution did not compel it. In the instant

case, however, the government does not dispute that the constitution precluded the use, in phase one, of the evidence that supported the phase two murder solicitation and witness tampering charges. Thus, *Matus-Leva* has no relevance here. The court's failure to sever the charges, and its reliance upon the novel and incomplete bifurcation procedure was error.

A. The Error Was Not Harmless Beyond A Reasonable Doubt.

The government points out that such an error in failing to sever may be found harmless where evidence of guilt is overwhelming, and then states that the evidence of the fraud, perjury, and contempt was overwhelming. The contention that the evidence was overwhelming, however, is made in one sentence without explanation or citation to the record. Clearly, the government could find no evidence to support the claim.

As set forth in the Appellant's Opening Brief, while defense counsel did not dispute that Mohsen had altered the notebooks or made false statements, the defense strongly contested the materiality element. The uncontested defense expert testimony established that QuickTurn's alleged prior art was so dissimilar to Mohsen's invention that it was irrelevant to the civil lawsuit; the government's evidence on materiality was categorically weak, insofar as the government offered *no evidence* that the prior art alleged by QuickTurn was at all similar to Mohsen's

invention, and no evidence that QuickTurn's prior art allegations could possibly provide a valid defense to the infringement suit. If the jury found it easy to convict on these charges, that would only be because they lacked the jury instructions that would have demonstrated that Mohsen's defense of a lack of materiality was a strong one.

The evidence of perjury and contempt, moreover, was also insufficient as a matter of law, or barely sufficient. Because the evidence was either insufficient or barely sufficient, the evidence was not overwhelming; the error, thus, cannot be found harmless.

Further, the prosecutor's vouching for the truth "of *each and every charge in the indictment*" at the end of trial (ER 203), makes clear that the evidence was prejudicial. *See United States v. Combs*, 379 F.3d 564, 574 (9th Cir. 2004) (prosecutor's argument emphasizing error demonstrates prejudice). Similarly, the jury's request to see the indictment which contained the inflammatory phase two charges that were referred to repeatedly in voir dire, and again in the prosecutor's closing, demonstrates prejudice. *See Shafer v. South Carolina*, 532 U.S. 36, 53 (2001); *Simmons v. South Carolina*, 512 U.S. 154, 178 (1994) (O'Connor, J. concurring). The trial court's improvised and incomplete bifurcation of the charges requires reversal of Counts 1-4 and 10-20.

B. The Government Vouching Was Reversible Error In Itself.

As set forth above and in the Opening Brief, the prosecutor's vouching for the truth of "each and every charge in the indictment" (ER 203) exacerbated the court's error in refusing to sever the charges. Moreover, this and other vouching by the prosecutor was reversible constitutional error in itself.

The government contends that when the prosecutor argued that the defendant is guilty of every charge in the indictment, the jury was only considering the phase one charges, and there was no mention of the witness tampering or murder solicitation charges. Thus, the government argues that "the jury could not have been confused that the prosecutor was asking them to find defendant guilty of anything other than" the phase one charges. (GB 53-54). The government misses the point. The vice of the prosecutor's remark was that it conveyed to the jury the prosecutor's personal opinion that not only was Mohsen guilty of the phase one charges the jury was going to consider, but that Mohsen was also guilty of the witness tampering and murder solicitation charges that were discussed at the beginning of the trial. Moreover, insofar as the jury had heard no evidence of the phase two charges, the prosecutor's vouching for the truth of those charges was clearly an argument beyond the evidence, relying upon allegations that had not been subject to confrontation and cross-examination.

The government does not dispute the prejudice to a defendant in a fraud trial caused by a prosecutor vouching that the defendant is also guilty of soliciting to murder a federal judge. Nor does the government dispute that the literal and plain meaning of the prosecutor's words was an assurance to the jury that the "truth" was that Mohsen was guilty of "each and every charge in the indictment" (ER 203), and that the indictment (which had been read to the jury and discussed repeatedly in voir dire) contained the inflammatory phase two charges.

Rather, the government contends that the jury would not have focused on the plain meaning of the prosecutor's words, but might have construed the words as limited by the context. Assuming *arguendo* that it is a possible interpretation of the words, it is as likely, if not more so, that the jury interpreted the remark as referring to the plain meaning of the words "each and every charge in the indictment." That the jury did so is supported by their request almost immediately after the prosecutor's remarks as to whether there was "a copy of the indictment with the specific charges that we can see." (ER 693, 205). *See Shafer*, 532 U.S. at 53 (jury's note leaves "no doubt" about the state of its deliberations).

As conceded by the government, moreover, on three additional occasions, the prosecutor used the words "I think" to express his thoughts about the evidence. (GB 54; *see* ER 194, 195, 196). The government relies upon *United States v.*

Williams, 989 F.2d 1061 (9th Cir. 1993), and contends that the use of the words "I think" was merely "rhetorical emphasis." *Id.* at 1072; *see* GB 54-55. But the government fails to acknowledge that the *Williams* Court found the prosecutor's comments to be "improper" "vouching" that was only deemed harmless in light of the substantial evidence of guilt. *Williams*, 989 F.2d at 1072.

The government again contends, without explication, that the evidence of guilt was overwhelming. Yet, as shown above, the government's evidence of materiality was hotly contested and arguably insufficient, as was the evidence of perjury and contempt. Because the evidence was not overwhelming, the improper vouching itself requires reversal of the phase one charges, if not in combination with the court's improper and incomplete bifurcation of the charges. *See, e.g.*, *United States v. Kerr*, 981 F.2d 1050, 1054 (9th Cir. 1992) (reversing for *plain error* where evidence was close and prosecutor vouched by using words "I think" in closing argument).

IV. THE CONSTRUCTIVE AMENDMENT REQUIRES REVERSAL.

A. Standard of Review.

The government argues that the constructive amendment issue is reviewed for plain error because there was no objection at trial, and because it was not raised

as a claim of error in the new trial motion. (GB 56). The government's argument, however, only serves to demonstrate the prejudice of the court's refusal to inquire into trial counsel's conceded conflict of interest in regard to the new trial motion, and the court's error in refusing to either permit new counsel to substitute as counsel for Mohsen, or to appoint unconflicted counsel to brief the new trial motion. Trial counsel's failure to object to the constructive amendment during argument was ineffective assistance of counsel, an issue which trial counsel acknowledged that he could not argue at the new trial hearing due to his conflict of interest. (ER 393; SER 858; *see* Argument XI, *infra*).

The government's brief, moreover, only serves to highlight the error and prejudice from the prosecutor's closing argument. The government rightfully concedes that it was required to prove that the 1988 notebook was material to the lawsuit and the alleged scheme to defraud QuickTurn. (GB 57). The government also concedes that the prosecutor argued in closing that the Lobo notes were falsified in an attempt to obtain greater damages from QuickTurn should Aptix win its lawsuit. (GB 59). The government also concedes that the portion of the prosecutor's closing quoted in the Appellant's Opening Brief suggests an argument that both the notebook and the Lobo notes were material to the lawsuit. (GB 61-62; *see* ER 199-200). While the government contends that the prosecutor never

explicitly argued that the jury could find appellant guilty based upon the Lobo notes alone, the government does not deny that the closing argument provided *two alternative theories of materiality*, one based upon the notebooks as alleged in the indictment, and one based upon the Lobo notes which was not charged in the indictment, but was first suggested in closing argument. Where the jury is presented with two theories of guilt, one permissible and one impermissible, the convictions must be reversed unless the government can prove beyond a reasonable doubt that the jury did *not* base its decision on the impermissible theory. *See Hedgpeth v. Pulido*, 129 S.Ct. 530, 532 (2008).[3]

The government cites appellant's trial counsel's reply brief regarding the new trial motion as a concession that there was no constructive amendment. (GB 62). Yet, as argued in Appellant's Opening Brief and below, trial counsel suffered from an acknowledged conflict of interest regarding the new trial motion: trial counsel could not argue that there was a constructive amendment in closing argument without exposing themselves to a claim of ineffective assistance due to their failure to object to the improper argument. The government's reliance upon

[3] Moreover, as argued in the opening brief, the presentation of alternative factual grounds for conviction deprived appellant of his right to a unanimous verdict, a point that the government does not contest. *See, e.g., United States v. Garcia-Rivera*, 353 F.3d 788, 792 (9th Cir. 2003).

the new trial reply in responding to this argument thus serves to highlight the prejudice from the trial court's erroneous refusal to permit new counsel to substitute in for the new trial motion, and the court's erroneous refusal to inquire into Mohsen's request for new counsel due to a conflict of interest. (*See* Argument XI, *infra*).

The government also contends that even if the government did argue a different theory than that contained in the indictment, then it would constitute a variance rather than a constructive amendment. (GB 62). The government does not explain, however, *why* the different theory should be deemed a variance; moreover, this argument reflects a fundamental misunderstanding of the nature of the difference between the two errors. As this Court has explained, a constructive amendment occurs when the court's instructions or the government's argument alters or broadens the terms of the indictment. That is what occurred here when the prosecutor argued that the fraud and perjury charges could be based upon a finding that the Lobo notes were material, despite the fact that the indictment charged only the 1988 notebook was material to the fraud and perjury counts. By contrast, a variance occurs when the evidence presented differs from the evidence alleged in the indictment. *See United States v. Adamson*, 291 F.3d 606, 614-615 (9th Cir. 2002).

The government's concession that the prosecutor urged to the jury that *either* the Lobo notes *or* the notebook could support the element of materiality (GB 61-62), is an acknowledgment that the closing argument constituted a constructive amendment.[4] Further, the jury's note requesting to see the "specific charges" in the indictment (ER 693, 205) indicates that the jury was confused about the charges, and when coupled with the court's failure to resolve the confusion, demonstrates that the error was a constructive amendment. *Howard v. Dagget*, 526 F.2d 1388, 1389-90 (9th Cir. 1975) (per curiam). Moreover, a constructive amendment is plain error which this Court will review even absent an objection. *United States v. Shipsey*, 190 F.3d 1081, 1085-88 (9th Cir. 1999). As argued previously, "a constructive amendment always requires reversal." *Adamson*, 291 F.3d at 614-615.

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[4] The government also acknowledges that a constructive amendment is measured in part by whether the indictment was altered "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); *see* GB 57 (quoting same). Here, of course, the government was forced to concede at sentencing, that contrary to the arguments at trial that Mohsen had invented the meeting with Lobo, the government was not sure whether the Lobo meeting did in fact occur as reflected in the Lobo notes. Thus, the government conceded that the notes may be an accurate reflection of the events. (ER 344-345). Clearly, a grand jury would not have indicted for allegedly fraudulent notes documenting a meeting, when the government was forced to concede that this meeting may well have taken place as reflected in the notes. The error was a constructive amendment.

Finally, the government argues that the quickness of the verdicts, and the jury's failure to ask any questions about materiality demonstrates that the evidence was overwhelming and that the error was harmless. (GB 62-63). Yet, the government fails to acknowledge that a constructive amendment requires reversal per se, absent a showing of prejudice. *Adamson*, 291 F.3d at 614-615. Furthermore, the government neglects to recognize that the jury *did* ask to see the specific charges in the indictment, which *does suggest* confusion regarding the specific charges. (ER 693, 205). Finally, because the only defense presented was the lack of materiality of the notebooks, and because the defense did not contest the materiality of the Lobo notes (because it was an issue not raised in the indictment), the speed of the verdict suggests that the jury quickly seized upon the Lobo notes as proving materiality, as the prosecutor urged, since the defense had never contested their materiality at trial. On the facts of this case, the speed of the verdict suggests prejudice rather than harmlessness.

The constructive amendment thus requires reversal of the convictions of Counts 1-4 and 10-19; moreover, even if this error itself did not alone require reversal, when considered in combination with the errors from the court's error in answering the jury note without consulting counsel, the court's error in incompletely bifurcating the charges, the prosecutor's vouching for the truth of the

charges and the court's failure to instruct on patent law, the cumulative errors require reversal of the phase one charges. *See United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996) (reversal required where the cumulative effect of multiple errors has prejudiced the defendant even if no single trial error examined in isolation was sufficiently prejudicial to warrant reversal).

V. THERE WAS INSUFFICIENT EVIDENCE TO PROVE PERJURY BECAUSE THE CONTEXT OF THE QUESTIONS SUGGESTS INDISPUTABLY THAT THE EXAMINER WAS ASKING ABOUT BOTH NOTEBOOKS.

As set forth in the opening brief, the perjury charges were based upon appellant's negative answers to two questions that asked him about the "notebooks" in the plural form. The Count 2 question asked whether Mohsen ever delivered the original "notebooks" to his attorneys or an independent expert for testing of those "notebooks;" the Count 3 question asked whether, the original of those "notebooks" were ever out of his possession. Because only the 1988 notebook was out of his possession and delivered to experts, the "no" answer was literally true–he had never delivered both of "those notebooks" to an expert or let both of "those notebooks" out of his possession.

The government suggests that in context, it was clear that the question referred to each notebook. Yet, the government cites passages of the deposition

where the examiner asked Mohsen about the "notebook*s*," referring to *both* notebook*s*. (GB 71-72, SER 743). Because the questions were always about *both* notebook*s*, using the plural form, the context makes clear that Mohsen was being asked if *both* notebook*s* were ever out of his possession, and whether Mohsen had delivered *both* notebook*s* to an expert. Mohsen's answer that "no" he had not delivered the "notebook*s*" to an expert, and that the "notebook*s*" had not left his possession, were literally true.

In this civil deposition, Mohsen was under no obligation to *volunteer* that he had taken only the 1988 notebook to an expert, when the questioning counsel did not clearly ask if he had ever taken "*either*" of "those notebook*s*" to the expert. *United States v. Reed*, 986 F.2d 191, 194 (7th Cir. 1993). Attorneys commonly advise their clients to answer questions truthfully but not to volunteer information. *United States v. Safavian*, 528 F.3d 957, 965 (D.C. Cir. 2008).

"[T]he perjury statute is not to be loosely construed;" it was the burden "of the questioner to pin [Mohsen] down to the specific object of the questioner's inquiry." *Bronston v. United States*, 409 U.S. 352, 360 (1973). Where the questioner's inquiry is imprecise as to whether a plural or singular is intended, the record is too equivocal to support a perjury conviction. *United States v. Martellano*, 675 F.2d 940, 943-945 (7th Cir. 1982). These convictions must be set

aside.

VI. THE CONTEMPT CONVICTION MUST BE SET ASIDE.

A. The Grand Jury Has No Power To Indict For Contempt Based Upon Violating A Condition Of Pretrial Release.

As the government notes, while this Court has previously held that the grand jury has the power to indict a defendant in general, (*see United States v. Armstrong*, 781 F.2d 700, 703-704 (9th Cir. 1986)), the statute herein at issue–18 U.S.C. § 3148(c)–specifically authorizes only "judicial officers" to "commence a prosecution for contempt . . . if the [defendant] has violated a condition of release." Two courts have held that the plain meaning of § 3148(c) dictates that *only* a judicial officer may initiate a contempt proceeding alleging a violation of a condition of release. *United States v. Bronson*, 2007 WL 2455138, at *10 (E.D.N.Y. 2007); *United States v. Herrera*, 29 F.Supp.2d 756, 759 (N.D. Tex. 1998).

This Court did not consider this question of statutory interpretation in *Armstrong*, because the defendant there was indicted under 18 U.S.C. § 401(3) for violating a court order directing him to testify, not for violating a condition of release. *Armstrong*, 781 F.2d at 702. Nor has this Court considered this issue in any other case. This Court should follow the persuasive reasoning of the courts in

Bronson and *Herrerra*. These holdings are consistent with the rule of lenity which requires that "ambiguous criminal statutes to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 128 S.Ct. 2020, 2025 (2008). The court below thus erred in holding to the contrary, and this Court should vacate the Count 20 contempt conviction.

B. The Contempt Conviction Must Be Reversed Because The Court Improperly Admitted Exhibit 97A.

As set forth in the Opening Brief, the trial court admitted Exhibit 97A relying in part upon the government's contention that the note was not necessarily meant to be a communication to Mohsen's wife, Mervat, and thus was not covered under the spousal privilege. *See, e.g., United States v. Vo*, 413 F.3d 1010, 1016 (9th Cir. 2005) (privilege extends "to words and acts intended to be a communication" between spouses). Contrary to its pretrial arguments, at trial the government conceded that Exhibit 97A was a note to Mohsen's wife, Mervat.

The government now contends that even if the note was intended as a marital communication, it could not be a marital communication because the government seized it before it could be sent to appellant's wife. The government contends there is no authority for applying the privilege when the communication has not been delivered or completed. (GB 79-80). To the contrary, there is no

authority for the government's novel argument that the marital privilege evaporates if a letter addressed to one's spouse is intercepted by a third party; the government cites no authority for its position and all authority is to the contrary. *See, e.g.*, *United States v. Montgomery*, 384 F.3d 1050, 1056-57 (9th Cir. 2004) (note from wife to husband left on kitchen counter was covered by privilege).

Nor does the attempted distinction between "words intended as a communication" and an "intent to communicate," (GB 79-80) hold up under scrutiny. The government does not dispute that Mohsen wrote a note; this writing was an utterance or expression, just as much as any other letter, note or email. The government has conceded that it was intended to be conveyed to his wife; the fact that the government seized it before it was delivered or handed to Mervat does not invalidate the privilege. If that were so, the government could open, read and present as evidence a letter to a defendant's spouse seized from a spouse's mailbox or at the doorstep; it would eviscerate the privilege entirely.

Nor is the privilege negated by jail monitoring of inmate phone conversations. The note was intercepted in a jail search, not by routine monitoring of phone calls or mail. Indeed, this Court's decision in *Montgomery*, 384 F.3d 1050, is particularly on point. There, a wife left a note addressed to her husband on the kitchen counter in a house where their children might have seen the note. It

was found during execution of a search warrant. After noting that such communications are presumed privileged, this Court found that the government had failed to meet its burden of showing that the note was not privileged. In particular, this Court held that it would "not cast aside the presumption of confidentiality by speculating that the communication" was likely to be seen by someone else. *Id.* at 1056-57. Here, too, this Court should not cast aside the presumption of confidentiality by speculating that jail authorities were likely to see the note.

Additionally, contrary to the government's assertion, appellant cited *Massiah* in his motion to quash the search warrant below and supplemental points and authorities, and the trial court ruled upon the matter. (ER 26; *see* Dkt. 445 at 2-3; Dkt. 449; RT 1/5/06 86-90). Moreover, the remaining evidence in the affidavit did not support cause for the warrant. The government points to evidence that Mohsen was asking about psychiatric disorders and books about psychiatric disorders, and that his attorneys had given notice of a possible insanity defense. The government suggests that this raises a reasonable belief that Mohsen was attempting to "fabricate incompetence." (GB 81-82). This is a leap of illogic. Requesting books about psychiatric symptoms does not suggest an intent to fabricate a psychiatric defense any more than an inmate's request for copies of

duress jury instructions demonstrates a plan to "fabricate" a duress defense, nor any more than an inmate's request for copies of the police reports showing the date and time of the offense demonstrate an intent to "fabricate" an alibi.

Finally, the evidence was insufficient to demonstrate that Mohsen applied for a passport after April 8, 2003 as charged in Count 20. Certainly there was evidence that Mohsen was at least contemplating fleeing; but the inquiries he made into travel to the Cayman Islands did not necessarily require a passport. The government points to the note to Mohsen's wife requesting assistance in getting documents from the Egyptian consulate regarding the loss of his passport in the 1990s, but that he "was not interested in any application in 2004." (GB 83-84; Exh. 97A). The fact that Mohsen expressed that he was *not* interested in any application in 2004, is not evidence that such an application existed. The evidence was insufficient, and the Court should acquit Mohsen of Count 20.

PHASE TWO ARGUMENTS

VII. THE GOVERNMENT'S HEAVY RELIANCE UPON THE PHASE ONE CONVICTIONS TO PROVE THE PHASE TWO CHARGES, WAS PREJUDICIAL, REQUIRING REVERSAL OF THE PHASE TWO COUNTS.

In the opening brief, appellant noted that the government relied heavily on the phase one convictions to urge the jury to convict appellant of the phase two

charges. The government does not dispute that the trial prosecutors relied heavily upon the phase one convictions to prove disposition. Nor does the government dispute that prejudicial spill-over may require reversal of charges, where the convictions on other charges are reversed. *See, e.g., United States v. Dinome*, 954 F.2d 839, 844 (2nd Cir. 1992). Nor does the government dispute that it had the burden of disproving entrapment beyond a reasonable doubt.

The government argues only that there was "sufficient" evidence of predisposition even setting aside the evidence of the phase one convictions upon which the government strongly relied. That, however, is not the standard for demonstrating harmlessness of constitutional or evidentiary error. Having strongly relied on the jury's rejection of the materiality defense in phase one to successfully convince the jury to convict appellant of the phase two charges, the government cannot now contend that its own arguments had no effect; the arguments were not harmless beyond a reasonable doubt. *See United States v. Combs*, 379 F.3d 564, 574 (9th Cir. 2004) (prosecutor's argument emphasizing error demonstrates prejudice). Reversal on the first phase charges requires reversal on the second phase charges as well.

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VIII. AUSA HARRIS'S DUAL ROLE AS A WITNESS AND ADVOCATE REQUIRES REVERSAL OF THE PHASE TWO COUNTS.

The state contends that AUSA Harris did not improperly act as a witness and advocate, because Harris never testified. But the rule may be violated even where the prosecutor does not testify. It is "'improper for a government attorney who has independent personal knowledge about facts that will be controverted at the trial to act as prosecutor (1) if [she] uses that inside information to testify indirectly by implying to the jury that [she] has special knowledge or insight.'" *United States v. Edwards*, 154 F.3d 915, 921-922 (9th Cir. 1998) (quoting *United States v. Hosford*, 782 F.2d 936, 939 (11th Cir. 1986)).

The state's recitation of the facts, moreover, confirms the key role that Harris played in vouching that Primas did not get a favorable deal in his state case based upon his federal cooperation. As the government agrees, Primas and his attorney Andrew Steckler met with AUSA Harris and the FBI on May 19, 2004. At trial, Harris asked repeated questions of witnesses about the purported lack of any promises and assurances made to Primas by the government at the May 19 meeting which Harris attended, suggesting that Primas's sentencing range had been set before the meeting. (GB 87).

The government neglects to mention that Harris elicited testimony that

Primas's eventual three-year sentence was in the same range as the state prosecutor had offered "before Mr. Primas came forward to cooperate with the Federal Government." (ER 542-546; RT 1364-67). Further, Harris not only argued that Primas did not gain anything by his *testimony*, but that the government had made no *promises* to Primas and that Primas did not gain anything by virtue of his *cooperation* with the government. (ER 506, 517, 520). These arguments directly inserted Harris's role as a witness to the negotiations into the case, and acted to vouch for the lack of promises, as a un-cross-examined witness.

The government suggests that Harris did nothing improper because she properly argued that Primas hoped he "could get a benefit in his own criminal case. . . ." (RB 90, quoting SER 679). But the government leaves the critical following words out of its quotation–"*He didn't*." (SER 679). Contrary to the government's selective quotation, Harris suggested that Primas hoped to get a benefit, but "he didn't" get a benefit.

Furthermore, Harris's vouching for a lack of promises and a lack of a benefit, was in stark contrast to the time-line of events suggesting that Primas's willingness to cooperate with the federal government broke a log-jam in negotiations over Primas's state sentence, resulting in an agreement by the state prosecutor to strike the ten-year gun enhancement. Before May 17, 2004, Primas's

attorney had been unable to get the state prosecutor to strike the ten-year gun enhancement, and thus the negotiations had been stuck on an offer of twelve years state prison (ten years plus the low term of two years for the robbery). On May 17, 2004, Primas's attorney first spoke with the U.S. Attorney's Office and set up the meeting on the afternoon of May 19, 2004. On the morning of May 19th, two days after Steckler's call to the U.S. Attorney, but before the meeting with the FBI, Steckler and the Alameda prosecutor suddenly, but tentatively, agreed to strike the ten-year gun enhancement and let Primas plead guilty to robbery for a sentence of two, three, or five years; this was not a "firm offer." (RT 1347-56, 1360-63).

Yet, Harris told the jury that despite this strong circumstantial evidence of a deal that cut Primas's sentence by 75% in exchange for his continued cooperation, Primas got *no benefit* for his cooperation, thus undermining a critical avenue of defense attack. Since Harris was involved in the meeting with Primas and was in charge of the federal prosecution, the jury would necessarily believe that Harris was basing her assurances on her role as a witness to the negotiations and upon her prestige as a federal officer.

Nor does the government's claim that the vouching did not affect the verdict hold up under scrutiny. To demonstrate lack of entrapment beyond a reasonable doubt, the government relied almost exclusively on Primas's credibility in denying

that he had made no threats or engaged in other coercive conduct in order to get Mohsen to make incriminating statements. It was the defense argument that Primas, the sophisticated criminal who conceded that he viewed Mohsen as a "pigeon," had entrapped Mohsen to cut his deal from twelve to three years; the prosecutor's assurances that there was no deal and that Primas had gotten nothing in exchange for his cooperation wholly undermined appellant's sole line of attack. As in *Edwards*, "[t]he prosecutor's implicit testimony was devastating to [the defendant's] only theory of defense, and it was a blow against which he had no way to defend." *Edwards*, 154 F.3d at 922. This impermissible vouching based upon the prosecutor's dual role requires reversal of the phase two convictions.

IX. THIS COURT MUST REVERSE THE PHASE TWO CONVICTIONS DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL.

As set forth in the opening brief, the record makes plain that appellant's trial lawyers failed to investigate Mohsen's requests through his prior counsel to have the trial court order that he be moved away from Primas. Mohsen repeatedly asked to be moved to another facility, and away from informant Primas's location, at precisely the time that the government was contending that Mohsen was obsessed with working closely with Primas to intimidate witnesses and plot the murder of a federal judge. This occurred during the same time period when, according to

appellant's trial theory, he feared Primas and was being entrapped and coerced by Primas into agreeing to these violent crimes.

The government contends that there was no ineffective assistance because Mohsen never specifically told his prior attorneys that he wanted to get away from Primas, only that he wanted to get out of the facility and transferred to a new facility. This is nonsense.

If Mohsen really desired above all else to use Primas to intimidate witnesses, commit arson, and plot the murder of a federal judge, as the government urged at trial, he would not be making multiple requests to get transferred to a new facility that would separate him from Primas–the sophisticated criminal who said he had the contacts necessary to pull off these crimes. Mohsen's repeated requests to move to a different facility were wholly inconsistent with the government's theory that Mohsen was trying to work closely with Primas to carry out this criminal scheme. Had Mohsen succeeded in being transferred–a move that the government blocked by their false statements to the court[5]–Mohsen would have lost his

[5] As noted in the opening brief, AUSA Harris argued against the transfer, and the U.S. Marshal told the trial court that the Dublin facility could not handle an inmate like Mohsen who had mental problems. As also noted, the record makes clear that Primas who had a history of mental disorders was sent to Dublin. (ER 274-276). Notably, the government does not contend that the Marshal was telling the truth to the trial court, but contends only that the record is insufficient to demonstrate the Marshal was lying. (GB 93-94).

opportunity to have Primas make the threatening calls and to arrange the arson of the car. Whether or not Mohsen ever mentioned a desire to get away from Primas specifically, the fact that Mohsen was willing to forgo his best opportunity for witness intimidation and arson, by repeatedly asking for a transfer to a new facility (away from Primas) is powerful evidence that Mohsen was not obsessed with an escalating pattern of criminal conduct, as the government repeatedly contended at trial.

It was also powerful evidence supporting the defense of entrapment. The defense argued at trial that Mohsen was entrapped and would not have committed these crimes if he had not been coerced by Primas. (ER 525-527). The defense argued that Primas had obtained Mohsen's address to threaten Mohsen, and that Primas confirmed to the FBI that he told Mohsen he had given Mohsen's address to "Kemo," the arsonist, to threaten him. (ER 531-532). Even if Mohsen never mentioned Primas by name during his transfer requests, the fact that Mohsen repeatedly asked only to go to a new facility and away from the facility he shared with Primas, at the time that Primas was taping the witness intimidation conversations, is strong evidence that Mohsen was so afraid of Primas that he would not even dare mention Primas's name, for fear of retribution to himself and his family.

Moreover, Mohsen's counsel did make clear, if in oblique terms, that Mohsen's mental distress stemmed from Mohsen's being locked down in the cell with his cellmate for 23 hours. (ER 271-274). Primas was in the cell next to Mohsen and had told Mohsen that his cellmate was working with Primas to threaten the witnesses. (RT 1398-1406, 1557). Mohsen, thus, at least expressed a desire to get away from his "cellmate," who was working with Primas, even if Mohsen was too afraid of Primas to mention Primas by name.

This Court has previously found prejudice from failure to present similar corroborative evidence whether it stemmed from ineffective assistance of counsel due to counsel's failure to investigate and discover the evidence or from a court's erroneous exclusion of the evidence. *Hart v. Gomez*, 174 F.3d 1067, 1073 (9th Cir. 1999) (counsel failed to investigate and present records and receipts to corroborate witness's testimony that she was with defendant and there was no molestation); *see also United States v. James*, 169 F.3d 1210, 1215 (9th Cir. 1999) (because the crux of the defense rested on the defendant's credibility which could have been directly corroborated through the excluded documentary evidence, exclusion was prejudicial and more probably than not affected the verdict). Here the records of Mohsen's attempts to get away from the facility where he was housed next to Primas were strong corroborative evidence that he only went along

with Primas's talk of intimidating witnesses out of fear of Primas; it also strongly disproved the government's theory that Mohsen wanted to stay with Primas to use Primas's underworld criminal contacts to violently dissuade the witnesses. As in *Hart* and *James*, the failure to investigate and present this evidence was prejudicial ineffective assistance of counsel. This Court must vacate the phase two convictions.

X. THE COURT ERRED IN SENTENCING MOHSEN.

In his opening brief, appellant argued that the court's sentencing guideline calculation which imposed a 17-point upward adjustment for intended loss exceeding $40 million per USSG § 2F1.1(b)(1)(R) was faulty for several reasons. The government either accepts or chooses not to dispute the bulk of appellant's arguments.

The government does not dispute that where an upward adjustment so drastically increases a sentence, the facts must be proven by clear and convincing evidence. *United States v. Mezas de Jesus*, 217 F.3d 638, 642 (9th Cir. 2000). Nor does the government dispute that in a fraud case with no actual loss, as here, any computation of intended loss must be offset by the amount that the defendant was entitled to receive. *See, e.g., United States v. Rutgard*, 116 F.3d 1270, 1293-94 (9th Cir. 1997) (in Medicare fraud case, loss calculation must give defendant credit

for services rendered that were medically necessary); *United States v. Rice*, 52 F.3d 843, 848 (10th Cir. 1995) (tax fraud loss calculation must be reduced by deductions defendant was entitled to receive); *United States v. Schneider*, 930 F.2d 555, 558-559 (7th Cir. 1991) (calculation of loss for fraudulently obtaining contract must be reduced by deducting the value of the services and costs that the defendant intended to render).

The government contends, however, that the outcome of the lawsuit was unknowable, and therefore the trial court was free to use the maximum damages sought by Aptix in the lawsuit as a measure of intended fraudulent loss without giving *any* credit or deduction to Mohsen for the amount of money Aptix was legitimately entitled to recover for QuickTurn's violation of the Aptix-Meta patent. (GB 98-99 [Aptix's right to recover "simply does not matter"]). Yet, in so arguing, the government glosses over its burden of proof: "As always, the burden is on the government to establish" that Aptix was *not* entitled to *win* the lawsuit and collect the damages sought. *Rutgard*, 116 F.3d at 1293-94. At trial, the defense expert testimony was uncontradicted that the prior art alleged by QuickTurn was so dissimilar to Mohsen's '069 patent that it never could have invalidated it. (RT 1010-20).

Moreover, at sentencing, the defense offered the declaration of Alan

MacPherson who had reviewed the prosecution file for QuickTurn's '231 patent ('310 application). In the course of the '231 patent prosecution, QuickTurn's attorneys argued to the patent office that there was *no prior art* that could invalidate a hierarchical two-stage global interconnect structure (*i.e.* Mohsen's '069 patent). This was the exact *opposite* of their position in the *Aptix v. QuickTurn* lawsuit, and the *opposite* of Miller's testimony at the criminal trial where Miller claimed that QuickTurn had prior art that could defeat the Mohsen '069 patent, to justify the potential relevance of the notebooks. (ER 326-36).

The Patent Examiner, moreover, rejected QuickTurn's argument that Butts's drawing supported global connectivity; the Examiner thus rejected QuickTurn's claim in the *Aptix* lawsuit that the Butt's drawing contained this essential component of Mohsen's '069 patent. QuickTurn acquiesced in the Examiner's ruling. This acquiescence, however, was also contrary to QuickTurn's subsequent position in the *Aptix* lawsuit, and also contrary to Miller's testimony at Mohsen's criminal trial. QuickTurn's statements to the patent office in the '231 application and their acquiescence in the Examiner's decision rejecting the claim of global connectivity for the Butts patent should have *estopped and precluded them* from taking an opposite position in the *Aptix v. QuickTurn* litigation. *See Bayer Aktiengesellschaft v. Duphar Intern. Research B.V.*, 738 F.2d 1237, 1242-43 (Fed.

Cir. 1984).

MacPherson's declaration proved beyond dispute that QuickTurn's only defense to the *Aptix* lawsuit was entirely bogus and a fraud upon the court. Thus, Aptix and Meta were entitled to *win* the civil suit on the merits, and Mohsen's alterations and misstatements provided QuickTurn with a way to *avoid* a $70 million judgment. Just as the government never contradicted expert Tredennick's testimony at trial that QuickTurn's prior art claim was a red herring with no legal merit, at the sentencing hearing, the government provided *no evidence* to rebut MacPherson's declaration that QuickTurn's prior art claim was fraudulent and legally barred.

Nor does the government on appeal contest these claims; the government contends only that whether Aptix was entitled to win the suit and to legally collect $70 million damages from QuickTurn is "totally irrelevant" to the question of whether Mohsen intended to defraud QuickTurn of $70 million to which Aptix was *not* entitled. Yet, the government fails to distinguish the cases from this Court and other Circuits which hold that the legitimate right to recovery *does matter*. The government contends that appellant provided no services for which he was entitled to be paid; yet, the government does not dispute that appellant had *a valid patent*, and that QuickTurn was *infringing upon that patent*. Nor does the government

contest that QuickTurn concocted a bogus prior art defense which it was estopped and precluded from asserting and that its lawyers perjured themselves in the civil and criminal case to perpetuate this fraud.

There is nothing "unknowable" about the merits of Aptix's patent infringement suit, only an *unwillingness* by the government to do its job and litigate the issue, and a failure of the court to decide it properly. Having presented *no evidence*, the government utterly failed to meet its burden of proving by clear and convincing evidence that Mohsen and Aptix intended a loss that exceeded the amount they were legally entitled to collect. The 17-point upward adjustment for intended loss exceeding $40 million per USSG § 2F1.1(b)(1)(R) must thus be set aside. At most, the Court should have adjusted upward for the $1.3 million in attorneys fees actually attributable to the notebook alterations.

Appellant also argued that it was improper for the court to find that Mohsen intended a loss of $70 million based upon the report from Meta's damages expert, Michael Wagner, a report that Mohsen was precluded from reviewing by the protective order in the case. The government does not dispute that the civil court's protective order prohibited Wagner and Meta's and Aptix's attorneys from sharing any of the report or its contents with Mohsen, upon pain of substantial sanctions. But, the government contends nonetheless that the protective order was essentially

meaningless, and that it should be presumed that Aptix and Meta's attorneys and experts violated the court's order. If that were so, courts would have no reason to make the orders in the first place.

Without *some* proof, this Court should presume that the protective order was obeyed. *See, e.g., United States v. Sepulveda*, 15 F.3d 1161 (1st Cir. 1993) (presumption "that witnesses, like all other persons subject to court orders, will follow the instructions they receive"). Yet again, the government offered *no evidence* that anyone had violated the protective order, although Wagner was present under subpoena by the government at the hearing. Certainly, having submitted *no evidence*, the government failed to meet its burden of proving by clear and convincing evidence that Mohsen knew of and intended the loss figure reflected in Wagner's protected report.

XI. IF THIS COURT DOES NOT REVERSE OUTRIGHT, IT SHOULD REMAND FOR A RENEWED NEW TRIAL HEARING WITH UNCONFLICTED COUNSEL.

As argued in the opening brief, if this Court is not prepared to reverse all of Mohsen's phase one and phase two convictions at this time, this Court should defer decision on this appeal until after a hearing on a renewed new trial motion. As the government concedes, "[a] court confronted with and alerted to possible conflicts of interest must take adequate steps to ascertain whether the conflict warrant

separate counsel." *Wheat v. United States*, 486 U.S. 153, 160 (1988); *see* GB 106. Here, beginning on April 14, 2006 and for five months thereafter, Mohsen repeatedly brought to the court's attention the "serious" and "unresolvable" conflict he had with his appointed attorneys Locke and Balasz; a conflict which counsel acknowledged. (SER 856, 858, 863-864, 867-868).

This conflict was also brought to the court's attention by Mr. Weinberg, and later Ms. Wilder when Mohsen sought to have them substitute in as counsel. (ER 419-420, 489-492). Mr. Zilversmit reiterated the point when he and Mr. Riordan attempted to substitute in as counsel (ER 130-131); and appointed counsel Balasz again raised issue when he told the court he would not be arguing some of the issues set forth in support of a new trial motion due to his own conflict of interest. (ER 393; SER 858). The government never opposed the request for substitute counsel on the grounds that there was no conflict between Mohsen and his appointed attorneys, nor on the grounds of untimeliness. (GB 106).

On appeal the government neither denies that Mohsen and his trial counsel had a conflict, nor does the government dispute that Mohsen made a timely request for new counsel. The government contends only that the court did not have to inquire about the conflict with appointed counsel, at the hearing where Mr. Weinberg attempted to substitute. (GB 106). Whether or not the court was

required to make an inquiry into this undisputed conflict at this particular hearing is besides the point; the government concedes that the trial court had to do so at some point. Yet, the court utterly failed to do so.

The government asserts that the trial court had discretion to deny the substitution of Mr. Zilversmit and Mr. Riordan because it would have required a two month continuance of the new trial hearing. The government analogizes to this Court's decision in *United States v. Garrett*, 179 F.3d 1143, 1146 n.1 (9th Cir. 1999) (*en banc*). Yet, in *Garrett*, the defendant did not have a *conflict* with his current counsel, and thus by denying the continuance, the court did not force the defendant to proceed with conflicted counsel, as the court did in this case. Further, in *Garrett*, the case was set for trial, whereas in this case, the matter was set for new trial motion and to set sentencing; yet, even a two month continuance of the new trial motion would not have caused any delay in the sentencing date which was delayed due to the probation officer's schedule.

Finally, the government does not contend that there was any unconflicted attorney who was able to take the case and proceed on the motion in less than two months. The court's denial of the continuance to accommodate a substitution of an unconflicted counsel of choice, coupled with the court's refusal to inquire regarding the conflict with appointed counsel, denied Mohsen his right to

unconflicted counsel and to counsel of choice. *See United States v. Adelo-Gonzalez*, 268 F.3d 772, 777-780 (9th Cir. 2001); *United States v. Del Muro*, 87 F.3d 1078, 1080-81 (9th Cir. 1996) (per curiam).

In denying Mohsen, the right to counsel of choice, the trial court left Mohsen with conflicted counsel who refused to argue some of the issues Mohsen sought to raise. Moreover, the government repeatedly points to failures of Mohsen's appointed (and conflicted) counsel to raise certain issues in Mohsen's new trial motion. (GB 56, 66-67).[6] Additionally, given the government's arguments, prejudice has been demonstrated even if the error were not structural. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) (denial of right to counsel of choice is structural error). The district court's failure to inquire into Mohsen's conflict with appointed counsel and its forcing Mohsen to proceed with conflicted counsel was error, and requires remand for a new new trial motion. *See Del Muro*,

[6] In the opening brief, counsel identified at least three clear areas where trial counsel rendered ineffective assistance of counsel–failure to request instructions on patent law, failure to obtain and present evidence of Mohsen's attempts to get away from Primas, and failure to present evidence that QuickTurn's prior art defense was based on testimony contrary to the position QuickTurn had previously taken in attempting to patent the Butts drawing. The government has identified trial counsel's failure to object to the constructive amendment, failure to object to the government's vouching, failure to object to the court's response to the jury note, and failure to object to AUSA Harris's improper dual role as advocate and witness.

87 F.3d at 1080-81.

If this Court is not inclined to reverse all of Mohsen's convictions outright, it should stay decision on the appeal and remand the matter for a hearing on a renewed new trial motion with unconflicted counsel.

CONCLUSION

For all these reasons, appellant respectfully requests that this Court reverse his convictions and sentence.

Dated: June 18, 2009

Respectfully submitted,

/s Dennis P. Riordan
DENNIS P. RIORDAN
MARC J. ZILVERSMIT

ATTORNEYS FOR APPELLANT
AMR MOHSEN

CERTIFICATION REGARDING BRIEF FORM

I, Dennis P. Riordan, hereby certify that the foregoing Appellant's Reply Brief is proportionately spaced, has a typeface of 14 points, and contains 13,643 words.

Dated: June 18, 2009

/s/ Dennis P. Riordan
Dennis P. Riordan

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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.

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Jocilene Yue

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IN THE UNITED STATES OF AMERICA

FOR THE NINTH CIRCUIT COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff/Respondent, v. AMR MOHSEN, Defendant/Appellant.	)	Ninth Cir. No. 07-10059 [No. Dist. No. CR-03-0095 WBS] **APPELLANT'S MOTION FOR LEAVE TO FILE OVERSIZED REPLY BRIEF**

Defendant/Appellant Amr Mohsen, through his counsel, hereby requests that the Court issue an order permitting the filing of the accompanying proposed Appellant's Reply Brief containing 13,643 words. In support of this motion, Marc

J. Zilversmit declares under penalty of perjury as follows:

1. Dennis Riordan and I are counsel for defendant-appellant Amr Mohsen in this appeal.

2. Mr. Mohsen was convicted following a jury trial in the district court for the Northern District of California on various counts of mail fraud, perjury, contempt, conspiracy to commit arson, and related offenses.

3. The trial court sentenced Mr. Mohsen to serve 204 months in federal prison. He remains in custody pending disposition of this appeal.

4. This appeal is, in effect, not from one trial but two, both on very complex and serious charges. In a bifurcated proceeding, Mohsen was tried first on charges of altering documents and committing perjury and fraud in a civil patent suit, as well as contempt of court for allegedly attempting to flee the jurisdiction. In order to address its charges, the government had to, in effect, put on a mini-trial on the underlying patent suit, which concerned an extremely complicated invention related to computer chip circuitry.

5. The second stage of the trial involved charges that Mohsen had threatened witnesses, committed arson, and even solicited the murder of a federal judge.

6. Because this appeal is from what could have been tried as two

separate trials, and due to the complexity of the issues, this Court has previously granted motions to file an oversized Opening Brief, and an oversized Respondent's Brief. In each case, this Court ordered that the Brief be limited to 28,000 words, twice the normal word limit.

6. Normally, a Reply Brief is limited to half the number of words permitted for Appellant's Opening Brief and Respondent's Brief. *See* Fed.R.App.P. 32(a)(7)(B)(i), (ii). Because this Court has previously found good cause to file Opening and Respondent's Briefs of 28,000 words, good cause exists to file a Reply Brief of half the size of those briefs–that is, a brief of less than 14,000 words.

7. To that end, the Reply Brief in its current form has been edited down to less than 14,000 words. I believe the present length of Mohsen's Reply Brief is justified and will facilitate a correct resolution by the Court of the issues raised.

8. For all of the foregoing reasons, I respectfully request that the Court permit the filing of the proposed reply brief in its present form.

Executed this 18th day of June, 2009, at San Francisco, California.

/s/ Marc J. Zilversmit
Marc J. Zilversmit
Counsel for Defendant-Appellant
Amr Mohsen

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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.

Signature: /s/ Jocilene Yue
Jocilene Yue

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