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Ms. Molly Dwyer
Clerk, U.S. Court of Appeal for the Ninth Circuit
P.O. Box 193939
San Francisco, California 94119-3939

Re: United States v. Amr Mohsen, CA 07-10059
Filed under Fed. R. App. P. 28(j).

Dear Ms. Dwyer:

Defendant argues the trial court's failure to consult counsel regarding a jury note requires reversal regardless of prejudicial effect, citing *Musladin v. Lamarque*, 555 F.3d 830 (9th Cir. 2009). Reply Brief 4-9. *Musladin* is not binding.

Harmless error, not per se prejudice, applies to constitutional error in answering jury questions without defendant or in providing supplemental instruction or read-back testimony without consulting counsel. See *United States v. Berger*, 473 F.3d 1080, 1094, 1096 (9th Cir. 2007); *Beardslee v. Woodford*, 358 F.3d 560, 575 (9th Cir. 2004) (en banc); *Fisher v. Roe*, 263 F.3d 906, 917 (9th Cir. 2001), *overruled on other grounds*; *United States v. Franzin*, 780 F.2d 1461 (9th Cir. 1986).¹ This Court has also applied harmless error to Sixth Amendment error from the court's failure to consult counsel before responding to jury notes. *United States v. Rosales-Rodriguez*, 289 F.3d 1106, 1111 (9th Cir. 2002); *Barragan v. Devies*, 133 F.3d 1287, 1289-90 (9th Cir. 1998). *Musladin* cannot overrule prior Court precedents. *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001).

Musladin's analysis is dicta, and its facts distinguishable. Unlike the note in *Musladin*, here, the note came 10 minutes after the jury began deliberations, before all documents were given to the jury, and was a request for the indictment. The parties had already agreed the jury should not get the indictment. ER407; SER531. See *Hudson v. Jones*, 351 F.3d 212 (6th Cir. 2004) (where court told lawyers he would reinstruct jury without consulting them and counsel did not object, reinstruction was not a critical stage).

Cronic error is rare and most constitutional errors are subject to harmless error, as this

¹ Several of these cases address due process claims. The Supreme Court holds that if harmless error analysis applies to a due process claim for a particular error, it applies to a Sixth Amendment claim for the same error. *Arizona v. Fulminante*, 499 U.S. 279, 311-12 (1991).

claim should be. *See Florida v. Nixon*, 543 U.S. 175 (2004); *Fulminante*, 499 U.S. at 306-07 (collecting cases).

Sincerely,

JOSEPH P. RUSSONIELLO
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_____/s/_____
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