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August 25, 2009

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:

Please distribute this letter to Judges B. Fletcher, Kleinfeld, and Duffy, the panel scheduled to hear argument on this case August 31, 2009.

Defendant has raised the issue that 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. On August 20, 2009, we filed a 28j letter responding to this argument. We offer this letter to complete the record.

We are attaching pages 1250 through 1254 of the transcript of record (currently only pages 1250 and 1254 appear in the excerpts of record at ER205 and SER601, respectively), because they show that defendant learned of the jury's note and the court's response *before* the jury rendered its verdict, further distinguishing this case from *Musladin*. Because defense counsel had an opportunity to object before the verdict was returned, but chose not to, any error should be reviewed for harmlessness.

Sincerely,

JOSEPH P. RUSSONIELLO
United States Attorney

_____/s/_____
AMBER S. ROSEN
Assistant United States Attorney

1 Leave your notes there.

2 **MR. BALAZS:** The only other housekeeping thing is my
3 understanding is that the jury doesn't have a DVD player or
4 something to play any of the transcripts or audiotapes, right.

5 **THE COURT:** Yes, you are both familiar with Ninth
6 Circuit law, I assume, which naively prohibits the Court from
7 letting the jury play a DVD, a tape recorder or anything with
8 more moving parts than a crowbar without the defendant being
9 present in open court. I will follow that rule until the Ninth
10 Circuit realizes what they have done and changes it.

11 (Jury out at 2:59 p.m./counsel confer over
12 exhibits/exhibits taken into the jury
13 room.)

14 (Proceedings recess for jury deliberations
15 at 3:05 p.m./resume at 4:22 p.m.)

16 **THE COURT:** The defendant is present with counsel.
17 Shortly after the jury retired, I received a note
18 with the following question: "Is there a copy of the
19 indictment with the specific charges that we can see?" And I
20 wrote back the answer, "No."

21 I'm now informed orally that the jury has reached a
22 verdict. The foreperson, from the note that they sent out,
23 appears to be Juror No. 2, John Shepherd. So I'm going to
24 bring the jury in and -- however, I need to have the alternates
25 here, too.

1 **THE CLERK:** Oh.

2 **THE COURT:** As soon as the alternates are here,
3 we'll bring the jury in.

4 While we're waiting, Counsel, we need to discuss the
5 schedule because it did not occur to me, as a practical matter,
6 that the jury would reach a verdict today when I told you that
7 we would not ask you to put on any evidence on Wednesday. If,
8 in fact, we have a verdict here today, what would be your
9 suggestion?

10 **MS. HARRIS:** Your Honor, we had not expected this
11 either. We had thought it would probably be tomorrow and then
12 the jury would want a day's break. And that would be
13 convenient.

14 We would ask the Court if we would be permitted to
15 start on Monday. If not, we will be prepared to start on
16 Wednesday.

17 **THE COURT:** What would your suggestion be,
18 Mr. Balazs and Mr. Locke?

19 **MR. BALAZS:** I think it's my preference to start on
20 Monday, but either way is --

21 **THE COURT:** You are both telling me we are ahead of
22 schedule, and so that doesn't bother me. I just don't want the
23 jury to lose momentum.

24 **MS. HARRIS:** Okay, whatever the Court --

25 **THE COURT:** Well, I mean, my only concern is that

1 the jury might --

2 **MR. LOCKE:** Judge, we read it as the Government's
3 case on the next part of the case is three days.

4 **MS. HARRIS:** It's going to be shorter, I don't know
5 if it's going to be three days.

6 **THE COURT:** Well, then, let's come in on Monday. I
7 want to meet with you at some point in time and go over,
8 especially if it's going to be a short trial, go over the jury
9 instructions, first, so that I can give them the preliminary
10 instructions. I do at the beginning so they know what the
11 issues are, and then secondly, so that I'll be ready when you
12 go to the verdict.

13 So the other jurors are on their way down?

14 **THE CLERK:** They're on their way.

15 **MR. LOCKE:** We do the jury instructions Wednesday
16 morning, Judge?

17 **THE COURT:** Can't you do them tomorrow?

18 **MS. HARRIS:** I haven't prepared them yet. I mean, I
19 will --

20 **THE COURT:** Maybe we can do them after the --

21 **MR. LOCKE:** Tomorrow afternoon is fine.

22 (Alternate jurors enter the courtroom.)

23 **THE COURT:** If you'll come in, ladies and gentlemen,
24 and take your original seats here.

25 I have been told that the jury has a verdict, so we

1 are going to have the clerk bring the jury in.

2 (Jury in at 4:24 p.m.)

3 **THE COURT:** The jurors are all present.

4 Mr. Shepherd, are you the foreperson of the jury?

5 **FOREPERSON SHEPHERD:** Yes, I am.

6 **THE COURT:** The marshal has told me that you advised
7 him the jury has reached a verdict; is that correct?

8 **FOREPERSON SHEPHERD:** Yes, we have.

9 **THE COURT:** Would you hand the verdict to the clerk,
10 please.

11 (Court reviews verdict.)

12 **THE COURT:** The verdict form appears to be in order.

13 Mr. Butler, will you read this verdict and ascertain
14 if it is the true verdict of this jury.

15 **THE CLERK:** I will, Your Honor.

16 Ladies and gentlemen of the jury, listen to your
17 verdict as it will stand recorded.

18 "We, the jury, in the above entitled cause on the
19 following count of the Superseding Indictment returned
20 January 10th, 2006, find the defendant, Amr Mohsen, as follows:

21 "On Count 1, guilty" -- excuse me, "on count 1,
22 conspiracy, guilty.

23 "On Count 2, perjury, testimony on page 339 of the
24 April 29th, 1999 deposition, guilty.

25 "On Count 3, perjury, testimony on page 349 of

1 April 29th, 1999 deposition, guilty.

2 "On Count 4, perjury, testimony at the February 18th
3 2000 deposition, guilty.

4 "On Count 10, subornation of perjury, guilty.

5 "On Count 11, mail fraud, September 25th, 1998,
6 guilty.

7 "On Count 12, mail fraud, March 1st, 1999, guilty.

8 "On Count 13, mail fraud, March 4th, 1999, guilty.

9 "On Count 14, mail fraud, June 4th, 1999, guilty.

10 "On Count 15, mail fraud, January 4th, 2000, guilty.

11 "On Count 16, mail fraud, March 1st, 2000, guilty.

12 "On Count 17, mail fraud, March 2nd, 2000, guilty.

13 "On Count 18, mail fraud, June 1st, 2000, guilty.

14 "On Count 19, obstruction of justice, guilty.

15 "On Count 20, contempt of court, guilty."

16 It is dated February 27th, 2006, signed by
17 foreperson John Shepherd.

18 **THE COURT:** Mr. Shepherd, is the verdict as just
19 read by the clerk the unanimous verdict of the jury?

20 **THE WITNESS:** Yes, it is.

21 **THE COURT:** Does either side wish to have the jury
22 polled?

23 **MR. BALAZS:** No, Your Honor.

24 **MS. HARRIS:** No, Your Honor.

25 **THE COURT:** The verdict as the jury as read shall