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

PETITION FOR REHEARING AND REHEARING EN BANC

Dennis P. Riordan, Esq. (SBN 69320)
Donald M. Horgan, Esq. (SBN 121547)
Riordan & Horgan
523 Octavia Street
San Francisco, CA 94102
Telephone: (415) 431-3472

Marc. J. Zilversmit (SBN 132057)
523 Octavia Street
San Francisco, CA 94102
Telephone: (415) 431-3472

Attorneys for Defendant-Appellant
AMR MOHSEN

TABLE OF CONTENTS

STATEMENT PURSUANT TO FED. R. APP. P. 35(b) 1

ISSUES PRESENTED 1

PROCEDURAL CONTEXT 2

ARGUMENT 2

I. THE PANEL'S OPINION HOLDING HARMLESS THE VIOLATION OF DEFENDANT'S RIGHT TO COUNSEL AT A CRITICAL STAGE OF HIS TRIAL CREATES A CLEAR CONFLICT WITH THREE RECENT DECISIONS OF THIS CIRCUIT 2

II. DECISIONS PRIOR TO 2006 CONCERNING STRUCTURAL ERROR IN THE CONTEXT OF SIXTH AMENDMENT VIOLATIONS MUST BE RECONSIDERED IN LIGHT OF INTERVENING SUPREME COURT AUTHORITY 10

III. REHEARING OR REHEARING EN BANC SHOULD BE GRANTED BECAUSE THE PANEL'S HOLDING THAT EXPERT TESTIMONY ON THE PATENT LAW ISSUES IN THE CIVIL LAWSUIT COULD SUBSTITUTE FOR INSTRUCTIONS BY THE TRIAL COURT IS AT ODDS WITH THE HOLDINGS OF THIS AND OTHER CIRCUITS 13

A. The Panel Erred In Applying the Plain Error Standard of Review 13

B. The Panel's Decision Is At Odds With Prior Decisions Of This Court And With The Decisions Of Other Circuits 14

CONCLUSION 18

TABLE OF AUTHORITIES

CASES

Frantz v. Hazey,
533 F.3d 724 (9th Cir. 2008) 3, 5, 8, 10

McKaskle v. Wiggins,
465 U.S. 168 (1984) 12

Musladin v. Lamarque,
555 F.3d 830 (9th Cir. 2009) 3, 4, 5, 6

People v. Hernandez,
178 Cal. App. 4th 1510 (2009) 12

Roe v. Flores-Ortega,
528 U.S. 470 (2000) 4

Specht v. Jensen,
853 F.2d 805 (10th Cir. 1988) 15

United States v. Barragan-Devis,
133 F.3d 1287 (9th Cir.1998) 3

United States v. Benford,
574 F.3d 1228 (2009) 6

United States v. Cronic,
466 U.S. 648 (1984) 4

United States v. Frazin,
780 F.2d 1461 (9th Cir. 1986) 10

United States v. Gonzalez-Lopez,
548 U.S. 140 (2006) 10, 11, 12

Table of Authorities continued

United States v. Jones,
909 F.2d 533 (D.C. Cir. 1990) 17

United States v. Lake,
472 F.3d 1247 (10th Cir. 2007) 16

United States v. Mohsen,
587 F.3d 1028 (9th Cir. 2009) passim

United States v. Pree,
408 F.3d 855 (7th Cir. 2005) 17

United States v. Price,
8 Fed.Appx. 849, 2001 WL 488896 (9th Cir. 2001) 14

United States v. Rosales-Rodriguez,
289 F.3d 1106 (9th Cir. 2002) 3, 10

United States v. Scholl,
166 F.3d 964 (9th Cir. 1999) 15

United States v. Woods,
335 F.3d 993 (9th Cir. 2003) 17

United States v. Zipkin,
729 F.2d 384 (6th Cir. 1984) 16

STATEMENT PURSUANT TO FED. R. APP. P. 35(b)

Pursuant to Federal Rule of Appellate Procedure 35(b), petitioner Amr Mohsen hereby petitions for rehearing and rehearing en banc of the published panel decision in this matter. (*See* Exhibit A) That decision, filed on November 25, 2009, affirmed petitioner's convictions for multiple offenses following a highly unusual bifurcated trial proceeding in which the charges against petitioner were decided by one jury in two phases. *See United States v. Mohsen,* 587 F.3d 1028 (9th Cir. 2009). En banc review is necessary both to maintain uniformity of this Court's decisions and to resolve questions of exceptional importance.

ISSUES PRESENTED

I. SHOULD THE COURT REHEAR EN BANC THE PANEL'S DECISION THAT A VIOLATION OF THE RIGHT TO COUNSEL IN A TRIAL JUDGE'S CONSIDERATION OF A NOTE FROM A DELIBERATING JURY WAS HARMLESS ERROR, A HOLDING IN CONFLICT WITH THIS CIRCUIT'S "STRUCTURAL ERROR" DECISIONS IN *MUSLADIN, BENFORD* AND *FRANTZ*?

II. SHOULD REHEARING BE GRANTED AS TO THE PANEL'S DECISION THAT EXPERT TESTIMONY MAY SUBSTITUTE FOR REQUIRED INSTRUCTIONS ON THE ISSUE OF MATERIALITY, A HOLDING IN CONFLICT WITH DECISIONS OF THIS AND OTHER CIRCUITS?

PROCEDURAL CONTEXT

Petitioner Mohsen was charged with fraud and perjury charges which stemmed from his alteration of dates in his engineering notebooks, and misstatements about those alterations in depositions in a civil trial between Mohsen's company, Aptix, and a rival company, QuickTurn. Mohsen contended that, under relevant patent law principles, the alterations were immaterial. He was also charged with attempting to dissuade witnesses from testifying in his trial; Mohsen contended that he was entrapped into doing so by an aggressive government informant.

In the unusual procedure adopted by the trial court herein, the fraud and perjury charges were bifurcated from the witness tampering charges, and tried before the same jury in two phases. Defense objections to this unprecedented procedure were overruled.

ARGUMENT

I. THE PANEL'S OPINION HOLDING HARMLESS THE VIOLATION OF DEFENDANT'S RIGHT TO COUNSEL AT A CRITICAL STAGE OF HIS TRIAL CREATES A CLEAR CONFLICT WITH THREE RECENT DECISIONS OF THIS CIRCUIT

During deliberations in phase one of the bifurcated trial herein, the jury sent the court a note asking whether there is "a copy of the indictment with the specific

charges that we can see." (ER 693, 205; Dkt. 519) The trial court wrote "no" on the note, and sent it back to the jury without consulting the parties. The court informed the parties about the note only after the jury reached verdicts on the phase one charges.

A district court commits constitutional error if it fails to consult with counsel before replying to a jury's note received during deliberations.

> Because of the delicate nature of such mid-deliberation inquiries, we have recognized that defendants or their attorneys have a due process right to be present in conferences when jurors' notes are discussed, *United States v. Barragan-Devis,* 133 F.3d 1287, 1289 (9th Cir.1998), or "when a trial court prepares a supplemental instruction to be read to a deliberating jury," *United States v. Rosales-Rodriguez,* 289 F.3d 1106, 1110 (9th Cir. 2002).

Frantz v. Hazey, 533 F.3d 724, 743 (9th Cir. 2008) (en banc)

Under *Musladin v. Lamarque*, 555 F.3d 830 (9th Cir. 2009), *Frantz* error during a federal criminal trial must be deemed structural in nature, requiring automatic reversal on direct appeal. *Id.* at 837-843. In *Musladin*, a federal habeas corpus action, the state trial court responded to a jury note during deliberations without consulting counsel, and the jury returned its verdict shortly thereafter. *Id.* at 835. The Court first considered what standard of review would apply *if* the state court's consideration of the jury's note were found to constitute a critical stage of

the petitioner's trial.

Musladin began by noting that *United States v. Cronic*, 466 U.S. 648 (1984) "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) and by observing that the Supreme Court had reaffirmed the *Cronic* rule in more recent decisions. *Id*. at 838 (quoting *Mickens v. Taylor,* 535 U.S. 162, 166 (2002) ("We have spared the defendant the need of showing probable effect upon the outcome, and have simply presumed such effect, where assistance of counsel has been denied entirely or during a critical stage of the proceeding. When that has occurred, the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary.")); *Roe v. Flores-Ortega,* 528 U.S. 470, 483 (2000) ("In *Cronic, Penson*, and *Robbins,* we held that the complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice . . . ."). The *Musladin* panel concluded that "[b]ecause *Cronic* is directly on point and has not been overruled by the Supreme Court, its rule requiring automatic reversal where a defendant was denied counsel at a 'critical stage' is binding on this court." *Id*. at 838. Any different conclusion would be "contrary to . . . clearly established Federal law." *Id*. at 838 n.6.

Turning to the question of whether consideration of the jury note was a critical stage of the state court trial, *Musladin* held that under this Circuit's law, specifically *Frantz*, it indeed was.

> 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.*

555 F.3d at 840 (emphasis added).

> Counsel is most acutely needed before a decision about how to respond to the jury is made, because it is the substance of the response-or the decision whether to respond substantively or not-that is crucial. *See Frantz,* 533 F.3d at 743 ("The defendant's or attorney's presence may also be an important opportunity 'to try and persuade the judge *to* respond.")

Id. at 842.

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." *Id.*

Under the AEDPA's deferential review of a state court's judgment, however, 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 that had already been discussed with counsel, an event which some other federal courts had found not to constitute a critical stage of a trial, *Musladin* could not find on habeas that the state court opinion to the same effect was "objectively unreasonable." *Id.* at 842-843. *Musladin* made clear, however, that in a direct appeal such as Mohsen's, this Circuit must find structural error under *Chronic* and reverse. "[W]ere 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.*

This Court's decision in *United States v. Benford*, 574 F.3d 1228 (2009) affirmed the two principles crucial to the present issue: (1) "consideration of a jury note" is a critical stage of a trial requiring the presence of counsel (*id*. at 1232, citing *Frantz,* 533 F.3d at 743); and the deprivation of the right to counsel at a critical stage cannot be deemed harmless, as "prejudice is presumed."

> [A]lthough most ineffective assistance of counsel claims require courts to conduct a prejudice inquiry, *see generally Strickland v. Washington,* 466 U.S. 668 [] (1984), a complete denial of counsel at a critical stage does not. *See Musladin v. Lamarque,* 555 F.3d 830, 836 (9th Cir.2009)

Id. at 1232 (parallel citations omitted).

In this case, it is undisputed that during the jury's deliberations, the district court received, considered, and responded to a jury note without informing the defendant or his counsel of the note or consulting with them concerning it. The panel agreed that the district judge committed "trial error" (*Mohsen*, 587 F.3d at 1032), but deemed it harmless. The panel's affirmance necessarily rests on a finding either that (a) the lower court's consideration of the note was not a critical stage of the trial, and the court's error therefore was not of federal constitutional dimension; or (b) although of constitutional dimension, the error was not structural in nature, and thus a showing of prejudice was required. Either reading of the panel's opinion creates a profound conflict in this Circuit's jurisprudence.

That the panel found the receipt, consideration, and response to the jury note not to be a "critical stage" is suggested by the absence in its opinion of that legal term of art, as well as by the panel's comment that "[u]nlike the communication in *Musladin*, the jury note here was not a question about the law governing the jury's deliberations." *Mohsen*, 587 F.3d at 1032. Likewise, the panel attempts to distinguish *Frantz*, on the ground that it "concerned a note from the jury about evidence that had not been admitted at trial." *Id.* But *Frantz* clearly states that: "Because of the delicate nature of such mid-deliberation inquiries, we have recognized that defendants or their attorneys have a due process right to be present

in conferences when *jurors' notes* are discussed," 533 F.3d at 743 (emphasis added); the right is not limited, as the panel asserts, to jury notes raising "a question about the law governing the jury's deliberations" or which "concern[] a note from the jury about evidence that had not been admitted at trial." 587 F.3d at 1032. *See Frantz*, 533 F.3d at 746 (Kozinski, CJ, concurring) ("Consideration 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," citing *McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984)). Furthermore, *Musladin and Benford,* in citing *Frantz,* make no reference to the content of jury notes as a factor determinative of whether consideration of such notes by a trial court constitutes a critical stage of a trial.

Moreover, the panel's attempt to suggest that the note in this case did not concern the law or evidence at trial is wholly untenable; the jury's note evidenced its confusion concerning, and need for clarification of, a most important issue: the "specific charges" which jurors had to consider and decide during the first phase of the trial. During the phase one deliberations, jurors were barred from considering the phase two charges, which included an inflammatory solicitation of murder charge, of which petitioner was eventually acquitted. But the prosecutor improperly asserted in his phase one closing argument that "the truth is that the defendant is guilty of *each and every charge in the indictment*" (ER 203)

(emphasis added). *Mohsen*, 587 F.3d at 1033. Furthermore, the prosecutor had made an improper argument in closing that conduct not alleged in the indictment could supply a basis for finding materiality or fraud. (*See* ER 197-200 [argument to convict based upon Lobo notes])

The trial court's consideration of the jury note asking about the "specific charges" during deliberations on the phase one charges was no less a critical stage of Mohsen's trial than was the case in *Frantz* and *Musladin*. The panel's opinion on this point simply cannot be reconciled with this Court's opinions in those cases, nor can it be reconciled with this Court's decision in *Benford*, which reaffirmed that consideration of a jury note is a critical stage.

Alternatively, if the panel did conclude that the failure of the trial court to confer with the defendant and counsel concerning the note was a violation of Mohsen's rights to due process and the assistance of counsel at a critical stage of his trial, then its holding that such error can be deemed harmless is in stark conflict with those of *Musladin* and *Benford*. Rehearing en banc is thus required.

II. DECISIONS PRIOR TO 2006 CONCERNING STRUCTURAL ERROR IN THE CONTEXT OF SIXTH AMENDMENT VIOLATIONS MUST BE RECONSIDERED IN LIGHT OF INTERVENING SUPREME COURT AUTHORITY

As the panel opinion notes, three opinions of this Circuit, the latest of which

issued in 2002, suggest that a district court's failure to consult counsel concerning a jury note received during deliberations may be harmless error. *Mohsen*, 587 F.3d at 1031-1032, citing *United States v. Barragan-Devis,* 133 F.3d 1287, 1289 (9th Cir. 1998); *United States v. Rosales-Rodriguez,* 289 F.3d 1106, 1110 (9th Cir. 2002); *United States v. Frazin,* 780 F.2d 1461, 1469 (9th Cir. 1986). To the extent that those opinions hold that the denial of counsel at a critical stage of a trial can be deemed harmless, however, those holdings have been called into question by an intervening decision of the Supreme Court in *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), as well as by this Court's en banc decision in *Frantz*, 533 F.3d 724, and by *Musladin* and *Benford*, all of which followed *Gonzalez-Lopez*.

In *Gonzalez-Lopez*, the Supreme Court was called upon to decide whether a defendant erroneously denied his right to counsel of choice had to demonstrate that his resulting trial and conviction were unfair. Justice Scalia, writing for the majority, held that the Sixth Amendment violation required reversal per se. The *Gonzalez-Lopez* dissenters relied on the fact that, while not represented by counsel of choice, the defendant apparently had been ably represented by appointed counsel. In this view, since presumptively the defendant had received a fair trial, there was no reason to reverse his conviction absent some showing of prejudice caused by the erroneous denial of his counsel of choice. Justice Scalia began by

rejecting the notion that the function of the right to counsel is simply to ensure a fair trial and verdict.

> [T]he Sixth Amendment right to counsel of choice . . . commands, not that a trial be fair, but that a particular guarantee of fairness be provided–to wit, that the accused be defended by the counsel he believes to be best. "The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause." *Strickland, supra,* at 684-685, 104 S.Ct. 2052. In sum, the right at stake here is the right to counsel of choice, not the right to a fair trial; and that right was violated because *the deprivation of counsel was erroneous. No additional showing of prejudice is required to make the violation "complete."*

Gonzalez-Lopez, 548 U.S. at 146 (emphasis added).

Justice Scalia then rebutted the dissent's contention that only "right to counsel" errors which render a trial "fundamentally unfair" can be deemed so serious as to dispense with harmless error analysis.

> [A]s we have done in the past, we rest our conclusion of structural error upon the difficulty of assessing the effect of the error. See *Waller v. Georgia,* 467 U.S. 39, 49, n. 9 [] (1984) (violation of the public-trial guarantee is not subject to harmlessness review because "the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance"); *Vasquez v. Hillery,* 474 U.S. 254, 263 [] (1986) ("[W]hen a petit jury has been selected upon improper criteria or has been exposed to prejudicial publicity, we have required reversal of the conviction because the effect of the violation cannot be

> ascertained"). The dissent would use "fundamental unfairness" as the sole criterion of structural error, and cites a case in which that was the determining factor, see *Neder v. United States,* 527 U.S. 1, 9 [] (1999) (quoted by the dissent, *post,* at 2569). But this has not been the only criterion we have used. In addition to the above cases using difficulty of assessment as the test, we have also relied on the irrelevance of harmlessness, see *McKaskle v. Wiggins,* 465 U.S. 168, 177, n. 8 [] (1984) ("Since the right to self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis").

Gonzalez-Lopez, 548 U.S. at 148-149 n.4 (parallel citations omitted). *See also People v. Hernandez*, 178 Cal.App.4th 1510, 101 Cal.Rptr.3d 414 (2009) (citing, *inter alia*, *Gonzalez-Lopez*, Court of Appeal finds structural error requiring automatic reversal where trial judge directed defense counsel to refrain from discussing with his client one particular document provided in discovery concerning a key prosecution witness).

Gonzalez-Lopez undermines any contention that a denial of the right to counsel during a critical stage of trial can be harmless. The cases cited by the panel as authority for its finding of harmless error are, like the panel opinion itself, also in conflict with *Frantz, Musladin*, and *Benford*. En banc review is necessary both to maintain uniformity of this Court's decisions and to resolve a question of exceptional importance.

III. REHEARING OR REHEARING EN BANC SHOULD BE GRANTED BECAUSE THE PANEL'S HOLDING THAT EXPERT TESTIMONY ON THE PATENT LAW ISSUES IN THE CIVIL LAWSUIT COULD SUBSTITUTE FOR INSTRUCTIONS BY THE TRIAL COURT IS AT ODDS WITH THE HOLDINGS OF THIS AND OTHER CIRCUITS

A. The Panel Erred In Applying the Plain Error Standard of Review

At the outset, Mohsen asks the panel to reconsider its decision to review the instructional issue only for plain error, or for the Court to rehear that issue en banc. *Mohsen*, 587 F.3d at 1030. The panel states that because Mohsen did not propose an instruction on patent law at trial, the claim must be reviewed for plain error. *Id.* (citing *United States v. McCormick*, 72 F.3d 1404, 1409 (9th Cir. 1995) and *United States v. Krasn*, 614 F.2d 1229, 1235 (9th Cir. 1980))

Here, of course, during arguments on the Rule 29 motion and jury instructions, Mohsen personally argued to the court, that the court was required to instruct the jury on the underlying patent law as part of the materiality issue in the fraud and perjury charges. (ER 219, 221; *see generally* ER 216-228) Mohsen specifically cited the trial court to this Court's decision in *United States v. Price*, 8 Fed.Appx. 849, 2001 WL 488896 (9th Cir. 2001). (ER 221) In *Price*, this Court approved a trial court's instructions on the law regarding eligibility for social security benefits as part of defining materiality in a social security benefits case,

"given that the jury's task was to determine whether Price's statements could have influenced the SSA's decision." *Price*, 2001 WL 488896, at *2.

Mohsen thus preserved the error for review under the formulation of the plain error test set forth in cases cited by the panel, either because his comments should be considered a request for instruction or an objection to the failure to include such instructions.

B. The Panel's Decision Is At Odds With Prior Decisions Of This Court And With The Decisions Of Other Circuits

As the government conceded on appeal: "Defendant is right that for purposes of determining materiality, the jury needed to know some patent law." (Government Brief ["GB"] 40) The government also agreed "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) It is undisputed that the trial court gave no instructions on patent law. Nonetheless, the panel's decision found no error, stating that expert testimony could and did provide the jury with a sufficient understanding of patent law to convict Mohsen. *Mohsen*, 587 F.3d at 1030.

The panel's ruling that expert testimony may substitute for instructions from the trial court on the underlying law related to materiality is at odds with this Court's own precedents and those of other Circuits.

> "[I]t is well settled that the judge instructs the jury in the law. Experts 'interpret and analyze factual evidence. They do not testify about the law because the judge's special legal knowledge is presumed to be sufficient, and it is the judge's duty to inform the jury about the law that is relevant to their deliberations.'"

United States v. Scholl, 166 F.3d 964, 973 (9th Cir. 1999) (quoting *United States v. Brodie*, 858 F.2d 492, 496-497 (9th Cir. 1988) [quoting *United States v. Curtis*, 782 F.2d 593, 599 (6th Cir. 1986)]).

The Courts of Appeals have repeatedly held that it is error to permit experts to explain relevant law to the jury. In *Specht v. Jensen*, 853 F.2d 805, 807-810 (10th Cir. 1988) (en banc), after a thorough analysis of Federal Rules of Evidence 702, 704 and the opinions of several federal circuits, the Tenth Circuit, sitting en banc, held that an expert's testimony is only proper under Rule 702, "if the expert does not attempt to define the legal parameters within which the jury must exercise its fact-finding function." *Id.* at 809-810. By contrast, expert testimony that seeks to direct the jury's understanding of the legal standards upon which their verdict must be based . . . cannot be allowed." *Id.* at 810.

This universally recognized prohibition on permitting experts to define the law relevant to a jury's deliberations imposes upon the trial court the concomitant duty to do so, which cannot be delegated to expert witnesses. Thus, in *United*

States v. Lake, 472 F.3d 1247(10th Cir. 2007), the Tenth Circuit made clear that where (as conceded by the Government in Mohsen's case) a jury's understanding of an element of an offense depends upon understanding an underlying legal obligation or legal framework, failure to instruct the jury on the underlying applicable law is reversible error. *Id.* at 1263. Lake was charged with failure to properly complete Director and Officer forms, charges as to which the intent element depended in part upon the SEC reporting requirements. The lack of instructions on those same SEC reporting requirements left the defense to rely upon expert testimony which the government attacked as biased. *Id.* at 1262. The Court held that "[i]t was error for the district court to abdicate its responsibility in this regard and let opposing counsel argue their competing theories, especially when the defendants' view of the law was the correct one." *Id.* at 1263.

Likewise, in *United States v. Zipkin*, 729 F.2d 384 (6th Cir. 1984), in a case charging an attorney with fraud, the Sixth Circuit held it was error to permit a bankruptcy judge to testify regarding an attorney's duties under bankruptcy law:

> It is the function of the trial judge to determine the law of the case. It is impermissible to delegate that function to a jury through the submission of testimony on controlling legal principles.

Id. at 387.

Similarly, in *United States v. Jones*, 909 F.2d 533, 538 (D.C. Cir. 1990) the lower court correctly instructed on the state law crimes that were the predicate acts of a Travel Act violation, but also instructed the jury that the definitions of state offenses were not binding on the jury's determination. The *Jones* Court reversed because the failure of the trial court to give binding instructions on the underlying law relieved the government of its "duty to prove beyond a reasonable doubt one or more of the facts necessary to constitute an offense under the Travel Act." *Jones*, 909 F.2d at 538. *See also United States v. Woods*, 335 F.3d 993, 1000-01 (9th Cir. 2003) (instruction taking judicial notice of a regulation that created a duty was proper where finding of materiality depended in part on duty described in regulation).

The panel decision here is at odds with these decisions of other circuits, as well as this Court's own prior holdings. The only case cited by the panel, *United States v. Pree*, 408 F.3d 855 (7th Cir. 2005), is entirely distinguishable.[1] Even if it were not, it would be in conflict with the law of this Circuit (and numerous others),

---

[1] In *Pree*, unlike here, there was no dispute that the expert's testimony accurately and completely explained the law on the subject. (See Appellant's Opening Brief 37-40, Appellant's Reply Brief 17-19) Nor did the trial court in *Pree* instruct the jury that consideration of the experts' opinions was not the appropriate inquiry, as the trial court did in this case. Thus *Pree* does not support the panel's decision here.

which the panel was required to follow.

This panel should grant rehearing to reconsider the instructional issue, or the Court should rehear this case en banc, in order to settle the conflict between the panel's decision here and the prior holdings of this Court and the decisions of other Circuits.

CONCLUSION

For all these reasons, petitioner respectfully requests that this Court grant rehearing or rehearing en banc and reverse his convictions.

Dated: January 8, 2010

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 brief is proportionately spaced, has a typeface of 14 points, and contains 4,167 words.

Dated: January 8, 2010

/s/ Dennis P. Riordan
Dennis P. Riordan

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the
Appellate CM/ECF System

I hereby certify that on January 8, 2010 , I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

Signature: /s/ Jocilene Yue
Jocilene Yue

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the
Appellate CM/ECF System

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

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature: ____________________

EXHIBIT A

United States Court of Appeals,
Ninth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Amr MOHSEN, Defendant-Appellant.
No. 07-10059.

Argued and Submitted Aug. 31, 2009.
Filed Nov. 25, 2009.

Background: Defendant was convicted in the United States District Court for the Northern District of California, William B. Shubb, J., of conspiracy, perjury, subornation of perjury, mail fraud, obstruction of justice, contempt of court, witness tampering, and solicitation to commit arson. Defendant appealed.

Holdings: The Court of Appeals held that:
(1) jury instruction on substantive patent law was not warranted;
(2) trial judge's error in failing to consult the parties before denying the jury's request to see the indictment was harmless;
(3) marital privilege was not applicable so as to bar admission of note found in defendant's jail cell that had his wife's name at the top;
(4) search of jail cell did not violate *Massiah v. United States*;
(5) evidence was sufficient to support conviction of contempt of court; and
(6) defendant was not deprived of his right to counsel of his choice.

Affirmed.

West Headnotes

[1] Perjury 297 ⚷37(1)

297 Perjury
297II Prosecution
297k35 Trial
297k37 Instructions
297k37(1) k. In general. Most Cited Cases

Postal Service 306 ⚷50

306 Postal Service
306III Offenses Against Postal Laws
306k50 k. Trial and review. Most Cited Cases
Jury instruction on substantive patent law was not warranted in prosecution for perjury and mail fraud, where trial judge instructed jury on materiality element of perjury and fraud charges, and jury heard sufficient unchallenged expert testimony regarding the substance of patent law and the underlying dispute.

[2] Criminal Law 110 ⚷620(4)

110 Criminal Law
110XX Trial
110XX(A) Preliminary Proceedings
110k620 Joint or Separate Trial of Separate Charges
110k620(3) Severance, Relief from Joinder, and Separate Trial in General
110k620(4) k. Discretion of court. Most Cited Cases
The test for abuse of discretion for failure to sever a trial is whether a joint trial was so manifestly prejudicial as to require the trial judge to exercise his discretion in but one way, by ordering a separate trial.

[3] Criminal Law 110 ⚷1174(1)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1174 Conduct and Deliberations of Jury
110k1174(1) k. In general. Most Cited Cases
Trial judge's error in failing to consult the parties before

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

denying the jury's request to see the indictment was harmless in prosecution for perjury and fraud, as the parties had previously agreed not to give the jury the indictment.

[4] Contempt 93 ⚷30

93 Contempt
93II Power to Punish, and Proceedings Therefor
93k30 k. Nature and grounds of power. Most Cited Cases

Grand Jury 193 ⚷36.5(1)

193 Grand Jury
193k36 Witnesses and Evidence
193k36.5 Contempt
193k36.5(1) k. In general. Most Cited Cases
Both the trial court and the grand jury have power to bring contempt proceedings for violation of a release condition. 18 U.S.C.A. §§ 401, 3148.

[5] Privileged Communications and Confidentiality 311H ⚷70(2)

311H Privileged Communications and Confidentiality
311HII Family Privileges
311HII(B) Spousal Privilege
311Hk68 Mode or Form of Communications
311Hk70 Writings and Documents
311Hk70(2) k. Letters and correspondence. Most Cited Cases
Marital privilege was not applicable so as to bar admission in prosecution for contempt of court of a note found in defendant's jail cell that had his wife's name at the top and no mailing address, since there was no evidence that defendant intended to deliver the message to his wife.

[6] Criminal Law 110 ⚷1721

110 Criminal Law
110XXXI Counsel
110XXXI(B) Right of Defendant to Counsel
110XXXI(B)2 Stage of Proceedings as Affecting Right
110k1721 k. Investigative proceedings generally; witness interviews; search or surveillance; eavesdropping and use of informers. Most Cited Cases

Criminal Law 110 ⚷1852

110 Criminal Law
110XXXI Counsel
110XXXI(B) Right of Defendant to Counsel
110XXXI(B)11 Deprivation or Allowance of Counsel
110k1852 k. Particular cases in general. Most Cited Cases
Search of defendant's jail cell pursuant to warrant to search for evidence of witness tampering, solicitation of a crime of violence, and obstruction of justice did not violate *Massiah v. United States*, which prohibited the government from deliberately eliciting incriminating statements from a defendant once his right to counsel attached, even though police inadvertently found evidence relating to a contempt charge; warrant was justified by affidavit that noted statements made to undercover informant concerning illegal activities with which defendant had not yet been charged, and the objects to be searched for and seized all related to potential criminal acts that had not yet been charged. U.S.C.A. Const.Amend. 6.

[7] Contempt 93 ⚷60(3)

93 Contempt
93II Power to Punish, and Proceedings Therefor
93k60 Evidence
93k60(3) k. Weight and sufficiency. Most Cited Cases
Evidence was sufficient to support finding that defendant applied for a new passport to flee the country in violation of his conditional pre-trial release, as required to support conviction of contempt of court; a note found in defendant's jail cell made reference to an application for an Egyptian passport, defendant made reservations for overseas travel requiring a passport, he went to the consulate, and he had copies of the necessary documents to obtain a passport in his car.

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

[8] Criminal Law 110 1171.3

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1171 Arguments and Conduct of Counsel
110k1171.3 k. Comments on evidence or witnesses, or matters not sustained by evidence. Most Cited Cases

Criminal Law 110 2091

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2088 Matters Not Sustained by Evidence
110k2091 k. Personal knowledge, opinion, or belief of counsel. Most Cited Cases
Prosecutor's rhetorical use of the phrase “I think” in improperly vouching during closing argument did not constitute reversible error.

[9] Attorney and Client 45 22

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k22 k. Acting in different capacities; counsel as witness. Most Cited Cases

Criminal Law 110 2098(5)

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2093 Comments on Evidence or Witnesses
110k2098 Credibility and Character of Witnesses; Bolstering
110k2098(5) k. Credibility of other witnesses. Most Cited Cases
Prosecutor's conduct did not constitute vouching or violate the advocate-witness rule, where she did not suggest that her questions or closing argument were based on private knowledge or anything other than the evidence presented at trial.

[10] Habeas Corpus 197 275.1

197 Habeas Corpus
197I In General
197I(C) Existence and Exhaustion of Other Remedies
197k275 Particular Issues and Problems
197k275.1 k. In general. Most Cited Cases
Ineffective assistance claims are ordinarily left for collateral habeas proceedings due to the lack of a sufficient evidentiary record as to what counsel did, why it was done, and what, if any, prejudice resulted. U.S.C.A. Const.Amend 6.

[11] Criminal Law 110 1828(1)

110 Criminal Law
110XXXI Counsel
110XXXI(B) Right of Defendant to Counsel
110XXXI(B)9 Choice of Counsel
110k1824 Discharge by Accused
110k1828 Particular Cases
110k1828(1) k. In general. Most Cited Cases
District court did not deprive defendant of his right to counsel of his choice when it rejected his choice of substitute counsel due to the substitute attorney's conflict of interest. U.S.C.A. Const.Amend. 6.

[12] Criminal Law 110 1855

110 Criminal Law
110XXXI Counsel
110XXXI(B) Right of Defendant to Counsel
110XXXI(B)11 Deprivation or Allowance of Counsel
110k1855 k. Denial of continuance; time for preparation. Most Cited Cases
District court did not deprive defendant of his right to counsel of his choice by refusing to grant a three month continuance requested by defendant's second choice of

substitute counsel, even though the attorney decided not to take the appointment because of the court's decision; court did not deny the substitution of the counsel chosen, but exercised its discretion to deny the continuance requested by that attorney. U.S.C.A. Const.Amend. 6.

[13] Criminal Law 110 586

110 Criminal Law
110XIX Continuance
110k586 k. Discretion of court. Most Cited Cases
The district court has broad discretion to grant or deny motions for continuances.
***1030**Dennis P. Riordan, Riordan & Horgan, San Francisco, CA, for the appellant.

Amber S. Rosen, Assistant United States Attorney, San Jose, CA, for appellee.

Appeal from the United States District Court for the Northern District of California, William B. Shubb, District Judge, Presiding. D.C. No. CR-03-00095-WBS.

Before: B. FLETCHER and ANDREW J. KLEINFELD, Circuit Judges, and KEVIN THOMAS DUFFY,[FN*] District Judge.

FN* The Honorable Kevin Thomas Duffy, Senior United States District Judge for the Southern District of New York, sitting by designation.

PER CURIAM:

On February 27, 2006, Amr Mohsen was convicted by a jury of conspiracy, three counts of perjury, subornation of perjury, eight counts of mail fraud, obstruction of justice, and contempt of court. On March 15, 2006, Amr Mohsen was convicted by the same jury (in Phase II of his bifurcated trial) of witness tampering and solicitation to commit arson. He appeals his conviction on a multitude of grounds. We reject his arguments for the reasons given below.

I. Jury Instructions

[1] Mohsen's first contention is that the district court committed reversible error because it did not instruct the jury on substantive patent law. Defense counsel, however, failed to propose an instruction on patent law at trial. Therefore, we review for plain error. *United States v. McCormick,* 72 F.3d 1404, 1409 (9th Cir.1995); *United States v. Krasn,* 614 F.2d 1229, 1235 (9th Cir.1980).

Mohsen argues that in order to understand the element of materiality in the various perjury and fraud charges against him, the jury needed an instruction on substantive patent law. Mohsen is incorrect. This is not a patent case. This is a perjury and fraud case. The judge correctly***1031** instructed the jury on the materiality element of the perjury and fraud charges. *United States v. McKenna,* 327 F.3d 830, 839 (9th Cir.2003). Moreover, the jury heard sufficient unchallenged expert testimony regarding the substance of patent law and of the underlying dispute to understand and ultimately convict Mohsen of the perjury and fraud charges. *See United States v. Pree,* 408 F.3d 855, 873 (7th Cir.2005).

II. Motion to Sever the Trial

[2] Mohsen asserts that the district court abused its discretion by denying Mohsen's motion to sever the trial and order a separate trial of Counts 21-23. The test for abuse of discretion for failure to sever a trial is "whether a joint trial was so manifestly prejudicial as to require the trial judge to exercise his discretion in but one way, by ordering a separate trial." *United States v. Decoud,* 456 F.3d 996, 1008 (9th Cir.2006) (quotation marks and citation omitted); *see also United States v. Lewis,* 787 F.2d 1318, 1321 (9th Cir.1986) ("The prejudice must have been of such magnitude that the defendant's right to a fair trial was abridged."). Here, there was no use of the Phase II counts or evidence in the Phase I proceedings, and the bifurcation process was not so manifestly prejudicial as to require reversal.

III. Constructive Amendment

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

Mohsen argues that the prosecutor's closing argument constructively amended the indictment in violation of Mohsen's Fifth Amendment rights. Because defense counsel did not raise this objection at trial, Mohsen's claim is reviewed for plain error. *United States v. Dipentino,* 242 F.3d 1090, 1094 (9th Cir.2001). There is no plain error here. The prosecutor's mention of the "Lobo notes" in the closing argument did not change the terms of the indictment, nor did it offer an alternative factual basis for conviction so as to prejudice Mohsen's substantial rights. *See* *United States v. Adamson,* 291 F.3d 606, 614-15 (9th Cir.2002); *Dipentino,* 242 F.3d at 1094.

IV. The Jury Note

[3] Mohsen contends that the judge should have consulted the parties or counsel before responding to the jury's request to see the indictment with the "specific charges." He is correct. The judge erred. However, the error was harmless beyond a reasonable doubt. *United States v. Barragan-Devis,* 133 F.3d 1287, 1289 (9th Cir.1998). The parties had previously agreed not to give the jury the indictment. The verdict form gave the jury the information the indictment would have given them, without the charges that were not before them. As the district judge made clear in a subsequent discussion with counsel, he thought that the jury had asked for the indictment only because there had been a delay in taking the instructions and verdict form to the jury room. The district court stated, "it was obvious ... that if the jury would just take one look at the verdict form that they hadn't seen by the time they wrote the note, they would have been able to see what the specific charges are, because they are differentiated in the verdict form."

Mohsen argues that answering a jury question or request without first consulting defendant's counsel is structural error always requiring reversal. That is incorrect. The judge's failure to consult the parties before refusing the jury's request to see the indictment was trial error. The cases Mohsen cites regarding structural error are distinguishable. In *Musladin v. Lamarque,* 555 F.3d 830 (9th Cir.2009), we upheld under AEDPA a state court's decision that a trial judge's response to a jury ***1032** note asking for "amplification" of a jury instruction was not a "critical stage" of the trial process for purposes of determining whether the error was structural. We never suggested that all errors regarding jury communications during deliberations were subject to automatic reversal. Unlike the communication in *Musladin,* the jury note here was not a question about the law governing the jury's deliberations.

Mohsen also cites to *United States v. Benford,* 574 F.3d 1228 (9th Cir.2009). *Benford* holds, in the context of direct review of an ineffective assistance of counsel claim, that a pre-trial status conference was not a "critical stage" of the trial. *Id.* at 1232. Mohsen appears to rely on *Frantz v. Hazey,* 533 F.3d 724, 743 (9th Cir.2008) (en banc), which *Benford* cites in passing. *Frantz,* however, concerned a note from the jury about evidence that had not been admitted at trial. *See* *id.* at 741-42. The communication here, by contrast, made no substantive inquiry about the facts or the law.

In *United States v. Rosales-Rodriguez,* 289 F.3d 1106, 1110 (9th Cir.2002), we applied harmless error analysis to a trial judge's ex parte unsolicited note to the jury with a supplemental instruction regarding the substitution of an alternate juror. In *Barragan-Devis,* 133 F.3d at 1289, we applied harmless error analysis to the trial judge's lack of response to a jury note. In *United States v. Frazin,* 780 F.2d 1461, 1469 (9th Cir.1986), we applied harmless error analysis where a trial judge responded to a jury note communicating deadlock with an ex parte instruction to continue deliberations.

V. Insufficient Evidence Claim

Mohsen argues that there was insufficient evidence to support his perjury conviction because his answers to the questions posed were "literally true" but misleading. We reject this argument. There was sufficient evidence for the jury to conclude that Mohsen understood the question as it was asked, and intentionally lied. *United States v. Camper,* 384 F.3d 1073, 1076 (9th Cir.2004).

VI. Contempt of Court Conviction

Mohsen was convicted for contempt of court for applying for a new passport to flee the country in violation of his conditional pre-trial release. Mohsen argues this conviction should be set aside for three reasons.

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

[4] First, Mohsen argues that the conviction should be set aside because the contempt prosecution was initiated by the grand jury's indictment, not by the judge who set the conditions of his release. This is incorrect. Both the trial court and the grand jury have power to bring contempt proceedings under 18 U.S.C. § 3148 and 18 U.S.C. § 401. *See, e.g., United States v. Armstrong,* 781 F.2d 700, 703-04 (9th Cir.1986); *Steinert v. U.S. Dist. Ct. for the Dist. of Nevada,* 543 F.2d 69, 70-71 (9th Cir.1976).

[5][6] Second, Mohsen argues that the district court abused its discretion by admitting into evidence a note found in Mohsen's jail cell that had his wife's name at the top and no mailing address. The note was uncovered in a box of documents under a desk when the government executed a warrant to search Mohsen's jail cell for evidence of witness tampering, solicitation of a crime of violence, and obstruction of justice, and to seize notes and documents related to faking a psychological disorder or incompetence. Mohsen claims that the note is covered by the marital privilege, and that the search itself was conducted in violation of *Massiah v. United States,* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). Both of Mohsen's arguments are ***1033** incorrect. The marital privilege does not apply because, as the district court found, Mohsen had presented "no evidence whatsoever" that he intended to deliver the message to his wife. *See also United States v. Montgomery,* 384 F.3d 1050, 1056-57 (9th Cir.2004). Nor did the search and seizure violate *Massiah.* The search and seizure warrant was justified by an affidavit that noted statements made to the undercover informant concerning illegal activities with which the defendant had not yet been charged, and the objects to be searched for and seized all related to potential criminal acts that had not yet been charged. That the police inadvertently found evidence relating to the contempt charge during the search and seizure does not invalidate the search warrant. *See United States v. Ewain,* 88 F.3d 689, 693 (9th Cir.1996).

[7] Finally, Mohsen argues that there was insufficient evidence for the jury to find beyond a reasonable doubt that Mohsen applied for a passport. We disagree. In addition to the evidence that Mohsen had made reservations for overseas travel requiring a passport, that he had gone to the consulate, and that in his car he had copies of the necessary documents to obtain a passport, the note found in his jail cell made specific reference to a "2004 application" for an Egyptian passport. We conclude that there was sufficient evidence for a jury to find beyond a reasonable doubt that Mohsen had applied for a new passport.

VII. Improper Vouching

[8] Mohsen correctly contends that the prosecutor improperly vouched during the closing argument of Phase I. Because the defense did not object at trial to the prosecutor's comments, the prosecutor's vouching is reviewed for plain error. *United States v. Williams,* 989 F.2d 1061, 1071-72 (9th Cir.1993). We find that the prosecutor's rhetorical use of the phrase "I think" did not constitute reversible error.

[9] Mohsen also argues that the prosecutor violated the advocate-witness rule and engaged in improper vouching in Phase II of the trial. Because Mohsen did not raise this objection to the district court, the claim is reviewed for plain error. *United States v. Cabrera,* 201 F.3d 1243, 1246 (9th Cir.2000). The prosecutor's conduct in Phase II did not constitute vouching or violate the advocate-witness rule. The prosecutor did not suggest that her questions or closing argument were based on private knowledge or anything other than the evidence presented at trial. *Cf. United States v. Molina,* 934 F.2d 1440, 1446 (9th Cir.1991). Moreover, given the weight of tape-recorded evidence supporting the Phase II convictions, there is no plain error. *Id.*

VIII. Ineffective Assistance of Counsel

[10] Mohsen argues that his trial counsel's failure to request an instruction on the underlying substantive patent law constituted ineffective assistance of counsel. Mohsen also argues that his Phase II convictions should be overturned for ineffective assistance of counsel. "Ineffective assistance claims, however, are ordinarily left for collateral habeas proceedings due to the lack of a sufficient evidentiary record as to what counsel did, why it was done, and what, if any, prejudice resulted." *United States v. Sager,* 227 F.3d 1138, 1149 (9th Cir.2000) (internal quotation marks and citation omitted). Here, the record is not sufficiently developed and Mohsen's counsel

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

was not so inadequate as to deny Mohsen his Sixth Amendment right to counsel. We therefore decline to consider Mohsen's ineffective assistance claims on direct appeal.

***1034** IX. Sentencing Enhancement

Mohsen argues that the district court erred at sentencing in calculating the amount of loss attributable to his fraudulent scheme. We disagree. There was sufficient evidence to justify the district court's conclusion that Mohsen intended his scheme to cause losses totaling more than forty million dollars. Thus, under the 1998 guidelines, the 17 point upward sentence enhancement was appropriate. U.S.S.G. § 2F1.1(b)(1)(R) (1998).

X. Request for Remand

[11][12][13] Mohsen contends that this Court should remand this case for a renewed motion for new trial on the grounds that he was deprived of his right to counsel of his choice. We disagree. The district court did not abuse its discretion when it rejected (after briefing and a hearing on conflict of interest issues) Mohsen's choice of substitute counsel due to the substitute attorney's conflict of interest. *See Miller v. Blacketter,* 525 F.3d 890, 895 (9th Cir.2008) ("A defendant does not have the right to be represented by ... an attorney with a conflict of interest...."). Nor did the district court abuse its discretion in refusing to grant a three month continuance requested by Mohsen's second choice of substitute counsel, even where the attorney decided not to take the appointment because of the court's decision. The district court did not deny the substitution of the second counsel chosen, but exercised its discretion to deny the continuance requested by that attorney. The district court has broad discretion to grant or deny motions for continuances. *United States v. Garrett,* 179 F.3d 1143, 1145 (9th Cir.1991). Mohsen's request that we remand for a renewed retrial hearing with new counsel is denied.

XI. Spillover prejudice

Mohsen argues that if any of his convictions in Phase I are vacated, his convictions in Phase II must also be vacated due to "the risk of prejudicial spillover." Because we affirm all of Mohsen's Phase I convictions, we do not reach this question.

AFFIRMED.

C.A.9 (Cal.),2009.
U.S. v. Mohsen
587 F.3d 1028, 09 Cal. Daily Op. Serv. 14,107

END OF DOCUMENT

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.