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8 APPEARING SPECIALLY
9 for Defendant Amr Mohsen
10 On Motion for Substitution of Counsel

11 UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 UNITED STATES OF AMERICA)
12)
13 Plaintiff,)
14 vs.)
15 AMR MOHSEN,)
16 Defendant.)

No. CR-03-0095 WBS

**MEMORANDUM RE: SUBSTITUTION
OF COUNSEL AND WAIVER OF
CONFLICT**

Date: August 3, 2006
Time: 10:00 a.m.
Hon. William B. Shubb

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12	Plaintiff,)	MEMORANDUM RE: SUBSTITUTION
)	OF COUNSEL AND WAIVER OF
13	vs.)	CONFLICT
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14)	
15	AMR MOHSEN,)	Date: August 3, 2006
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16	Defendant.)	Hon. William B. Shubb
)	

17 **INTRODUCTION**

18 On June 23, 2006, defendant Amr Mohsen appeared before the Court requesting leave to
19 substitute undersigned counsel and the firm of Weinberg and Wilder for his current attorneys.
20 Bruce Locke and John Balazs. Messrs Locke and Balazs had been appointed by the Court to
21 represent Dr. Mohsen after his prior attorneys had moved to withdraw. They jointly represented
22 Dr. Mohsen at trial and also filed on his behalf post-trial motions for acquittal and for a new trial.
23 Independently, Dr. Mohsen filed a pro se motion for a new trial on grounds of ineffective
24 assistance. Because he believes that he was not adequately represented at trial, Dr. Mohsen
25 wishes to be represented by different attorneys, Weinberg and Wilder, in all post-conviction
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1 matters, including pending motions, sentencing, and possibly on appeal.

2 Doron Weinberg, undersigned counsel’s partner, represented Dr. Mohsen’s sister, Magda
3 Metwally, earlier in this proceeding. Dr. Metwally was represented by Mr. Weinberg when she
4 testified before the grand jury and then as a government witness at Dr. Mohsen’s trial.¹
5 Notwithstanding that Dr. Metwally is the defendant’s sister and that she and family members are
6 willing to bear the costs of his further representation, the government has objected to the
7 requested substitution of counsel. The government has argued that Mr. Weinberg’s relationship
8 with Dr. Metwally creates a disqualifying conflict of interest. The government has also
9 questioned the source of the funds used to retain Weinberg & Wilder.

10 The Court has made clear that it shares the government’s concerns,² despite Mr.
11 Weinberg’s assurances that no actual conflict of interest exists because (1) Dr. Metwally
12 imparted no information to him that was not also in the public record, (2) Dr. Metwally’s
13 interests are not actually adverse to her brother’s interests, and (3) both Drs. Mohsen and
14 Metwally are willing to voluntarily enter waivers of any potential conflict of interest arising from
15 their successive representation by Weinberg & Wilder. Additionally, Mr. Weinberg offered to
16 make Dr. Metwally available to submit to questioning regarding the asserted conflict of interests
17 and the source of the retainer.

18 To resolve these issues, the Court set the matter for a further hearing with Dr. Metwally
19 present, and solicited briefing on the applicable legal standards. Undersigned counsel, acting
20 specially for Dr. Mohsen, submits this memorandum to establish that the requested substitution
21 does not offend the administration of justice or the rules of professional ethics, nor does it give
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23 ¹ As it happened, Mr. Weinberg was unavailable on the dates Ms. Metwally was
24 scheduled to testify both before the grand jury and at trial, and undersigned counsel accompanied
25 Ms. Metwally on both occasions in his stead.

26 ² District courts have a “legitimate wish . . . that their judgments remain intact on appeal.
Wheat v. United States, 486 U.S. 153, 161 (1988).

1 rise to any claim of ineffective assistance. Accordingly, the Court is respectfully urged to permit
2 the substitution of Weinberg & Wilder as post-conviction counsel for Dr. Mohsen, conditioned
3 on adequate waivers of conflict-free representation by both Drs. Mohsen and Metwally.

4 **FACTUAL BACKGROUND**

5 Despite the overall complexity of this case, the facts relevant to the conflict issue are few
6 in number. Over the lengthy course of this proceeding, Dr. Mohsen has been represented by
7 three sets of attorneys. The combination of Dr. Mohsen’s bankruptcy and the charge that he
8 solicited the murder of Judge Alsup resulted in the successive withdrawals of the two sets of
9 retained counsel, as well as the Northern District Federal Defender’s Office. The Bench of the
10 Northern District also recused itself. This Court then accepted an appointment to hear the case,
11 and, in turn, appointed attorneys Bruce Lock and John Balacz under CJA (Criminal Justice Act)
12 to represent Dr. Mohsen.

13 During the investigation of the solicitation and related witness tampering charges, Dr.
14 Metwally was served with a subpoena to testify before the grand jury. She retained attorney
15 Doron Weinberg to represent her. At the government’s request, Dr. Metwally initially submitted
16 to an interview by government attorneys and agents, with Mr. Weinberg present and under a
17 limited immunity agreement (commonly referred to as a “Queen for a Day”).

18 Following the interview, the government agreed to give Dr. Metwally full immunity for
19 her testimony, which would necessarily entail admissions of actions, performed at her brother’s
20 request, which were intended to facilitate the tampering scheme. However, because Dr.
21 Metwally was unaware of the true purpose of these actions, the government’s attorney did not
22 believe Ms. Metwally was subject to prosecution for aiding her brother in any way.

23 Dr. Metwally then testified before the grand jury, and again at the second phase of her
24 brother’s trial, limited to the witness-tampering and solicitation charges. A tape recording of a
25 telephone call from Dr. Mohsen to Dr. Metwally was also played by the government as further
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1 evidence of witness tampering. Dr. Mohsen's only defense at the second stage was entrapment.
2 Dr. Mohsen did not dispute Dr. Metwally's factual testimony, and his trial counsel did not cross-
3 examine her, therefore.

4 In addition to his across-the-board convictions at the first phase of his trial, Dr. Mohsen
5 was convicted at the second phase of witness tampering and solicitation to commit arson.
6 However, he was acquitted of the most serious charge in the indictment, soliciting the murder of
7 Judge Alsup.

8 Following the verdicts, trial counsel filed timely motions for acquittal and for a new trial.
9 Separately, Dr. Mohsen filed a pro se motion for a new trial contending that his trial counsel had
10 rendered ineffective assistance in a number of respects. All post-trial motions were scheduled to
11 be heard on June 23, 2006. Meanwhile, Dr. Mohsen, with the assistance of Dr. Metwally, had
12 begun to seek other attorneys to represent him in the upcoming post-conviction proceedings.

13 Shortly before the June 23rd hearing, while undersigned counsel was away, Dr. Mohsen
14 decided to retain her services. Dr. Metwally assisted her brother by contacting Mr. Weinberg,
15 and arranging for payment of the firm's retainer. Before agreeing to represent Dr. Mohsen,
16 attorney Weinberg satisfied himself that – for the purposes of post-conviction proceedings –
17 there were no conflicts of interest between Dr. Metwally and Dr. Mohsen.³ Nevertheless, he
18 conveyed the government's concerns to Drs. Mohsen and Metwally, and received their
19 assurances that they were prepared to waive any conflict arising from their successive
20 representation by Weinberg & Wilder. Dr. Mohsen, moreover, was prepared to waive any claim
21 on appeal or in a Section 2255 motion based upon his representation by Dr. Metwally's counsel.
22 Dr. Metwally, for her part, will secure different counsel, should that become necessary in the
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24 ³ In confining this motion to the immediate question of post-trial representation, counsel
25 does mean to suggest that any irreconcilable conflict would be posed by Weinberg & Wilder's
26 representation of Dr. Mohsen at a re-trial. As noted below, that separate issue need not be
reached by the Court at this time.

1 future. Drs. Mohsen and Metwally are prepared to execute these waivers on the record, orally or
2 in writing, at the Court’s preference.

3 **ARGUMENT**

4 **DR. MOHSEN’S RIGHT TO RETAINED COUNSEL OF CHOICE MAY**
5 **NOT BE DENIED WHEN THERE IS A WAIVEABLE CONFLICT OF**
6 **INTEREST**

7 While Mr. Weinberg and undersigned counsel have taken the position that there is no
8 actual conflict between Dr. Mohsen’s and Dr. Metwally’s interests, nor even an appearance of
9 conflict at this juncture, the Court has opined otherwise. As such, without conceding the point,
10 counsel thinks it more fruitful to assume that a conflict exists when analyzing the competing
11 rights and interests germane to the Court’s decision. These are, on the one side, the right to
12 retained counsel of choice, and, on the other side, the right to conflict-free representation.
13 Counsel submits that any tension between these rights must be resolved in favor of the right to
14 counsel of choice, in that any conflict arising from the requested substitution may be – and surely
15 will be – voluntarily and knowingly waived.

16 **A. The Right to Retained Counsel of Choice Must Prevail Where**
17 **The Conflict of Interest Is Waiveable.**

18 An element of the Sixth Amendment right to counsel is the right of a defendant to secured
19 paid counsel of his own choice. *Wheat v. United States*, 486 U.S. 153, 159 (1988); *See also*
20 *Caplin & Drysdale v. United States*, 491 U.S. 617, 624-25 (1989). To be sure, the right to
21 counsel of choice is circumscribed in several important respects. *Wheat*, 486 U.S. at 159.
22 Nevertheless, as the Supreme Court recently held, the erroneous deprivation of chosen counsel is
23 a “structural defect,” which affects the “framework” within which the case proceeds. *United*
24 *States v. Gonzalez-Lopez*, 2006 WL 1725573, *6 (June 26, 2006) (cases cited therein).
25 Accordingly, as with the denial of counsel, the denial of the right to self-representation, and the
26 denial of right to trial by jury, the erroneous denial of counsel of choice is not subject to harmless
error analysis; rather, such error requires automatic reversal. *Id.*

1 The right to conflict-free representation is likewise an aspect of the Sixth Amendment
2 right to counsel. Thus, when a trial court “improperly requires joint representation over timely
3 objection reversal is automatic.” *Mickens v. Taylor*, 535 U.S. 162, 168 (2000), citing *Holloway*
4 *v. Arkansas*, 435 U.S. 475, 488 (1978) (trial court denied counsel’s motion for the appointment
5 of separate counsel for three jointly-tried defendants, and also refused to allow counsel to cross-
6 examine any of the defendants on behalf of the other two).

7 However, in the absence of an objection to the multiple representation, the automatic
8 reversal rule does not apply. Instead, the defendant must demonstrate that “a conflict of interest
9 actually affected the adequacy of his representation.” *Id.*, *Cuyler v. Sullivan*, 446 U.S. 335, 347-
10 48 (1980), *United States v. Mett*, 65 F.3d 1531, 1535 (9th Cir. 1995). Moreover, under *Mickens*
11 and *Cuyler*, the duty to inquire into the propriety of a multiple representation arises only when
12 “the trial court knows or reasonably should know that a particular conflict exists which is not
13 when the trial court is aware of a vague, unspecified possibility of conflict, such as that which
14 ‘inheres in almost every instance of multiple representation.’” 446 U.S. at 347-48; *accord*
15 F.R.Cr.P., 44(c) (imposing a duty of inquiry in cases of joint representation, where joint
16 representation is defined as “two or more defendants who have been charged jointly . . . or have
17 been joined for trial” and where “the defendants are represented by the same counsel or counsel
18 who are associated in practice”).

19 District courts have an independent interest in “ensuring that criminal trials are conducted
20 within the ethical standards of the profession and that legal proceedings appear fair to all who
21 observe them.” *Wheat*, 486 U.S. at 160. When a district court learns that a particular conflict
22 exists, it must inquire into the details to determine whether the conflict is actual, potential, or
23 non-existent. *United States v. Lussier*, 71 F.3d 456, 461 (2nd Cir. 1995), cited with approval in
24 *United States v. Martinez*, 143 F.3d 1266, 1270 (9th Cir. 1998). An actual conflict of interest is a
25 conflict that affects counsel’s performance, “as opposed to a mere theoretical division of
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1 loyalties.” *United States v. Wells*, 394 F.3d 725, quoting *Mickens*, 535 U.S. at 171; *see also*
2 *United States v. Baker*, 256 F.3d 855, 860 (9th Cir. 2001) (an “attorney has an actual, as opposed
3 to a potential conflict of interest when, the attorney’s and the defendant’s interests diverge with
4 respect to a material factual or legal issue or to a course of action” [citation and internal quotation
5 marks omitted]); *United States v. Shwayder*, 312 F.3d 1109, 1118 (9th Cir. 2002) (to prove an
6 adverse effect, the defendant must show that “counsel was influenced in his basic strategic
7 decisions” by loyalty to another client or former client [citation and internal quotation marks
8 omitted]).

9 Trial courts have substantial latitude when determining whether to allow an attorney to
10 proceed despite a conflict, “if the defendant makes a voluntary, knowing and intelligent waiver.”
11 *Garcia v. Bunnell*, 33 F.3d 1193, 1195 (9th Cir. 1994) (waiver of conflict-free counsel was valid
12 where defendant was “well aware of his interests, his right to an unbiased counsel, his right to
13 seek outside legal advice, and his right to discuss with the court any dissatisfaction with his
14 appointed counsel”); *but see United States v. Agosto*, 675 F.2d 965, 976-77 (8th Cir. 1982)
15 (waiver invalid when defendant was told that a conflict due to he attorney’s prior representation
16 of a co-defendant might arise from prior confidential communications, but not told that a conflict
17 may result from continued loyalty to the codefendant). Conflicts of interest between a client and
18 his attorney are waiveable unless they are “*so egregious that no rational defendant would*
19 *knowingly and voluntarily desire the attorney’s representation.*” *Martinez*, 143 F.3d at 1270
20 (italics added); *United States v. Ward*, 105 Fed.Appx. 188, 190 (9th Cir. 2004).

21 The government has conjectured several possible conflicts of interest at the post-
22 conviction stage. None pose any foreseeable risk that counsel’s duties of confidentiality and
23 loyalty to Dr. Mohsen or Dr. Metwally will be compromised. Under these circumstances,
24 denying Dr. Mohsen his post-trial attorneys of choice – when a valid conflict waiver is obtainable
25 – tempts automatic reversal under *Gonzalez-Lopez*.

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B. The Substitution Will Not Handicap Dr. Mohsen’s Presentation of His Post-Trial Arguments, Unduly Prejudice Dr. Metwally’s Rights, or Cast Doubt on the Integrity of the Judicial System.

The government has not cited a single case, nor has the defense encountered one. where post-trial – rather than trial – counsel has been disqualified for a conflict of interest. In *Wheat*, the leading case on the subject, the defense attorney had already been allowed to represent two co-defendants, among many, jointly charged in a major drug conspiracy case. One of the defendants (Bravo) had pled guilty, and the other (Gomez-Barajas) was awaiting the district court’s acceptance of his offer to plead (evidently a conditional plea). Two court days before his trial, yet a third defendant (Wheat) moved to substitute the same attorney as his counsel as well. Despite the willingness of all three defendants to waive their rights to conflict-free representation, the district court denied the request for substitution.

The Supreme Court ratified the trial judge’s decision and reasoning. As a general matter, the Court was troubled by the fact that the three jointly-represented defendants were co-conspirators of varying stature in a complex drug distribution scheme. Gomez-Barajas, whose plea agreement was under submission, was one of the alleged kingpins of the conspiracy. According to the government, Bravo was the least culpable of the three, and Wheat was intermediate between Bravo and Gomez-Barajas.

The government had indicated that it intended to call Bravo as a witness – in exchange for sentencing leniency – at Wheat’s impending trial. When that occurred, the attorney’s position in representing both Bravo and Wheat would become wholly untenable because he would be ethically precluded from vigorously cross-examining a crucial prosecution witness. It was also possible that the district court would reject the plea agreement of Barajas-Gomez, making the other two defendants potential witnesses in his ensuing trial.

Viewing these actual and potential ethical dilemmas from the perspective of the trial judge on the eve of trial, the Supreme Court held that the refusal to permit the substitution of

1 counsel was a legitimate exercise of the judge’s discretion, and did not violate the Sixth
2 Amendment.⁴ *Id.*, at 164.

3 In *United States v. Allen*, 831 F.2d 1487 (9th Cir. 1987), the Ninth Circuit likewise noted
4 that serious constitutional and ethical problems face lawyers who represent multiple co-
5 defendants, or who purport to represent multiple defendants of varying culpability in joint plea
6 negotiations. In *Allen*, a single law firm “spearheaded” the defense of seventeen co-defendants
7 charged as participants in a far-flung marijuana smuggling conspiracy. The firm simultaneously
8 represented two defendants, Allen and his boss, Minnig, as well as the unindicted “generals” of
9 the smuggling operation.

10 At the outset, all seventeen defendants were represented by the same firm, and all
11 defendants agreed to this arrangement when advised that conflicts would arise out of the joint
12 representation if one or more defendants decided to cooperate. The defendants were never
13 advised of the possibility of conflicts arising from joint plea bargaining. Subsequently, the firm
14 obtained, and paid separate counsel for most of the defendants. But the firm still took primary
15 responsibility for joint plea negotiations, for which the firm had prepared a culpability ranking of
16 all the defendants. In the firm’s culpability list, Allen was ranked as one of the bosses, but
17 Minnig was not. Allen became, in effect, the “fall-guy” not only for Minnig, but also for the
18 other unindicted bosses who were bankrolling the defense.

19 Not surprisingly, the Court concluded that the joint representation gave rise to a glaring,
20 actual conflict, which Allen could not have waived since he had never been informed of the risks
21 of joint plea bargaining. *Id.*, at 1501; *see also Shwayder*, 312 F.3d at 1117 (waiver document
22 that states there is no conflict of interest is not valid).

23 This case presents none of the insuperable ethical predicaments considered in *Wheat* and
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25 ⁴ Strikingly, even in the case of triple-representation of co-defendants, the Supreme Court
26 acknowledged that a district court might *with equal justification* have reached the opposite
conclusion and permitted the substitution in *Wheat* despite the actual conflict. 486 U.S. at 164.

1 *Allen*. The overarching – and dispositive – distinction is that this case does not involve joint
2 representation of multiple defendants or targeted co-conspirators at the trial or plea bargaining
3 stage. In this case, Dr. Mohsen’s and Dr. Metwally’s interests and objectives are wholly
4 consistent. *Cf., Ward*, 105 Fed.Appx. at 190 (given his familial relationship to his son, defendant
5 could have reasonably believed his interests and his son’s were not likely to diverge); *United*
6 *States v. Gilliam*, 835 F. Supp. 288 (W.D. Va. 1993) (counsel’s joint representation of father and
7 son drug defendants did not deprive son of effective assistance because both defendants asserted
8 innocence, and counsel was able to present unified defense throughout trial). Thus, any
9 conceivable conflict between Drs. Mohsen and Metwally are readily reconcilable and may be
10 waived.

11 Both the Supreme Court and the Ninth Circuit recognize that the attorney “is in the best
12 position professionally and ethically to determine when a conflict of interest exists or will
13 probably develop in the course of the trial.” *United States v. Henke*, 222 F.3d 633, 638 (9th Cir.
14 2000), citing *Holloway*, 435 U.S. at 485. In undersigned counsel’s opinion, the Weinberg &
15 Wilder firm possesses no confidences from Dr. Metwally that would engender an ethical
16 quandary or divided loyalties in litigating post-trial motions or preparing for Dr. Mohsen’s
17 sentencing.

18 The government has identified two areas of purported conflict. First, the government has
19 pointed to Weinberg & Wilder’s solicitation of immunity for Dr. Metwally. As Mr. Weinberg
20 explained at the last hearing, the decision to seek immunity for Dr. Metwally was prompted by
21 prudential considerations, not by incriminating confidences reposed in counsel.

22 Ultimately, the decision whether or not to grant Dr. Metwally immunity was solely the
23 government’s to make. Nonetheless, the grant of immunity was not a quid pro quo for Dr.
24 Metwally’s testimony, and Dr. Metwally was not a cooperating witness, in any meaningful sense.
25 She was, and remains, a neutral fact witness, who is neither hostile to Dr. Mohsen, nor beholden
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1 to the government.

2 The government also has argued that it intends to seek an obstruction of justice
3 enhancement based on a telephone call in which Dr. Mohsen allegedly endeavored to influence
4 Dr. Metwally's testimony. (Attachment: Excerpt of Reporter's Transcript [Direct Examination
5 of Magda Metwally], at 1633 et seq.) The telephone call was tape recorded, and the recording
6 was played to the jury as evidence of the attempted tampering charge in the indictment.

7 Defense counsel had objected when the government attempted, through Dr. Metwally, to
8 lay the framework for the introduction of the tape recording. Defense counsel had argued that the
9 proffered evidence was not probative of the tampering charge specified by the government.
10 (Attachment, at 1638.) The Court disagreed. First, the Court noted that the government was not
11 strictly bound by the theory of tampering expressed in its opening statement. Second, the Court
12 accepted the government's proffer that the telephone call would be used to rebut Dr. Mohsen's
13 entrapment defense by proving that he was predisposed to tamper with witnesses. (Attachment, at
14 1639.) Concluding that this purpose was sufficiently probative, the Court permitted the
15 foundational questioning of Dr. Metwally. (Attachment, at 1641.)

16 The government then asked Dr. Metwally whether, before he was arrested, her brother
17 had talked about the possibility of leaving the country. She answered: "He did not say he was
18 leaving the country, but he said that the situation that he is in, some people, when they hear the
19 situation or the whole thing, just say some people leave the country." (Attachment, at 1641.)
20 That was all Dr. Metwally was asked by either party on the subject. The government later
21 introduced the tape recording of the alleged tampering conversation.

22 Assuming for argument's sake that the obstruction enhancement overcomes obvious
23 double-counting and grouping objections, all the relevant evidence has been presented at trial.
24 There is no particular conflict or ethical dilemma looming at sentencing.

25 That leaves only the government's inchoate speculation as to the possibility of future
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CERTIFICATE OF SERVICE

I, Corey S. O'Connor, declare under penalty of perjury under the laws of the United States of America that the following facts are true and correct:

I am a citizen of the United States, over the age of eighteen years, and not a part to the within action. I am an employee of WEINBERG & WILDER, and my business address is 523 Octavia Street, San Francisco, CA 94102. I served the following document(s):

MEMORANDUM RE: SUBSTITUTION OF COUNSEL AND WAIVER OF CONFLICT

in the following manner:

 X by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below. The transmission was reported as complete with out error by the machine.

 * by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail, at San Francisco, California addressed as set forth below.

 by overnight mail by placing the document(s) listed above in a sealed overnight mail envelope with the postage thereon fully prepaid, addressed as set forth below .

 by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

Robin L. Harris, AUSA
Kyle F. Waldinger, AUSA
FAX: (415) 436-7234

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FAX: (916) 569-0665

John Paul Balazs
FAX: (916) 557-1118

Amr Mohsen, UKU326*
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Oakland, CA 94607

**Attachment Electronically Filed, not faxed.

Executed on this day, July 20, 2006, at San Francisco, California.


