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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13	UNITED STATES OF AMERICA,)	No. CR 03-0095 WBS
14	Plaintiff,)	UNITED STATES' MEMORANDUM RE: CONFLICT OF INTEREST OF PROPOSED NEW COUNSEL FOR DEFENDANT AMR MOHSEN
15	v.)	
16	AMR MOHSEN,)	
17	Defendant.)	Date: August 3, 2006 Time: 10:00 a.m. Courtroom: D, 15 th Floor

18 **INTRODUCTION**

19 On June 19, 2006, defendant Amr Mohsen, through his CJA appointed counsel,
20 notified the Court by letter that he intended to retain and substitute the law firm of
21 Weinberg and Wilder ("Weinberg and Wilder"), as his counsel of record for all further
22 proceedings in this case. On June 20, 2006, the government sent the Court a letter
23 advising that Weinberg and Wilder had a conflict of interest in representing Mohsen
24 because that law firm also represents government witness Magda Metwally, who testified
25 at trial against Mohsen under a grant of immunity, during the government's case-in-chief
26 (Phase 2).

27 On June 23, 2006, the Court held a hearing (which had been previously scheduled
28 to hear argument on Mohsen's pending motion for a new trial) that was attended by one

1 of Mohsen's current attorneys (John Balazs); one of Mohsen's proposed substitute
2 attorneys (Doron Weinberg); and, government counsel. At that time, Mr. Weinberg took
3 the position that (1) his law firm did not have a conflict of interest in representing both
4 Magda Metwally and defendant Amr Mohsen ("I decided firmly and without any concern
5 that there was no conflict") RT 23:1; and (2) even if there were a conflict of interest, both
6 of his "clients" could waive the conflict ("There is no actual conflict, no potential
7 conflict, and any conflict can be waived") RT 33:13-14.¹

8 The Court requested both the government and the law firm of Weinberg and
9 Wilder to file simultaneous briefs addressing the issues of (1) whether there is a conflict
10 of interest and, if so (2) whether both Magda Metwally and Amr Mohsen could
11 knowingly, intelligently and voluntarily waive the conflict. The Court also requested
12 guidance concerning whether the judiciary's independent concern for the integrity of the
13 process would warrant overriding a waiver of the conflict of interest in this case.

14 **FACTS RELATING TO MOHSEN'S CRIMINAL REPRESENTATION**

15 On April 8, 2003, Amr Mohsen made his first appearance on the indictment in this
16 case. CR 3. At that time, Mohsen was represented by Dan Bookin and Michael Tubak of
17 the O'Melveny & Myers law firm. The O'Melveny firm—which had also represented
18 Mohsen during the May 2000 civil evidentiary hearing before Judge Alsup--entered a
19 special appearance on Mohsen's behalf. On May 12, 2003, attorney John Williams
20 entered a general appearance on Mohsen's behalf. CR 12.

21 On or about January 12, 2004, in the aftermath of an aborted change of plea
22 proceeding, Mohsen apparently advised Judge Alsup that he wanted to substitute another
23 lawyer in place of John Williams. CR 58-60.² On January 22, 2004, Judge Alsup set a
24

25 ¹ A true and correct copy of the transcript from the June 23, 2006 hearing is attached
26 hereto as Exhibit 1.

27 ² The January 12, 2004 docket entry at CR 59 is under seal. Government counsel
28 believes, based upon her memory of that hearing, that the issue of substitution of John Williams

(continued...)

1 pre-trial conference for February 2, 2004 and a jury trial for February 17, 2004. CR 62.

2 On February 2, 2004, (the date which was to have been the pre-trial conference),
3 Mohsen advised Judge Alsup that he wanted to fire John Williams and substitute attorney
4 Edward Swanson in place of Mr. Williams. CR 77. Mr. Swanson was not willing to
5 substitute into the case unless Judge Alsup would grant a lengthy continuance of the
6 February 17, 2004 trial date. *Id.* Judge Alsup declined to grant the six month
7 continuance Mr. Swanson requested, but did agree to the following arrangement: (1) Mr.
8 Williams, who had been Mohsen's attorney for the past nine months, would remain in the
9 case to give Mohsen the benefit of Mr. Williams' familiarity with the case; (2) Mr.
10 Swanson would be permitted to substitute into the case as co-counsel with Mr. Williams
11 to give Mohsen the benefit of his new choice of counsel; (3) the court would continue the
12 trial for six weeks until March 31, 2004 to permit Mr. Swanson to familiarize himself
13 with the case. CR 77. Judge Alsup gave Mohsen (who was not in custody at this time),
14 the evening to think this proposal over and ordered Mohsen to report his decision back to
15 the court on February 3, 2004.

16 On February 3, 2004, Mohsen informed Judge Alsup that he wanted Mr. Swanson
17 to join his legal team and, accordingly, the trial was continued until March 31, 2004. CR
18 78, 80. This Court is now all too familiar with the machinations that resulted in the
19 March 31, 2004 trial date going by the wayside. First, on March 29, 2004, Mohsen was
20 arrested trying to flee the country immediately before trial. Next, Mohsen began to feign
21 symptoms of insanity and/or incompetency, which led Judge Alsup to continue the trial to
22 August 30, 2004 pending resolution of a competency examination. Lastly, Mohsen was
23 indicted on new charges stemming from crimes Mohsen committed while he was
24 incarcerated at Santa Rita jail which resulted in the voluntary recusal of Judge Alsup and
25

26 _____
27 ²(...continued)

28 was raised at that hearing. On January 14, 2004, Judge Alsup issued an order requesting briefing
on the issue of substitute counsel. CR 61. The government filed its response to Judge Alsup's
order on January 16, 2004. CR 58.

1 the entire Northern District. On August 3, 2004, Ninth Circuit Chief Judge Schroeder
2 reassigned the case to this Court. CR 162.

3 On August 27, 2004, this Court presided over its first status conference, following
4 the Ninth Circuit's reassignment order. CR 168. At that time, Mr. Williams and Mr.
5 Swanson jointly informed this Court that they wished to be relieved as Mohsen's counsel
6 for an unspecified conflict. The Court denied counsel's request to be relieved, but
7 relaxed Mohsen's conditions of confinement to permit Mohsen to have jail visits with
8 additional attorneys that Mohsen was considering retaining in substitution of Williams
9 and Swanson. CR 168-170.

10 On November 19, 2004, the Court granted Mohsen's request to fire Williams and
11 Swanson and to retain attorneys Mark Rosenbush and John Grele. CR 189, 190. A mere
12 ten weeks later, on February 11, 2005, Rosenbush and Grele filed a motion seeking
13 permission to withdraw as Mohsen's attorneys. CR 246. Rosenbush and Grele alleged
14 that Mohsen's personal bankruptcy petition filed in early February 2005 would probably
15 void their retainer agreement with Mohsen. Rosenbush and Grele did not propose
16 alternative representation for Mohsen though they suggested that Mohsen might qualify
17 for representation under the Criminal Justice Act. CR 261. On March 3, 2005, this Court
18 required Rosenbush and Grele to remain as Mohsen's counsel and directed criminal
19 counsel and/or Mohsen's bankruptcy attorney (David Levin)³ to make an application to
20 the bankruptcy court to permit payments from the estate to Rosenbush and Grele.

21 On April 26, 2005—nearly two full months after Rosenbush and Grele, through
22 attorney David Levin, were supposed to make an application for payment to the
23 bankruptcy court—Rosenbush and Grele advised this Court that no application for
24 payment of criminal defense fees had been made to the bankruptcy court. Rosenbush and
25

26 ³David Levin, Esq. Appeared before this Court on March 3, 2005 and represented that he
27 would make an application to the bankruptcy court for payment of criminal defense counsel's
28 fees so that Rosenbush and Grele could continue to get paid as Mohsen's criminal lawyers. CR
261.

1 Grele further advised the Court that Mohsen was now claiming to be indigent and
2 requested appointment of new counsel for Mohsen under the Criminal Justice Act.⁴ On
3 April 26, 2005, the Court granted Rosenbush and Grele's motion to withdraw and
4 appointed attorney Bruce Locke (who had already been vetted by Mohsen during the two
5 month hiatus between Rosenbush and Grele's motion to withdraw and the April 26, 2005
6 hearing) under the Criminal Justice Act. CR 311.

7 On May 26, 2005, Mohsen requested that the court appoint a second CJA attorney
8 to his legal team. CR 314. The Court acceded to Mohsen's request for appointment of a
9 second CJA attorney, which is virtually unprecedented in a non-capital case, and
10 appointed attorney John Balazs to join Bruce Locke on the Mohsen defense team. CR
11 314.

12 Locke and Balazs represented Mohsen through extensive pre-trial litigation and
13 during the six week bifurcated jury trial. During this period, Locke and Balazs secured
14 significant victories for Mohsen, including the suppression of incriminating evidence
15 found on Mohsen incident to his arrest⁵ and, more importantly, an acquittal on the most
16 serious count Mohsen was facing—solicitation of Judge Alsup's murder. As this Court
17 observed: "The lawyers that were appointed by the court have been better than any of the
18 lawyers that had been representing him—up to that point." RT 27. Nevertheless, Mohsen
19 has now filed a *pro se* motion accusing Locke and Balazs of rendering ineffective
20 assistance of counsel, in part based on counsel's tactical decision not to cross-examine
21 certain government trial witnesses (*see pro se* reply memo. pg. 3 fn 3), and apparently
22 requesting permission to substitute *retained* counsel (Weinberg and Wilder) in lieu of
23 Locke and Balazs' CJA appointment.

24
25 ⁴Rosenbush and Grele informed the Court that they would not accept a CJA appointment
26 to continue representing Mohsen and reiterated their request to be relieved as Mohsen's counsel
27 of record.

28 ⁵The Court granted a motion (filed by Locke and Balazs) to suppress the Egyptian
passport and the \$20,000 cash found on Mohsen's person during his arrest.

WEINBERG AND WILDER'S REPRESENTATION OF METWALLY

1 Government witness Magda Metwally is Amr Mohsen's sister. Metwally was
2 subpoenaed by the grand jury investigating Mohsen's new criminal activity while he was
3 incarcerated at the Santa Rita jail. Metwally was also called as a witness in the
4 government's case-in-chief during Phase 2 of the trial.⁶ Metwally visited Mohsen at
5 Santa Rita jail on numerous occasions and received collect telephone calls from Mohsen,
6 some of which were played for the jury at trial. Specifically, Metwally had important
7 testimony against Mohsen concerning, among others, the following areas. First,
8 Metwally was the recipient of Mohsen's first collect telephone call from the jail. During
9 that recorded conversation—which was read to the jury—Mohsen attempted to tamper with
10 Metwally's potential testimony by suggesting to her that she advise Mohsen's criminal
11 lawyers (at the time Williams and Swanson) that Mohsen thought about fleeing the
12 country before trial but that she, Metwally, had convinced him to stay.
13

14 Second, Metwally played a critical role in acting as Mohsen's "go-between" to
15 facilitate the payment of \$2000 to undercover FBI agent "Kimo" in exchange for the
16 arson Mohsen solicited of government witness David Moore's car. During recorded
17 telephone calls and jail visits to his family members and his friend, Mohammed Ali
18 Moussa (also a government witness), Mohsen arranged for his son, Ehab, to transfer
19 \$2000 from their bank account to Metwally's bank account. Mohsen's original plan was
20 to have Metwally pay Kimo the \$2000 that Mohsen owed for the arson of David Moore's
21 car. When Metwally balked at paying money to a man, Mohsen arranged a substitute
22 shill: Mohammad Ali Moussa. As the government established at trial through the
23 testimony of Moussa and Metwally (as well as recordings from the pertinent jail visits and
24 telephone calls), Moussa, Metwally and Mohsen's wife (Mervat) visited Mohsen at the
25 jail on June 11, 2004 where Mohsen instructed Moussa to pay the \$2000 (which Moussa
26 was to get from Metwally who, in turn, received the money from Mohsen's son, Ehab) to
27

28 ⁶A true and correct copy of Metwally's trial testimony is attached hereto as Exhibit 2.

1 Kimo. Thus, Metwally was the crucial conduit in facilitating the transfer of money for
2 the arson from Mohsen to its ultimate recipient, Kimo.

3 The law firm of Weinberg and Wilder has represented Metwally throughout this
4 case, including during her grand jury testimony; her proffer session with the government
5 which resulted in securing use immunity in exchange for Metwally's trial testimony; and,
6 during Metwally's trial testimony as a government witness in Phase 2. The government
7 argued to the jury that, among other things, Mohsen's initial call from Santa Rita jail to
8 Metwally (where Mohsen attempted to tamper with Metwally's testimony) was evidence
9 of his predisposition to tamper with the witnesses in counts 21 and 22 of the indictment.
10 The government further intends to argue that Mohsen's first jail phone call to Metwally
11 is, among Mohsen's many other obstructive acts, a basis for a two-level enhancement
12 under the sentencing guidelines.

13 Weinberg and Wilder have a conflict of interest which presents the risk that
14 Mohsen will not receive the full benefit of his Sixth Amendment right to an effective
15 advocate. Accordingly, the government respectfully requests the Court to deny Mohsen's
16 request to substitute Weinberg and Wilder in place of Locke and Balazs. The government
17 further requests the Court to override any purported waiver by Weinberg and Wilder's
18 ongoing client, government witness Magda Metwally, and their potential client, defendant
19 Amr Mohsen. In the alternative, if the Court is inclined to permit Metwally and Mohsen
20 to waive Weinberg and Wilder's clear conflict of interest, the government requests the
21 Court to obtain complete waivers from both of Weinberg and Wilder's clients consistent
22 with the parameters suggested below.

23 ANALYSIS

24 *1. The Law*

25 The general principles to be applied in determining whether to disqualify a
26 defendant's choice of counsel are set forth in *Wheat v. United States*, 486 U.S. 153, 108
27 (1988). In upholding the district court's decision to disqualify, the Supreme Court
28 emphasized that the Sixth Amendment right to counsel has more to do with ensuring the

1 fairness and integrity of the adversarial process than with vindicating the defendant's
2 right to be represented by his preferred attorney. *Id.* at 159. The Supreme Court observed
3 that when a district court detects a conflict of interest, the district court is required to
4 exercise its own independent judgment to ensure "that criminal trials are conducted
5 within the ethical standards of the profession and that the legal proceedings appear fair to
6 all who observe them." *Id.* at 160.

7 Under the Sixth Amendment, a criminal defendant has the right to effective
8 assistance of counsel which includes the entitlement to counsel that is free from conflicts
9 of interest. *United States v. Wells*, 394 F.3d 725, 733 (9th Cir. 2005). *Wheat* further
10 clarified that a waiver of the conflict by the defendant does not necessarily solve the
11 problem or absolve the district court of its independent obligation to vindicate the
12 integrity of the criminal justice process: "Nor does a waiver by the defendant necessarily
13 solve the problem, for we note, without passing judgment on, the apparent willingness of
14 Courts of Appeals to entertain ineffective-assistance claims from defendants who have
15 specifically waived the right to conflict-free counsel. . . . Thus, where a court finds an
16 actual conflict of interest, there can be no doubt that it may decline a proffer of waiver. . .
17 ." *Wheat*, *supra* 486 U.S. at 161-62.

18 Court's of Appeal throughout the country have rigorously applied *Wheat*'s
19 rationale to the point of reversing for abuse of discretion a district court's refusal to
20 disqualify a conflicted attorney because of a party's waiver of the conflict. *See Hoffman*
21 *v. Leeke*, 903 F.2d 280, 288 (4th Cir. 1990) (disqualification mandated where counsel
22 previously had represented a person who would be one of the state's main witnesses
23 against the defendant). In fact, an Eleventh Circuit case, *United States v. Ross*, 33 F.3d
24 1507 (11th Cir. 1994) applied *Wheat* to a similar conflict that is posed by Mohsen's
25 request to be represented by the attorney who also represents a key government witness
26 (Metwally) against him. In *Ross*, a defendant wanted to be represented by an attorney
27 who had earlier represented a person who had pled guilty and who would now be called
28 as a government witness against the defendant. The Eleventh Circuit affirmed the district

1 court's disqualification of the conflicted attorney and specifically emphasized the risk his
2 former representation posed to his ability to conduct effective and fair cross-examination
3 of his former client who was going to be a witness against his proposed current client. "If
4 the conflict *could* cause the defense attorney improperly to use privileged
5 communications in cross-examination, then disqualification is appropriate." *Id.* at 1523.
6 Emphasis supplied.

7 Finally, just weeks ago the Supreme Court reiterated that a criminal defendant may
8 not "demand that a court honor his waiver of conflict-free representation." *United States*
9 *v. Gonzalez-Lopez*, 06 C.D.O.S. 5518, 5519 (June 26, 2006). The Supreme Court
10 reaffirmed *Wheat's* recognition of "a trial court's wide latitude in balancing the right to
11 counsel of choice against the needs of fairness." *Id.*

12 **2. *Weinberg and Wilder Have A Conflict Of Interest***

13 Despite Weinberg and Wilder's steadfast refusal to acknowledge the obvious
14 conflict of interest that is posed by their insistence on simultaneously representing
15 government witness Magda Metwally and criminal defendant Amr Mohsen, the Court has
16 properly concluded otherwise. "There is a conflict here. . . .I will tell you there is a
17 conflict. Whether he [Mohsen] wants to waive that conflict is another story. I find there
18 is a conflict." RT 14:9-12. As the Ninth Circuit has cautioned: "The existence of a
19 conflict of interest cannot be governed solely by the perceptions of the attorney; rather the
20 court must itself examine the record to discern whether the attorney's behavior seems to
21 have been influenced by the suggested conflict." *Sanders v. Ratelle*, 21 F.3d 1446, 1452
22 (9th Cir. 1994).

23 Mohsen's current appointed counsel have moved the court for a new trial. If the
24 court were to grant that motion, Weinberg and Wilder would be in the untenable position
25 of possibly improperly using privileged communications from their representation of
26 Metwally or, by protecting those communications, failing to effectively cross-examine
27 Metwally as Mohsen's present interests might require. Even if the court were to deny
28 Mohsen's motion for a new trial, Mohsen will undoubtedly appeal that ruling as well as

1 numerous other rulings in the Ninth Circuit. If the Ninth Circuit were to reverse
2 Mohsen's conviction or to remand this case back to this Court for any further
3 proceedings, the government will call Metwally at a new trial and may need to call her at
4 any proceeding that relates to Phase 2 of the trial.

5 Nor is the fact that Locke and Balazs chose not to cross-examine Metwally during
6 the trial, dispositive of the conflict posed by Weinberg and Wilder's proposed
7 representation of Mohsen. We note that Mohsen has filed a *pro se* motion alleging that
8 Locke and Balazs were ineffective for, among other things, strategically choosing not to
9 cross-examine certain government witnesses. Weinberg and Wilder may have
10 information based upon their privileged communications with Metwally that would be
11 useful in cross-examining Metwally if this court or the Ninth Circuit were to grant a new
12 trial. It would be improper for Weinberg and Wilder to use privileged communications to
13 cross-examine Metwally and yet it would be equally inappropriate for Weinberg and
14 Wilder to be deterred from vigorously cross-examining Metwally to protect those
15 privileged communications. *See Ross, supra* 33 F.3d at 1523. "Disqualification is
16 equally appropriate if the conflict could deter the defense attorney from intense probing
17 of the witness on cross-examination to protect privileged communications with the former
18 client or to advance the attorney's own personal interest." *Id.*

19 Mohsen's request to be represented by conflicted counsel poses an ethical
20 conundrum that will repeatedly be visited upon the Court in any number of foreseeable
21 and unforeseeable future circumstances. For example, even in attempting to secure a
22 valid waiver of Weinberg and Wilder's conflict, the danger of divided loyalties is readily
23 apparent. An attorney without divided loyalties would possibly strongly counsel Mohsen
24 not to pursue representation by Weinberg and Wilder because doing so is inherently in
25 conflict with Mohsen's interest in showing that he was not predisposed to commit the
26 crimes alleged in Phase 2 of the trial. Yet, because Weinberg and Wilder also represent
27 Metwally (whose jail calls with Mohsen were used by the government, in part, to prove
28 Mohsen's predisposition), Weinberg and Wilder might not fully appreciate or be in a

1 position to explain all of the risks to both Metwally and Mohsen concerning their conflict.
2 “Human self-perception regarding one’s own motives for particular actions in difficult
3 circumstances is too faulty to be relied upon. . . .” *United States v. Shwayder*, 312 F.3d
4 1109, 1119 (9th Cir. 2002).

5 Finally, the fact that Metwally is paying for some portion of Weinberg and
6 Wilder’s proposed representation of Mohsen (*see* RT 7:8-16) further illuminates the
7 conflict posed by Weinberg and Wilder’s dual representation. A fee arrangement in
8 which a defendant is represented by a lawyer hired and paid by a third party, particularly
9 when the third party (Metwally) was a critical government witness (indeed, the linchpin
10 for transmitting the payment from Mohsen to Kimo for the arson charged in count 22),
11 there is, at a minimum, a “theoretical division of loyalties.” *Mickens v. Taylor*, 535 U.S.
12 162, 171 (1980). *See also In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238,
13 248 n.6 (2nd Cir. 1986) (*en banc*) (“Accepting payment of clients’ fees from a third party
14 may subject an attorney to undesirable outside influences,. . . .In such a situation, an
15 ethical question arises as to whether the attorney’s loyalties are with the client or the
16 payor”).

17 If any of the aforementioned conflicts are permitted to materialize, it could render
18 the court’s entry of judgment suspect because Mohsen will likely later claim that
19 Weinberg and Wilder’s assistance of counsel was ineffective and unethical, regardless of
20 any waiver he and Metwally might choose to conveniently make now.⁷

21 ***3. Effectiveness of Proposed Waiver of Conflict***

22 A valid waiver of a conflict of interest must be voluntary, knowing, and intelligent,
23 such that the defendant is sufficiently informed of the consequences of his choice.

24
25 ⁷ If Mohsen’s history of hiring and firing criminal defense counsel is any predictor of his
26 future behavior, it is highly likely that he will soon become dissatisfied with Weinberg and
27 Wilder and attempt to substitute a sixth team of lawyers in their place. Given Mohsen’s multiple
28 perjury convictions, it would be difficult for the Court to have any confidence in a sworn waiver
based upon Weinberg and Wilder’s obvious conflict of interest.

1 *Belmontes v. Woodford*, 350 F.3d 861, 885 (9th Cir. 2003). Whether a defendant has
2 made a valid waiver of his right to a conflict-free attorney depends “upon the particular
3 facts and circumstances surrounding that case, including the background, experience, and
4 conduct of the accused.” *Edwards v. Arizona*, 451 U.S. 477, 482 (1981). In determining
5 whether a district court abused its discretion in accepting a criminal defendant’s waiver of
6 conflict-free counsel, the Ninth Circuit is “required to ‘ascertain with certainty’ that a
7 defendant knowingly and intelligently waived that right by ‘focusing on what the
8 defendant understood.’” *Lewis v. Mayle*, 391 F.3d 989, 996 (9th Cir. 2004) *quoting*
9 *Lockhart v. Terhune*, 250 F.3d 1223, 1233 (9th Cir. 2001). In making such a
10 determination, “the court must ‘indulge every reasonable presumption against the waiver
11 of fundamental rights.’” *United States v. Martinez*, 143 F.3d 1266, 1269 (9th Cir. 1998)
12 *quoting Edwards v. Arizona*, 451 U.S. 477, 482 (1981).

13 In this case, it is difficult to conceive of a waiver that could anticipate all of the
14 possible future risks associated with a criminal defendant being represented by counsel
15 who also represented a key witness who provided significant incriminating evidence
16 against that defendant. Nevertheless, if the Court is inclined to permit Metwally and
17 Mohsen to waive Weinberg and Wilder’s conflict, the government suggests the Court voir
18 dire both Metwally and Mohsen and require a joint waiver on the following areas:

19
20 *Both Metwally and Mohsen have the right to a conflict-free attorney

21 *Both Metwally and Mohsen understand that Weinberg and Wilder have an
22 actual and potential conflict of interest in representing Mohsen

23 *Both Metwally and Mohsen can and should receive outside legal advice about
24 waiving the conflict

25 *Both Metwally and Mohsen may ask questions about the risks posed by the
26 Conflict

27 *Both Metwally and Mohsen understand the dangers and risks posed by the
28 Conflict

*Mohsen waives his right to claim that he was not properly advised of the risks
posed by Weinberg and Wilder’s conflict

1 *Mohsen waives his right to claim that he did not receive the full benefit of his
2 Sixth Amendment right to counsel because he was represented by attorneys
3 who had a conflict of interest

3 *Both Metwally and Mohsen specifically understand the following risks:

4 1. Metwally may be called as a witness at future hearings at which she will be
5 asked questions that may incriminate Mohsen;

6 2. Weinberg and Wilder owe a continuing duty of loyalty to Metwally which may
7 prevent Mohsen from receiving the full benefit of cross-examination concerning
8 both the substance of Metwally's testimony and her credibility;

9 3. Weinberg and Wilder's behavior, strategy and tactics may be influenced by
10 their continuing duty of loyalty to Metwally which could have anticipated and
11 unanticipated adverse consequences for Mohsen;

12 4. Weinberg and Wilder, as a result of confidential communications during their
13 representation of Metwally, may have obtained information which would be useful
14 for impeachment of Metwally which Weinberg and Wilder will be prevented from
15 using during representation of Mohsen

16 Finally, we respectfully request the Court to advise Mohsen of the potential pitfalls
17 associated with having Metwally pay for any portion of Weinberg and Wilder's fees to
18 defend Mohsen. First, the government could elicit information concerning Wilder and
19 Weinberg's fee arrangement in its examination of Metwally because the fact that
20 Metwally is paying Mohsen's legal fees tends to demonstrate that Metwally's loyalty to
21 Mohsen caused her to shade her testimony concerning, among other things, the
22 incriminating phone calls Mohsen made to Metwally. Second, the fee arrangement
23 creates a risk that Weinberg and Wilder's defense strategy or tactics will be adversely
24 influenced by the payor's (Metwally) interests rather than the client's (Mohsen) interests.

25 In sum, the proposed retention of Weinberg and Wilder raises the potential for a
26 readily apparent conflict of interest. The government contends that these risks are simply
27 too great to permit the proposed substitution. If the Court concludes that Mohsen has a
28 conflict with his present CJA counsel (which is a claim that has not been developed in the
29 district court and has only been made in a self-serving, factually unsupported *pro se*
30 motion Mohsen filed), then the Court can either appoint a new CJA attorney or permit the
31 Mohsen family a reasonable period of time to retain a non-conflicted attorney. The
32 government reiterates that its concern is in preserving this conviction; protecting the

1 record; and, ensuring that Mohsen receives the full benefit of his Sixth Amendment right
2 to conflict-free counsel. “[W]hen the government is aware of a conflict of interest, it
3 has a duty to bring it to the court’s attention and, if warranted, move for disqualification.”
4 *United States v. Migliaccio*, 34 F.3d 1517, 1528 (10th Cir. 1994).

5
6 **CONCLUSION**

7 Based on the foregoing, the United States respectfully requests the Court to deny
8 defendant Amr Mohsen’s request to substitute the law firm of Weinberg and Wilder in
9 place of current CJA counsel.

10 Dated: July 20, 2006

Respectfully Submitted,

11
12 KEVIN V. RYAN
United States Attorney

13
14 /s/ Robin L. Harris
15 ROBIN L. HARRIS
16 KYLE F. WALDINGER
Assistant United States Attorneys

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