

United States District Court
Northern District Of California
Before The Honorable William B. Shubb

United States of America,)
)
Plaintiff,)
)
vs.)
)
Amr Mohsen,)
)
Defendant.)
_____)

NO. CR 03-0095 WBS

COPY

San Francisco, California
Friday, June 23, 2006

Reporter's Transcript of Proceedings

Appearances:

For Plaintiff: Kevin V. Ryan
United States Attorney
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By: **Robin Harris, Esq.**
Assistant United States Attorney

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By: **John Balazs, Esquire**

Reported By: Sahar McVickar, RPR, CSR 12963
Official Reporter, U.S. District Court
for the Northern District of California

(Computerized Transcription by Eclipse)

1 Friday, June 23, 2006

10:00 a.m.

2 PROCEEDINGS

3 **THE COURT:** Where is Mr. Mohsen?

4 **THE MARSHAL:** I'll go get him, Your Honor.

5 **THE CLERK:** You may be seated.

6 Calling criminal 03-0095, United States versus
7 Amr Mohsen.

8 (Defendant enters courtroom.)

9 **MS. HARRIS:** Good morning, Your Honor.

10 Robin Harris for the United States.

11 **MR. BALAZS:** And good morning, Your Honor.

12 John Balazs on behalf of Amr Mohsen, who is present
13 in Court.

14 **MR. WEINBERG:** Good morning, Your Honor.

15 Doron Weinberg. I believe the Court is aware that
16 it's Mr. Mohsen's desire to substitute our office, Weinberg &
17 Wilder, in as counsel.

18 **THE COURT:** I have received Mr. Balazs' letter
19 advising me of that. And I have since received your letter and
20 Ms. Harris' letter on the subject.

21 This is the time set for the hearing on the motions
22 for judgment of acquittal and a new trial, but I believe we
23 should consider the matter raised by Mr. Balazs' letter first.

24 I would like a little more information on this. I
25 did receive the partial transcript of Ms. Metwally's testimony

1 but I don't recall the rest of her testimony.

2 **MS. HARRIS:** I brought the entire transcript, Your
3 Honor.

4 **THE COURT:** Could you summarize the substance and
5 significance of the testimony to refresh my recollection?

6 **MS. HARRIS:** Your Honor, Ms. Metwally was used by
7 the defendant for the -- as the repository of the \$2000, which
8 was then transferred to "Kimo," the undercover FBI agent to pay
9 for the arson that Mr. Mohsen commissioned and was convicted of
10 commissioning.

11 Ms. Metwally visited Mr. Mohsen in jail on several
12 occasions, but the one that was of most significance is where
13 he arranges to have \$2000 transferred to -- from his son,
14 Ehab Mohsen's, account into Magda Metwally's bank account. She
15 then withdraws the money from her bank account and gives the
16 money to Mohammed Ali Moussa, who the Court will recall
17 testified at trial under a grant of immunity. The money, the
18 \$2000 that Mr. Mohsen arranged to go through his sister,
19 Magda Metwally, was then given by Mohammed Ali Moussa to Kimo
20 as payment.

21 There was a great deal of discussion, both through
22 Ms. Metwally's testimony and then other witness' testimony. We
23 had the jail tapes read to the jury where Ms. Metwally visited
24 Mohsen and he describes the \$2000. We played several telephone
25 calls at the trial about the \$2000.

1 And then there was another telephone call of
2 significance involving Magda Metwally that didn't relate to the
3 \$2000 payment but related to the Government's burden on
4 entrapment. The Government played the first telephone call
5 that Mr. Mohsen ever made from jail, which was to his sister,
6 Magda Metwally, and in that telephone conversation we alleged
7 and argued to the jury Mr. Mohsen improperly attempted to
8 obstruct Magda Metwally by asking her to tell Mr. Mohsen's then
9 lawyers, John Williams and Ed Swanson, that Mr. Mohsen had told
10 Magda Metwally he did not intend to leave the country and was
11 not going to leave.

12 We alleged that that shows his predisposition to
13 tamper with witnesses. And we alleged that that was also an
14 obstruction of justice, an attempted obstruction of justice
15 which we'll be using at sentencing for an enhancement.

16 I did also want to point out to the Court -- the
17 Court had asked me to summarize the testimony of Ms. Metwally,
18 which I did, but I also want to point out I neglected to
19 mention in the letter I sent the Court that Ms. Wilder and
20 Mr. Weinberg also represented Magda Metwally, who was
21 subpoenaed to testify before the Grand Jury.

22 During her Grand Jury testimony, Ms. Metwally was
23 given an opportunity to confer with Ms. Wilder. Ms. Metwally
24 took the Fifth as to every question except for her name and her
25 relationship to the defendant. And that was on the advise of

1 her lawyer, Nina Wilder, who was outside the Grand Jury room
2 and available for consultation during that attempt to get
3 testimony from Ms. Metwally.

4 **THE COURT:** What do you think is the conflict or
5 potential conflict that Ms. Wilder and Mr. Weinberg have?

6 **MS. HARRIS:** Well, currently the relief that the
7 defendant is seeking in the motion that is before the Court is
8 a motion for a new trial. Obviously, we oppose that motion,
9 but if the Court were to grant that motion and we were to have
10 a new trial and Mr. Weinberg were to substitute in as counsel
11 for defendant Amr Mohsen, the Government would be calling his
12 client, Magda Metwally, to testify against his client,
13 Amr Mohsen. He would be in the position of having privileged
14 communications between himself and Ms. Metwally that he would
15 either, based on his duty of loyalty to Ms. Metwally, be forced
16 not to use in contravention of his duty of loyalty to
17 Mr. Mohsen.

18 Even if this Court were to deny the motion for a new
19 trial, we are still in a position where we would have a direct
20 appeal before the Ninth Circuit. Furthermore, in Mr. Mohsen's
21 pro se papers, he has in a footnote alleged ineffective
22 assistance of counsel based on in part Mr. Balazs' and
23 Mr. Locke's failure to cross-examine certain Government
24 witnesses.

25 If Mr. Weinberg were to represent Mr. Mohsen in his

1 efforts to prove that Mr. Balazs and Mr. Locke were ineffective
2 and the partial basis for that alleged ineffectiveness was
3 strategic decisions to cross-examine and not cross-examine
4 certain witnesses, the witness, Ms. Metwally, would be at issue
5 who they chose not to cross-examine.

6 I would also point out to the Court the conundrum
7 the Government faces; Mr. Weinberg asked the Government to
8 secure a grant of immunity based upon his considered opinion
9 that she was in legal jeopardy if she were to testify without
10 immunity. And based on those representations, the Government
11 did seek and receive a grant of immunity for Ms. Metwally in
12 exchange for her testimony.

13 We considered her to be an unindicted co-conspirator
14 in this case who did have possible legal jeopardy based on
15 aiding and abetting the arson by transferring the money. And
16 it strikes us as an unsolvable conflict. If Mr. Mohsen wants
17 new counsel and the Court is of an opinion that he should have
18 new counsel, we would not have an objection to him being in a
19 position to interview other attorneys. But he does have a
20 right to conflict-free counsel, we understand also his right to
21 counsel of choice, but in this case we think to inject this
22 issue into -- into the record is not prudent. Our interest is
23 in preserving this conviction and in protecting the record.

24 **THE COURT:** Mr. Weinberg, you said in your letter
25 that you would be happy to explain to the Court where the funds

1 are coming from in order to establish that Mr. Mohsen is still
2 indigent and that the funds should not be used to repay the
3 Government for what it has expended for appointed counsel. Are
4 you prepared to make any --

5 **MR. WEINBERG:** I am prepared to address it. And I'm
6 also prepared if the Court wishes to hear anything more on the
7 conflict issue.

8 With respect to the funds, I can attest to a number
9 of things. Number one is that Mr. Mohsen initially spoke to
10 Ms. Wilder about the possibility of retaining her well over
11 five or six weeks ago, but that he had no funds and he was
12 entirely dependent on his family to raise the money.

13 I have personally spoken to Magda Metwally on at
14 least three occasions in the last few days, and she has assured
15 me that she has raised the money from among members of the
16 family. None of the money comes from Mr. Mohsen.

17 **THE COURT:** Who assured you of this?

18 **MR. WEINBERG:** Magda Metwally; that is, the sister
19 has helped to raise the money from other family members.
20 Ms. Metwally herself, if the Court will recall, is a university
21 professor. Her husband is a businessman. They and other
22 family members have decided that it's important to raise money
23 at this point to assist Mr. Mohsen.

24 He has no funds of his own. The Court probably is
25 aware that he is in bankruptcy proceedings, and all of his

1 funds have been accounted for. He has no other funds. He has
2 no access to funds.

3 **THE COURT:** You know, I don't know if you are
4 familiar with this or not, but Mr. Mohsen had the opportunity
5 to seek relief from the bankruptcy court in order to have funds
6 released from the bankruptcy court in order to pay his
7 attorneys.

8 **MR. WEINBERG:** I --

9 **THE COURT:** And he, instead of doing that, hired a
10 different attorney to represent him in the bankruptcy court.
11 That attorney came into this Court and represented to me that
12 he was going to take the necessary action to seek the release
13 of those funds from the bankruptcy court. We delayed the case
14 so he could do that. When we came back he said he had a change
15 of heart, and he didn't believe it was in Mr. Mohsen's best
16 interest to seek release of those funds from the bankruptcy
17 court.

18 Now, I didn't pursue it any further, but if he is,
19 in fact, in bankruptcy, it was only going to be to the
20 disadvantage of his creditors, not him, if the bankruptcy court
21 were to allow funds to be released in order to pay his
22 attorneys. It was apparent to me that this was a tactical
23 decision on Mr. Mohsen's part to have the Court pay for the
24 lawyers instead of paying for them himself. Now, I just tell
25 you that just to bring you up to date on what happened here.

1 **MR. WEINBERG:** Let me -- obviously, the Court knows
2 things about the case that I don't know, but let me say that my
3 understanding with respect to that moment in the progress of
4 the case is that Mr. Metwally's --

5 **THE COURT:** You mean Mr. Mohsen?

6 **MR. WEINBERG:** I mean Mr. Mohsen's counsel at that
7 time did not wish to proceed by way of having to constantly ask
8 the bankruptcy court to release funds. And it was a process
9 that they found to be both unwieldy and unlikely to be
10 productive. They decided they did not want to go forward as
11 criminal counsel on that basis.

12 **THE COURT:** They did not tell me that.

13 Let me ask Ms. Harris, was that your understanding?

14 **MS. HARRIS:** No. In fact, as I recall, their
15 concern was that the bankruptcy court might not release the
16 funds, not that it was going to be cumbersome or anything like
17 that.

18 **THE COURT:** No, that was my understanding, also.
19 They did not tell that to me.

20 My impression, even though they didn't say it, was
21 that they wanted off the case but they wouldn't tell me why.

22 **MR. WEINBERG:** May I have a moment with Mr. Mohsen?

23 **THE COURT:** Yes.

24 **MS. HARRIS:** In fact, Your Honor, as I recall, we
25 continued the case to determine whether the bankruptcy court

1 would release the funds, and then the lawyer for Mr. Mohsen in
2 the bankruptcy court said he wasn't even going to seek the
3 relief.

4 **THE COURT:** That's what I said, yes. We had like a
5 two-month delay for no reason because the bankruptcy lawyer
6 said he made that determination that it wasn't in Mr. Mohsen's
7 best interest.

8 **MS. HARRIS:** And then he didn't even come to court
9 to represent that. I believe the other lawyers came in and
10 represented that they had spoken to the bankruptcy lawyer.

11 **MR. WEINBERG:** Your Honor, my understanding, and
12 it's hard to, you know, get a hold of complicated facts in
13 these brief few moments, but my understanding is this was not
14 Mr. Mohsen's decision or in Mr. Mohsen's interest, but rather
15 that it was the decision of counsel, Mr. Rosenbush,
16 specifically, that he did not wish to proceed in that manner.
17 That is what I understand. This is not a tactical move by
18 Mr. Mohsen.

19 **THE COURT:** Well, we have a record in this case that
20 will show what the facts were at that time. What you have just
21 said to me is somewhat different than what was represented to
22 me at the time.

23 Be that as it may, all I have now is your
24 representation that Ms. Metwally has said that she raised the
25 money from other family members. Now, I mean, that doesn't

1 really give me a lot of information. That doesn't tell me
2 where that money came from, it doesn't tell me whether it's
3 sufficient to get you through the motions and through the
4 sentencing if the motions fail, and through a new trial if the
5 motions prevail. It doesn't satisfy me that there aren't some
6 shenanigans going on here behind the scenes as to where the
7 money is coming from.

8 **MR. WEINBERG:** Well, Your Honor, I know of no
9 shenanigans, and I wouldn't participate in any if I had any
10 inkling that that is what was going on.

11 **THE COURT:** But your client hasn't been truthful
12 throughout these proceedings. I have watched tapes of him
13 lying very effectively.

14 **MR. WEINBERG:** Your Honor, I'm making a
15 representation to the Court as an officer of the Court that I
16 have been personally assured that the money is being raised by
17 family members on a voluntary basis, that this is not
18 Mr. Mohsen's money. And I would be happy, if the Court wishes,
19 to have the appropriate family members come before the Court to
20 certify that. They would be willing to do it. I'm confident
21 that that can be arranged, and it could be arranged rather
22 quickly.

23 **THE COURT:** But I don't know why family members
24 would want to do this now instead of earlier. In other words,
25 you are telling me they have enough money to pay you to handle

1 post-trial motions and, if they are successful, a new trial.

2 **MR. WEINBERG:** Your Honor, the family has hired my
3 firm to represent them in post-conviction proceedings. If
4 those post-conviction proceedings earn Mr. Mohsen a new trial,
5 then we will be at that juncture. No one would, in
6 anticipation of a prospect that under the most favorable
7 circumstances is a difficult one, would pay in advance. The
8 family is committed, now seeing Mr. Mohsen's predicament, to
9 assist him and to assist him at this crucial juncture.

10 The family has made arrangements that are sufficient
11 for the post-conviction litigation and for the sentencing, and
12 I believe for the appeal as well that is in process. I
13 don't -- if he should ever get a new trial, we will take that
14 up with the family. But the family doesn't have to now commit
15 to pay for a new trial in the event we get it.

16 **THE COURT:** So the family wants you to represent him
17 at sentencing also?

18 **MR. WEINBERG:** I believe they do.

19 **THE COURT:** Does the family understand -- well, I
20 guess I can't ask you that question.

21 **MS. HARRIS:** Your Honor, I think it raises another
22 conflict if it's Magda Metwally that has raised the money for
23 Weinberg and Wilder's representation. That adds to the actual
24 conflict, because if she is controlling the money that is being
25 used for Mr. Weinberg's fees and Mr. Weinberg represented her

1 as a witness adverse -- called by the Government who had
2 testimony adverse to Mr. Mohsen, I think that adds to the
3 conflict of interest here.

4 **MR. WEINBERG:** Your Honor, let me say this, for 35
5 years I have represented lawyers in front of the State Bar. I
6 do that as a regular part of my work. And I am thoroughly
7 familiar with the Rules of Professional Conduct. There is no
8 conflict here.

9 If Mr. Mohsen were to have a new trial, his lawyer
10 would do exactly -- and that lawyer may or may not be me or
11 Ms. Wilder -- but his lawyer would do exactly what Mr. Balazs
12 did at the end of Magda Metwally's testimony, which is to say
13 that the defendant has no questions. And in his petition in
14 which he raised the issue of counsel's failure to
15 cross-examine, he didn't raise it with respect to Magda
16 Metwally.

17 There is no limitation on the ability of third
18 parties to pay for legal services on behalf of a family member
19 or even a distant acquaintance as long as it is clear that the
20 client has a complete knowledge of that and that that lawyer
21 assures the client, as Ms. Wilder and I have assured
22 Mr. Mohsen, that that would not affect our reputation.

23 There is no conceivable way in which Mr. Mohsen's
24 interest and Ms. Metwally's interest would actually diverge in
25 any proceedings, but certainly not a motion for a new trial and

1 appeal.

2 **THE COURT:** You know, maybe if you were his lawyer
3 at trial you would have done just as Mr. Balazs did and say no
4 questions. But maybe because of your knowledge about her as a
5 result of having represented her you might have wanted to ask
6 questions in representing Mr. Mohsen but you would have been
7 prevented from doing it because of your representation of
8 Ms. Metwally.

9 There is a conflict here. You may represent lawyers
10 before the State Bar, I will tell you there is a conflict.
11 Whether he wants to waive that conflict is another story. I
12 find there is a conflict. And now, the question is --

13 **MR. WEINBERG:** Let me, before the Court finishes its
14 finding, assure the Court that I have read Ms. Metwally's
15 testimony, and I have no knowledge of any fact or circumstance
16 different than what appears in that transcript and no knowledge
17 of any fact or circumstances that would have impelled me to act
18 differently than his counsel did.

19 **THE COURT:** You know, just in saying that,
20 Mr. Weinberg, you are violating the attorney-client privilege
21 because you are saying right now that you didn't have any
22 conversation with her that is any different than what she said
23 in court here. That is, in effect, telling me what
24 conversations you did or did not have with your client.

25 Now, maybe she wants to waive that, I don't know.

1 You have a conflict of interest. I am satisfied you have a
2 conflict of interest. I am disappointed that lawyers who -- in
3 order to make some money would cause themselves to become the
4 subject of controversy in matters that the public may look at
5 and cast a bad light on the Bar.

6 So is your client, Mr. Mohsen, and your other
7 client, Ms. Metwally, willing to come before me and be
8 questioned about whether they want to waive this conflict of
9 interest?

10 **MR. WEINBERG:** Yes.

11 **THE COURT:** All right. Well, when can Ms. Metwally
12 be here?

13 **MR. WEINBERG:** I'm sure she could come next week, if
14 the Court wishes her to.

15 **THE DEFENDANT:** (Nodding head.)

16 **THE COURT:** Ms. Harris, do you think that if
17 Mr. Mohsen and Ms. Metwally want to waive the conflict that I
18 have to let Mr. Weinberg represent Mr. Mohsen?

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

20 **THE COURT:** Tell me why. Because you are concerned
21 about appeal as much as I am. This is purely a question now of
22 what record we make.

23 **MS. HARRIS:** Right.

24 **THE COURT:** So if I don't let Mr. Weinberg in,
25 that's arguably error that Mr. Mohsen can assert on appeal. If

1 I do let Mr. Weinberg in, that's arguably another argument he
2 can make on appeal.

3 **MS. HARRIS:** Right.

4 My -- my concern -- I don't think the Court should
5 be whipsawed into having to accept a lawyer that has a clear
6 conflict, particularly when, given the history of this case,
7 Mr. Weinberg would be the fifth lawyer to represent Mr. Mohsen.

8 **THE COURT:** Well, the fifth set of lawyers.

9 **MS. HARRIS:** Fifth set. I mean, probably the tenth
10 lawyer, but the fifth set. And presumably, later down the road
11 we are either going to find out that the funds have been
12 exhausted and we need to make arrangements for representation
13 under the Criminal Justice Act again, or Mr. Mohsen is going to
14 get fed up with Mr. Weinberg, and he is going to want a new
15 lawyer to come in --

16 **THE COURT:** Yeah. And you know what is going to
17 happen? It's not going to be that simple, because we've had
18 experience with four other sets of lawyers. It's going to be
19 this vague breakdown in communications.

20 **MS. HARRIS:** Right.

21 **THE COURT:** And the attorney-client privilege is not
22 going to allow counsel to fully explain why he and his client
23 have come to a parting in the ways, but we are going to be told
24 that the ethics of the Bar require counsel to withdraw. That
25 would be the most likely scenario.

1 **MS. HARRIS:** Right.

2 **THE COURT:** Because it's happened before.

3 **MS. HARRIS:** And then the sixth set of lawyers are
4 going to come in and say that the court made a mistake in
5 accepting the waiver because there was an insoluble conflict of
6 interest was ready, apparent and obvious from the outset, that
7 Mr. Mohsen didn't fully understand or appreciate that conflict,
8 in any event that it was an unwaivable conflict, given that the
9 chosen attorney represented another unindicted member of the
10 same criminal conspiracy.

11 In my opinion, even if Ms. Metwally and Mr. Mohsen
12 were both to come in and represent to the Court that they were
13 willing to waive an obvious conflict of interest, I would
14 respectfully request the Court to override that interest based
15 on the Court's independent interest in ensuring that the
16 criminal trial is conducted within the appropriate ethical
17 standards to make sure that Mr. Mohsen does get the full
18 benefit of the Sixth Amendment, which includes the right to
19 conflict-free counsel.

20 **THE COURT:** There is another way to handle it that
21 comes to my mind just now, and I haven't thought it through
22 entirely, but, under rule --

23 **MS. HARRIS:** 44.

24 **THE COURT:** 44? Under Rule 29, the motion for new
25 trial had to be made -- the motion for judgment of acquittal

1 had to be made within seven days. And under Rule 33 the motion
2 for new trial had to be made within seven days. The Court gave
3 Mr. Balazs and Mr. Locke an extension of time to do that, and
4 that time has now passed.

5 Under Rule 45, the Court can extend the time only
6 for good cause if the motion is made during the seven-day
7 period or after the time expires for excusable neglect. There
8 is no excusable neglect here, there is no neglect at all. And
9 so the time has passed to file a motion for judgment of
10 acquittal or a motion for new trial. The motions have been
11 filed. They have been fully briefed. There is no right that I
12 know to bring in new counsel for the purpose of getting a
13 delay.

14 The Court could go ahead and hear and decide the
15 motions. If Mr. Mohsen then wants to bring in new counsel, to
16 ask the Court to reopen or to make new motions, he can bring
17 new counsel in and have them do that. My understanding is that
18 new counsel steps into the shoes of old counsel. You don't get
19 a new benefit by bringing in new counsel. It would be absurd,
20 for example, to think that you get to start trial all over
21 again just because you have the right to counsel of your own
22 choice, and now you have the money through your relatives to
23 retain counsel so you get to start all over and have a new
24 trial, that would be absurd.

25 Well, it's just as wrong to say that you have the

1 right to have new motions for judgment of acquittal and a new
2 trial just because you bring in new counsel after the time to
3 file those motions is expired. New counsel should step into
4 the shoes of old counsel.

5 If Mr. Balazs or Mr. Locke had asked to file new
6 motions, I would consider those and I would rule on those.
7 Mr. Weinberg, if he comes in after I rule on these motions, can
8 make the motion that Mr. Balazs would be allowed to make.

9 Right now there is no right to continue these
10 proceedings just because he has a change of mind and wants to
11 get a new lawyer. So this would give us the benefit of having
12 a nice clean record with counsel who has no conflict, and then
13 we could deal with this conflict question. And if I decide
14 there is a waiver that is valid, bring in Mr. Weinberg, he can
15 make his own motions.

16 And if the Court of Appeals later on decides it was
17 error to bring in Mr. Weinberg, then we stay with the rulings
18 that I made on the motion before he was brought in. If they
19 decide that it's all right, I'll rule on the motions that he
20 brings in.

21 But --

22 **MR. WEINBERG:** May I be heard?

23 **THE COURT:** You don't represent anybody yet, but,
24 yes, you may be heard.

25 **MR. WEINBERG:** Let me address a couple of things,

1 Your Honor.

2 First of all, with respect to Ms. Harris' argument
3 that Ms. Metwally is somehow an unindicted co-conspirator, I
4 believe that is an argument of convenience because --

5 **THE COURT:** No, it's really not, because otherwise
6 you would not have insisted on immunity before she testified.

7 You are a good lawyer, you have a good reputation.
8 You understand what immunity is all about. You are not going
9 to waste a lot of time getting immunity for somebody unless you
10 think there is some exposure here. So it's not an
11 after-the-fact argument. You wouldn't have taken the Fifth
12 Amendment at the Grand Jury when you were representing her if
13 you didn't think there was some exposure.

14 **MR. WEINBERG:** Your Honor, I wish the Court would
15 let me finish my statement.

16 Ms. Harris and I discussed the matter at
17 considerable length, and she assured me that Ms. Metwally was
18 not suspected. I said she may believe that is the case, but I
19 am obliged as a lawyer to protect her interests against the
20 possibility that an answer might tend to incriminate her.

21 There was no requirement that I conclude that she
22 was criminally involved or that she was an unindicted
23 co-conspirator or that she was vulnerable. Ms. Harris assured
24 me repeatedly, no, no, no, we don't think she was knowingly
25 involved. I said, fine, then give her immunity. I don't want

1 her to take a chance that something she says might tend to
2 incriminate her. And that is all that was required, and that
3 is a exactly what I said to Ms. Harris.

4 There was no legitimate basis for the Government to
5 now contend that she was a co-conspirator, that she was
6 knowingly involved, when they expressly took the opposite
7 position with me. And I simply asked for the immunity because
8 I think a lawyer should, unless it is abundantly clear that
9 there is no conceivable basis for self-incrimination.

10 **THE COURT:** When you take the conversations that she
11 had with Mr. Mohsen that were recorded over the telephone
12 together with her receipt of the \$2000 and her delivery to
13 Mohammed Ali Moussa, don't you think that's evidence from which
14 a jury might find that she it was knowingly involved?

15 **MR. WEINBERG:** Your Honor, what I'm telling you, the
16 Court, is that Ms. Harris assured me, as did Mr. Waldinger, but
17 particularly Ms. Harris, that they did not believe she was
18 knowingly involved. She thought she was doing a favor for her
19 brother and didn't understand what was really happening. That
20 was their evaluation. I said that's very fine, then you should
21 have no problem getting her immunity. I did not want her to
22 inadvertently create a problem for herself.

23 I grant you somebody could look at the circumstances
24 and decide she was knowingly involved. That is why you take
25 the Fifth. But the Government's official representation was

1 that they did not believe her to be knowingly involved.

2 **THE COURT:** But what Ms. Harris personally believed
3 is not the question, you agree to that. The question is
4 whether there is some exposure there and whether a jury could
5 find that she was a co-conspirator.

6 **MR. WEINBERG:** Which she now has immunity for and
7 cannot be prosecuted on that basis.

8 The second thing I would like to say is I don't know
9 the Court well, but I have appeared before the Court, and I
10 don't know what I have done in the two matters in which I have
11 appeared before the Court extensively to allow the Court to
12 doubt my motives and integrity. The Court has --

13 **THE COURT:** I have --

14 **MR. WEINBERG:** The Court has raised that question.

15 **THE COURT:** I have not questioned your motives or
16 integrity. As a matter of fact, I acknowledge that you have a
17 good reputation.

18 **MR. WEINBERG:** But you question why lawyers, in
19 order to get money, they would put themselves in a bad light.
20 Let me assure you that before I did this I considered the very
21 question here, and I determined there was no reasonable
22 likelihood by any stretch of the imagination there would be a
23 conflict here.

24 Mr. Mohsen wants to hire my partner, my partner is
25 out of the country. I considered the matter as well as I

1 could, and I decided firmly and without any concern that there
2 was no conflict.

3 The Government didn't contact me and say, wait a
4 minute, let's talk about this, there may be a conflict here.
5 The Government wrote a letter to the Court accusing me of a
6 conflict.

7 **THE COURT:** Once you get the letter from the
8 Government, I would think that you would reflect on this, and
9 just to avoid the appearance of impropriety that you would
10 inform Mr. Mohsen you can't represent him, that he needs to get
11 somebody else to do that.

12 The public has a perception of lawyers that we are
13 constantly fighting, and we just have to take the extra steps
14 to avoid any appearance of impropriety.

15 **MR. WEINBERG:** To tell you the truth, I considered
16 that. And I think that just because the Government wants to
17 prevent Mr. Mohsen from having a lawyer that he wants, I don't
18 think that means that I should therefore accept the
19 Government's, you know, opposition and surrender to it.

20 **THE COURT:** But --

21 **MR. WEINBERG:** Now, let me address the Court's --

22 **THE COURT:** Mr. Weinberg, I want to say something
23 about Ms. Harris. I am satisfied that she has no interest in
24 denying Mr. Mohsen counsel of his choice just for the purpose
25 of denying him counsel of his choice. She has no reason to do

1 that. Her motivation is the record. She wants a good, clean
2 record in this case, and that is the only thing that is
3 motivating her in this matter.

4 **MR. WEINBERG:** Well, then, let me address that
5 issue, Your Honor.

6 The Court has before it motions; it is true that as
7 a technical matter the Court could say, I'm sorry, I'm not
8 giving you any further extensions or permission. But at this
9 point the motions are made. There are motions made. The issue
10 raised in those motions to some extent, I understand, including
11 the in pro per motion by Mr. Mohsen, is the ineffectiveness of
12 the very counsel that this Court would now compel him to have
13 represent him in his ongoing proceedings.

14 **THE COURT:** Now --

15 **MR. WEINBERG:** He has raised in propria persona an
16 issue of the ineffective of this counsel, this counsel now has
17 a conflict.

18 **THE COURT:** And let me make a suggestion to you, if
19 that is the argument that you want to urge on his behalf, then
20 the appropriate vehicle to do that, in my judgment, would be a
21 2255 petition.

22 **MR. WEINBERG:** Your Honor, I'm standing here because
23 this is the day set for hearings on the motions and because
24 within the last week Mr. Mohsen's family has managed, you know,
25 to make arrangements to retain counsel.

1 I have come in here simply to ask the Court to give
2 me, and more importantly Ms. Wilder, an opportunity to look
3 into the matter and to determine with the Court what we can and
4 what we should do.

5 I'm not here to concede any motions, to argue any
6 motions, to raise legal issues, I'm only saying he has the
7 ability now to retain counsel legitimately. He has counsel
8 whom he considers to be conflicted and about whom he has raised
9 an issue. I think counsel fully supports his request for there
10 to be new counsel. And if the Court won't allow a
11 supplementation, then the request will be let us argue these
12 motions at least on his behalf. He would be more confident
13 with us if we are allowed to argue them.

14 The Court may refuse us the right to supplement; I'm
15 only saying that because of the time constraints and because of
16 the complexity of the situation that we simply be allowed the
17 time to come before the Court and to determine with the Court a
18 reasonable way to proceed.

19 **THE COURT:** Would you be satisfied to be associated
20 in the matter and to be given leave to come in and make
21 arguments on the motion without substituting his existing
22 counsel out?

23 **MR. WEINBERG:** That's not entirely my decision. I
24 think Mr. Mohsen would have to consider that, and he would have
25 to discuss it with Mr. Balazs and Mr. Locke. I don't know what

1 their position would be.

2 All I'm trying to do, Your Honor, is --

3 **THE COURT:** Well, I asked if you would be satisfied.

4 **MR. WEINBERG:** I would be satisfied with playing a
5 role sufficient to meet Mr. Mohsen's needs. I'm not sure I
6 understand exactly what the Court has in mind, and I'm not sure
7 if Mr. Mohsen considers it sufficient to meet his needs.

8 I'm willing to do whatever the Court sets as its
9 limits. My goal is to assist Mr. Mohsen. That is what he has
10 hired us to do.

11 **THE COURT:** What about that, Ms. Harris? What if
12 the Court continued to have Mr. Locke and Mr. Balazs appointed
13 to represent Mr. Mohsen but allowed him to retain Ms. Wilder
14 and Mr. Weinberg to associate?

15 **MS. HARRIS:** Your Honor, I don't think that that is
16 appropriate for a number of reasons. I don't think the public
17 should continue to pay for legal representation for Mr. Mohsen
18 and then to have adjunct private counsel. I don't think that
19 is an appropriate use of the public's funds. Second, if he
20 truly feels --

21 **THE COURT:** Well, here is the way it could be:
22 Since he says there is no conflict, I could allow Ms. --

23 **MR. WEINBERG:** Wilder.

24 **THE COURT:** Ms. Metwally --

25 **MR. WEINBERG:** Oh.

1 **THE COURT:** Ms. Metwally to appear through counsel
2 as amicus and to make arguments on behalf of her brother.

3 **MS. HARRIS:** Umm --

4 **THE COURT:** And then Mr. Weinberg would be
5 representing Ms. Metwally. He says there is no conflict, so he
6 can make the same arguments for Mr. Mohsen in his capacity as
7 counsel for Ms. Metwally as he could in his capacity for
8 Mr. Mohsen.

9 **MS. HARRIS:** I continue to object to the presence of
10 counsel that has an actual conflict of interest on this record.

11 I do want to point out that I object to any
12 characterization of the Government's interest here as being
13 anything other than protecting the record. The Government has
14 a duty, and there is case law that says the Government has a
15 duty to raise a conflict when it becomes aware of one, and I
16 did that as soon as I received Mr. Balazs' letter.

17 **THE COURT:** I said that. There is no reason to
18 think that you would want to do anything to deny Mr. Mohsen
19 counsel of his own choice.

20 **MS. HARRIS:** Yeah.

21 **THE COURT:** The lawyers that were appointed by the
22 court have been better than any of the lawyers that he had
23 representing him --

24 **MS. HARRIS:** Absolutely.

25 **THE COURT:** -- up to that point.

1 **MS. HARRIS:** Absolutely.

2 **THE COURT:** So you had a harder time with the
3 lawyers that the Court appointed than any of the lawyers he
4 retained.

5 **MS. HARRIS:** Absolutely. They got much more
6 accomplished for Mr. Mohsen than any of the other lawyers did.
7 And I think they did an outstanding job, frankly, and I've told
8 them so privately.

9 But nevertheless, we are in a situation where
10 Mr. Mohsen wants to replace appointed counsel with retained
11 counsel who have an actual conflict of interest. I don't think
12 that it's a trivial conflict or one that can necessarily just
13 be overlooked. I think that given the probability that
14 Mr. Mohsen will later be challenging Mr. Weinberg and
15 Ms. Wilder's representation that we ought to just nip this in
16 the bud.

17 **THE COURT:** But let's think this through again,
18 because maybe there is a compromise that we can reach that will
19 satisfy everybody.

20 If Mr. Weinberg represented Ms. Metwally, and the
21 Court allowed him in that capacity to make any arguments that
22 he wanted to make as amicus curiae, I don't have to accept him,
23 I can take them for what I think they are worth, and how would
24 Mr. Mohsen be in a position to complain?

25 **MR. WEINBERG:** Your Honor, I think there are two

1 problems with the Court's suggestion. I mean, I respect the
2 Court's effort to find a solution to a problem which I don't
3 think exists, but I respect the Court's efforts.

4 Number one, the problem would be that if the Court
5 finds that there is no conflict sufficient to allow Ms. Wilder
6 and I to make arguments on behalf of Ms. Metwally, then why
7 would we create an artificial construct where the Court is not
8 permitting us to represent him?

9 Number two is the Court would not be granting
10 Mr. Mohsen his right to retain counsel. He wants counsel to
11 represent him, not prior counsel.

12 **THE COURT:** Right.

13 **MR. WEINBERG:** And by this solution, the Court would
14 still require him to be represented by prior counsel and not by
15 Ms. Wilder and myself.

16 The suggestion that the Court was raising about the
17 possibility of association I believe comes closer to the mark,
18 because it at least allows us to represent Mr. Mohsen and
19 allows Mr. Mohsen to be represented by us.

20 Whether there are other problems that arise from
21 that, if there are, we will try to bring them to the attention
22 of the Court. At least that meets the need of, you know,
23 Mr. Mohsen to have his counsel.

24 I don't think there is any issue about whether the
25 Government funds could be expended for two reasons. One is

1 that if the Court denies me and Ms. Wilder the right to
2 represent or assist in the representation of Mr. Mohsen, then
3 the Government would go on paying for Mr. Balazs and Mr. Locke
4 anyway, so this is not an additional expense to the Government,
5 it's an expense the Government currently has.

6 The other is that I think the law has clearly
7 established that indigent defendants who retain private counsel
8 through the help of third parties are entitled to court
9 services; for example, investigation experts, et cetera. So I
10 don't think that matter is a legitimate issue.

11 **THE COURT:** Well, I think I have an answer for each
12 of the problems that you said this creates.

13 The first problem that you said is that I would have
14 to find that there was no conflict between Ms. Metwally and
15 Mr. Mohsen in order to allow you to represent her as amicus
16 curiae; I would compare it to a lawyer who represents the
17 victim, which clearly has a conflict with the defendant. But
18 the victim may decide that she wants to speak on behalf of the
19 defendant.

20 The victim may decide that she wants to make a plea
21 for mercy on behalf of the defendant. The victim may decide
22 that she wants to argue that the case should be dismissed. I
23 would see nothing wrong with the Court allowing the victim to
24 be heard through counsel in making arguments favorable to the
25 defendant. So I think that would be my answer to the first

1 problem that you perceived.

2 The second one is you said that the Court's solution
3 would still deny Mr. Mohsen the right to counsel of his choice;
4 well, once I find there is a conflict, he doesn't have the
5 right to counsel with a conflict. There are hundreds of good
6 lawyers in this community if he wants to retain lawyers. You
7 know, you are one of them, and I don't know your partner, but I
8 assume she's one of them, too, but there are hundreds of other
9 good lawyers that don't even have the appearance of a conflict
10 that he could hire if he wanted to hire lawyers.

11 He picks the one, and maybe there is one other that
12 I know of, lawyer that can't represent him in this matter,
13 that -- to ask to represent him. And I wouldn't put it past
14 him to be doing this just to set up the record for error. I
15 wouldn't put it past him because that is what has happened with
16 all these other lawyers. And there has been some problem that
17 has been created that has the effect of muddying the record
18 with all these lawyers that he retains.

19 **MR. WEINBERG:** Your Honor, I don't know that much
20 about the history of the case.

21 First of all, I believe this is the fourth set of
22 lawyers. I know that Mr. Williams and Mr. Swanson got out of
23 the case because of the allegations involving Judge Alsup.
24 They wanted out. The Court I believe knows they wanted out.
25 It was not Mr. Mohsen's manipulation. Mr. Rosenbush and

1 Mr. Grele, apparently there was a problem about how they were
2 going to get paid.

3 **THE COURT:** No -- you know, if you could look at the
4 record in this case, you would see they came in once and they
5 said they were witnesses against Mr. Mohsen, so they had to get
6 out. They came in another time and they said they were
7 witnesses for Mr. Mohsen and they had to get out. They came in
8 a third time and said there were matters that they couldn't
9 disclose to me of attorney-client privilege that required them
10 to get out. And then finally they said they had to get out
11 because the bankruptcy court had the money tied up.

12 **MR. WEINBERG:** And how is that Mr. Mohsen's fault?

13 **THE COURT:** Mr. Mohsen is the one that tied up the
14 money in the bankruptcy court. He had opportunity through
15 another lawyer to have that money released in order to pay
16 Mr. Rosenbush, and for reasons that were never explained to me,
17 Mr. Mohsen elected not to make that motion in the bankruptcy
18 court.

19 **MR. WEINBERG:** Mr. Mohsen may wish to address that.

20 **MS. HARRIS:** Can I just raise one issue with the
21 Court?

22 Given that we do have court-appointed counsel in
23 this case, I don't know how the Eastern District works, but I
24 know our public defender declines to represent any potential
25 client where they have previously represented a witness, even

1 if that witness isn't going to be called to testify at trial.
2 I know our Public Defender then retains panel counsel --

3 **THE COURT:** Our Public Defender does that, too. And
4 when I was in private practice I did it. The lawyers that I
5 know do that.

6 **MS. HARRIS:** Okay. But I'm just pointing that out.

7 **THE COURT:** That has been on my mind because --
8 that's why I had this discussion with Mr. Weinberg. Once he
9 saw your letter, if I was in his position I would have just
10 told the client, I'm sorry, this is a case that I can't take.

11 **MR. WEINBERG:** Your Honor, I respectfully disagree.
12 I thought about it very carefully. There is no conflict.
13 There is no actual conflict, no potential conflict, and any
14 conflict can be waived.

15 The reason that Mr. Mohsen wants us to represent him
16 is because in the course of representing his sister he felt
17 that our skill and integrity was what he wanted to work with.
18 It was precisely because he knows us. He doesn't know other
19 lawyers out there. It was because he saw the quality of the
20 work, that is why he wanted us to represent him. We spoke to
21 him several times. We are willing to do it because we do not
22 believe there is a conflict, and any conflict can be waived.

23 You know, it just seems to me, Your Honor, that if
24 the Court requires Mr. Mohsen to go forward with lawyers
25 against whom he has raised an issue of ineffectiveness, that is

1 a problem for the record that is at least equal if not greater
2 than the problem that we have here.

3 **THE COURT:** You know, with the games that he plays
4 we would never get to judgment if we followed the rule that he
5 could never proceed with counsel that he claimed was
6 ineffective. He would claim that with respect to every lawyer
7 that represented him, and we would never get to judgment. That
8 is just the reality of it.

9 **MR. WEINBERG:** Your Honor, I don't think -- you
10 know, I don't know the Court's relationship with Mr. Mohsen and
11 I'm --

12 **THE COURT:** My relationship with Mr. Mohsen is all
13 on the record. I have never seen Mr. Mohsen, spoken with him,
14 or heard a word from him that is not on the record of this
15 Court.

16 **MR. WEINBERG:** I never intended to suggest
17 otherwise. All I'm saying is I don't know what the basis is
18 for the Court's interpretation of the events that it has seen.

19 **THE COURT:** The evidence in this case, that is my
20 basis, the evidence in the case.

21 **MR. WEINBERG:** I'm saying I don't know.

22 **THE COURT:** Well, you are going to have to learn the
23 evidence in the case if you are going to represent him.

24 **MR. WEINBERG:** I know that. And that is what I'm
25 attempting to do, is get permission to do that.

1 **THE COURT:** Well, you have permission to do that.
2 You could always familiarize yourself with the record in the
3 case. The Court didn't have to give you permission to do that.

4 **MR. WEINBERG:** Your Honor, I was only asked by
5 Mr. Mohsen to do this last Friday. He had been in touch with
6 my partner, who is out of the country. She returns over the
7 weekend. I took the best steps I could to try to preserve his
8 right to retain counsel of his choice.

9 **THE COURT:** But that is not your fault, that is
10 Mr. Mohsen's fault. He has had three years or more to hire you
11 if that is what he wanted to do. His sister has had three
12 years or more to hire you if that is what she wanted to do.
13 She has had three years or more to raise the money to hire you
14 if that's what she wanted to do. Instead, she waits until the
15 week that I'm going to hear the post-trial motions to strike
16 this deal with you, which apparently still hasn't even been
17 consummated.

18 Do you have the money yet?

19 **MR. WEINBERG:** I have money in the trust account. I
20 don't know why the Court would assume that it would be easy for
21 Ms. Metwally to produce money any time that she wanted to. I
22 understand that she has been working for several weeks to raise
23 it.

24 **THE COURT:** She should have been working for several
25 years to raise it if that's what she wanted to do.

1 **MR. WEINBERG:** It was only after the conviction and
2 as the post-conviction proceedings went forward that Mr. Mohsen
3 decided he wanted and needed to change counsel. It was at that
4 point that we were contacted and at that point the
5 conversations began between Ms. Metwally and Mr. Mohsen and
6 Ms. Wilder.

7 The family struggled to raise the money, and they
8 were able to do so by last week and contacted me and asked me
9 to come in and let the Court know that we were prepared to
10 represent Mr. Mohsen, if the Court would permit us to do that,
11 because we do not believe there is a conflict.

12 **THE COURT:** Ms. Harris, I'm not sure it's my
13 business or prerogative to make any further inquiry into where
14 these funds came from. I do have grave doubts about the source
15 of these funds, but that is another story. I don't know that
16 it's my business when she gets here to have you cross-examine
17 her about where this money came from, do you?

18 **MS. HARRIS:** The only interest the Government -- the
19 Government has two interests, one, in protecting the public,
20 given that there was sworn factual representations of
21 indigency, which the Government at the time took issue with
22 given what we know about Mr. Mohsen's finances.

23 The second interest is I perceive there to be a
24 conflict if Ms. Metwally, who testified under a grant of
25 immunity and provided incriminating evidence against the

1 defendant is now paying for the lawyer representing the
2 defendant. That strikes me as a conflict. It's just not as if
3 his sister raised the money for him and we were wondering, you
4 know, is this potentially dirty money. It's her as a person
5 who was a witness in this case who testified adversely to
6 Mr. Mohsen's interest.

7 **THE COURT:** Don't you see that, Mr. Weinberg? Leave
8 aside for the moment your argument that she is not an important
9 witness and that Mr. Balazs didn't cross-examine her, and put
10 yourself back in your office or at the State Bar, and somebody
11 says to you, did you hear that a witness who testified against
12 a defendant as a witness for the Government under a grant of
13 immunity is now paying the lawyer to represent the man that she
14 testified against?

15 **MS. HARRIS:** And that it was her lawyer.

16 **THE COURT:** Even if it wasn't her lawyer. She is
17 now paying her lawyer or even another lawyer.

18 Wouldn't you raise your eyebrows?

19 **MR. WEINBERG:** No, Your Honor, if you ask the
20 question the proper way, which is did you hear that
21 Mr. Mohsen's sister, who the Government compelled to testify
22 and who apparently had very little importance to say but he got
23 convicted anyway now wants to assist him and has raised money
24 for the family to help him --

25 **THE COURT:** You don't get to phrase the way the

1 article appears in the *Daily Journal* or the way the public
2 perceives you. You are stuck with the public perception. And
3 the public perception here is that a witness who testified
4 against the defendant under a grant of immunity is now paying
5 her lawyer to represent the defendant in that very case.

6 **MR. WEINBERG:** Your Honor, first of all, to leave
7 out the fact that it's his sister is I think to skew the issue
8 and the perception. And the second thing is, even as the Court
9 has stated it, it does not raise a conflict.

10 **THE COURT:** You say so.

11 **MR. WEINBERG:** I do.

12 **MS. HARRIS:** Your Honor, I mentioned to Mr. Balazs
13 before we started, wouldn't you love to represent a defendant
14 on a 2255 where you could claim that the defendant's lawyer
15 post-conviction also represented a witness who testified under
16 a grant of immunity and gave testimony adverse to your client?
17 Mr. Balazs didn't answer the question, but it just strikes me
18 as a situation that poses a lot of problems for no real reason.

19 Under these circumstances --

20 **THE COURT:** The real reason is it is a whipsaw, and
21 that if you don't allow him to have counsel of his choice, then
22 you have to answer that argument.

23 **MS. HARRIS:** I have a Fourth Circuit case that -- I
24 did a lot of research on this, but I didn't have time to file a
25 brief, but I did do some research. The Fourth Circuit had a

1 case just like this one where they declined to allow a lawyer
2 who represented a witness to then come in and represent the
3 defendant. And the Court had considered that auxilliary
4 counsel, that Your Honor had mentioned -- in the opinion that
5 was written, it said, and it's quoting from the Supreme Court's
6 Wheet decision, "The Supreme Court made plain that for this
7 purpose the Court must have sufficiently broad discretion to
8 rule without fear that it is setting itself up for reversal on
9 appeal" --

10 **THE COURT:** I wish that was the Ninth Circuit that
11 said that.

12 **MS. HARRIS:** -- "either on right to counsel ground
13 if it disqualifies the defendant's chosen lawyer or on
14 ineffective grounds if it permits conflict-infected
15 representation of the defendant."

16 The Fourth Circuit wrestled with this exact same
17 conundrum that Mr. Mohsen has now visited upon the Court, and
18 it is Mr. Mohsen that visited this on the Court.

19 There has not even been a fully developed record on
20 this allegation of ineffective assistance. I share the Court's
21 view that Mr. Balazs and Mr. Locke did an admirable job in this
22 case, and that Mr. Mohsen got some of the best representation I
23 have seen in the course of representing the Government in
24 criminal cases. But nevertheless, I do think that the Court is
25 being put in a position that it should not be put in, and the

1 Government's conviction is being put in a posture it shouldn't
2 be put in.

3 And there is no real reason for this. There are any
4 number of lawyers that Mr. Mohsen can consult with. The Court
5 has relaxed the conditions of his confinement. Apparently the
6 Government unwittingly agreed to a continuance of the
7 sentencing and then allowed Mr. Mohsen to have the time to do
8 this. And that is fine if he wants to consult with other
9 lawyers.

10 I just don't understand why we would take the risk
11 of doing this, particularly when the facts are known to
12 everyone. It's not as if Mr. Weinberg substitutes in and then
13 we learn about some potential conflict. We have what I believe
14 is an actual conflict that all parties are aware of. I don't
15 care how you couch it, it's a conflict.

16 **THE COURT:** Thinking out loud about the record for a
17 minute, if the Court doesn't allow Mr. Weinberg in and the
18 Court of Appeals disagrees, would the worst that could happen
19 be that it's remanded back for a hearing on the post-trial
20 motions?

21 **MS. HARRIS:** I believe that's the case, because -- I
22 believe that's the case.

23 **THE COURT:** If the Court errs on the other side and
24 allows Mr. Weinberg in when it creates a conflict, what would
25 be the worst scenario?

1 **MS. HARRIS:** I would obviously be arguing to the
2 Ninth Circuit there would be no basis to disturb the
3 conviction.

4 **THE COURT:** But what would be the worst scenario if
5 you lost to the Ninth Circuit?

6 **MS. HARRIS:** Well, perhaps the conviction could get
7 reversed if Mr. Weinberg's conflict prevented him from
8 zealously representing Mr. Mohsen in post-trial relief which
9 the Ninth Circuit perceived could have and should have been
10 granted with a lawyer who didn't have that conflict and were
11 able to say Ms. Metwally should have been cross-examined in the
12 following areas, and but for that the verdict might have been
13 different.

14 **THE COURT:** Let me think that through.

15 **MR. WEINBERG:** Your Honor --

16 **THE COURT:** Seems to me that either way the worst
17 disruption we could expect would be a remand for hearing on the
18 post-trial motions, although I could be wrong.

19 **MR. WEINBERG:** Let me say, if I may, Your Honor,
20 first of all, let me remind the Court that Mr. Mohsen is
21 prepared to enter a full and knowing waiver of any of these
22 possibilities, including specifically the raising of any 2255
23 or ineffective assistance of counsel claims. The Government
24 routinely demands waivers from clients in order to proceed on
25 appeal. And although those waivers do not include waiver of

1 ineffectiveness, Mr. Mohsen would be prepared to waive any
2 claim of ineffectiveness, and that would insulate the Court's
3 record if he knowingly does that.

4 **THE COURT:** It might if I could ask enough
5 questions. But the problem with any waiver is if you don't
6 know fully what you are waiving, then it's usually not valid.
7 When you don't know whether your lawyers are effective or
8 ineffective, it's kind of hard to waive a claim of ineffective
9 assistance of counsel. That is probably why the Government
10 doesn't routinely expect people to waive that claim.

11 **MR. WEINBERG:** Let me address the Court's question.
12 The position the Court has now is that there is a
13 motion for a new trial and a Rule 29 filed by Mr. Balazs and
14 Locke; is there not?

15 **THE COURT:** There is.

16 **MR. WEINBERG:** There is an in propria persona motion
17 filed by Mr. Mohsen, that is before the Court. If the Court
18 allows counsel to come in now and supplement or argue and that
19 for some reason is considered to be error, the Ninth Circuit
20 has before it the arguments that were otherwise -- that would
21 have been before the Court. And the Ninth Circuit can look at
22 it and say, well, new counsel should not have been allowed to
23 come in and clutter the record, but looking at the arguments
24 that were already before the Court, the Court's decision is,
25 you know, is not to be disturbed.

1 **THE COURT:** No, they wouldn't say that, because I
2 would have been taking Mr. Balazs and Mr. Locke out of the case
3 before I had a chance to hear their oral arguments on the
4 motion. And so what would happen is it would come back to me
5 to allow them to argue the motion, I would suppose.

6 **MR. WEINBERG:** Well, but that's all that it would
7 be, is to allow them to argue a motion that is already fully
8 briefed and presented to you.

9 The most that it would do is require you to allow
10 you to allow them to argue, whereas if you decline him the
11 right to have counsel of choice, you have denied him counsel in
12 the entire post-conviction proceeding. And at the very least,
13 that is what would have to be redone.

14 **THE COURT:** It's the same both ways, it's to go back
15 and redo the post-conviction motions, either way.

16 **MR. WEINBERG:** No, because right now the Court
17 stands here ready today, or sits here ready today prepared to
18 hear Mr. Balazs' argument.

19 If the Court decided that there was no -- to rule
20 against Mr. Mohsen and not allow him counsel, the Court could
21 say, okay, Mr. Balazs go ahead and argue. That is the only
22 piece missing. If the Court were then to be found to have made
23 a mistake or, you know, if the Court were found to have made a
24 mistake by not allowing counsel --

25 **THE COURT:** The whole resentencing would have to be

1 redone, too.

2 See, sentencing is a big deal right now.

3 **MR. WEINBERG:** I understand that. And that's why
4 Mr. Mohsen wants to make sure that he has counsel in whom he
5 has confidence.

6 **THE COURT:** He wants to make sure that he has
7 counsel who doesn't know the sentencing judge nearly as well as
8 the lawyers he already has, and he wants to make sure that he
9 has counsel that didn't sit through the trial, like the lawyers
10 that he already has does, so that he can have that counsel
11 argue what sentence this judge ought to impose rather than
12 those other lawyers.

13 If that is what he wants, so be it. But if I let
14 you in the case and that turns out to be a conflict, it's not
15 just going to come back for rehearing on the motions for
16 judgment of acquittal and new trial, it's going to come back
17 for a new sentencing.

18 **MS. HARRIS:** Your Honor, I do want to point out, if
19 the Court is going to allow Mr. Weinberg and Ms. Wilder to
20 substitute in after an appropriate waiver, I want to make sure
21 the record is clear that we as the Government will be arguing
22 for an enhancement at sentencing based on obstruction of
23 justice, and that will be based in part on the phone call to
24 Magda Metwally that Mr. Mohsen made from jail trying to tamper
25 with her testimony.

1 We will also be using the Tom Haung break-in, the
2 proposed vandalism of Haung's cars for an obstruction of
3 justice enhancement. But we will be relying on that
4 obstructive phone call from jail.

5 **THE COURT:** With Booker and Ameline and the Ninth
6 Circuit's decision in Zavalla and other recent cases, all of
7 those things are relevant at the time of sentencing thought
8 just in determining the guidelines but in determining the
9 ultimate sentence under the factors of section 3553. So --

10 **MR. WEINBERG:** How is that conceivably a conflict
11 for Mr. Mohsen for his counsel to argue that you shouldn't
12 enhance on that basis?

13 **THE COURT:** On the basis of your client's testimony.

14 **MR. WEINBERG:** Even if that were true, so? But it's
15 on the record there is no potential for conflict.

16 **THE COURT:** See, what you could have done when you
17 represented her is not enter into the agreement for immunity.
18 That would have kept her off the stand.

19 **MR. WEINBERG:** I couldn't not enter into the
20 agreement, no. How can I decline immunity? If the Government
21 wants her testimony, it's going to get it. What I did for the
22 Government is --

23 **THE COURT:** You negotiated it.

24 **MR. WEINBERG:** Yeah.

25 **THE COURT:** Maybe they wouldn't have given her

1 immunity if you didn't negotiate it.

2 **MR. WEINBERG:** They assured me they would because
3 they didn't think she was involved.

4 Your Honor, no --

5 **THE COURT:** All I'm saying is it's impossible to
6 reconstruct what would have happened if you were representing
7 Mr. Mohsen instead of Ms. Metwally at the time she was
8 subpoenaed to the Grand Jury and the time she came here in this
9 court. It's impossible to reconstruct it.

10 **MR. WEINBERG:** I can tell you without the slightest
11 doubt that no lawyer who was interested in Ms. Metwally's legal
12 welfare would have done differently than I or Ms. Wilder did.
13 And I can tell you with absolute confidence that it made no
14 difference whatsoever to Mr. Mohsen.

15 **THE COURT:** Well, I guess I have no choice but to
16 follow through with this and to have Ms. Metwally in here and
17 go over with both her and Mr. Mohsen the conflict.

18 Now, I would suggest, Ms. Harris, that you give some
19 thought to that, and you put together all the questions or
20 subjects that you think I ought to ask or address to each of
21 these two, both Ms. Metwally and Mr. Mohsen, in order to first
22 inform them as to why there is a conflict.

23 **MS. HARRIS:** Um-hmm.

24 **THE COURT:** And to why there is a potential of an
25 additional conflict, and then, B, to assure that they knowingly

1 and voluntarily waive that conflict.

2 **MS. HARRIS:** Okay. I will do that, Your Honor.

3 I also want to provide the Court, if the Court
4 thinks it would be useful, with the cases that give the Court
5 the discretion to override a waiver if the Court thinks that
6 the integrity of the process demands overriding the waiver, and
7 that the essential aim of conflict-free counsel for the
8 defendant is more important than the conundrum the defendant is
9 putting the court in by asking that his sister's lawyer
10 represent him post-trial.

11 **MR. WEINBERG:** If there is going to be any further
12 briefing, I would appreciate an opportunity to respond.

13 **THE COURT:** Yes, I can give you an opportunity to
14 respond.

15 You have it in your power, here, Mr. Weinberg, to
16 simply say you have decided not to represent him. Nobody could
17 hold that against you, nobody could criticize you for doing
18 that.

19 **MR. WEINBERG:** You know, I'm sorry, Your Honor, but
20 you and I have very different views of my professional
21 responsibility.

22 I have a client who wishes to exercise his right to
23 counsel.

24 **THE COURT:** Whether he is your client is the
25 question. You have the ability to decline to accept him as a

1 client.

2 **MR. WEINBERG:** Your Honor, I understand that, and I
3 have thought about it very carefully. I think he has the right
4 to ask Ms. Wilder and me to represent him, and I do not believe
5 there is any legitimate reason why --

6 **THE COURT:** Do you think you have the duty to
7 represent everybody who wants you to represent them as long as
8 there is no conflict? Lawyers turn down clients all the time.

9 **MR. WEINBERG:** Your Honor, I believe that if it is
10 possible for me to represent a client who wishes me to
11 represent him I should do that. And I shouldn't avoid doing
12 that on the basis of contrived conflicts raised by the
13 Government.

14 **THE COURT:** Then you and I have a very different
15 view about a lawyer's obligation, because I don't think a
16 lawyer has any obligation to represent any client unless he
17 wants to.

18 **MR. WEINBERG:** Well, I think that the Rules of
19 Professional Conduct suggest otherwise.

20 **THE COURT:** Okay. Let's find them, because I
21 would like to know that. You could have a sole practitioner
22 out there that everybody in the state wanted to represent him,
23 and according to you he has the duty -- I would like to know
24 right now --

25 **MR. WEINBERG:** Your Honor, the Rules of Professional

1 Conduct suggest that no lawyer should done turn down a cause
2 for reasons personal to himself. I think that is almost an
3 exact quote.

4 **THE COURT:** Is the press of other business personal
5 to himself?

6 **MR. WEINBERG:** Your Honor, the point is, this is a
7 man with whom we have some relationship because we represented
8 his sister. His sister wants us to do this. We have met with
9 him. It appeared to us to be an appropriate thing to do. We
10 thought about conflict, we did not believe there was a conflict
11 and we agreed to do it.

12 We now find the Government raising what we believe
13 to be an artificial claim of conflict, and the Court is
14 suggesting that we should genuflect to that and say, Oh, my
15 God, somebody has raised a conflict.

16 We have made an independent decision based on
17 careful thought that Mr. Mohsen was entitled to have counsel of
18 his choice, and if we were that counsel based on his confidence
19 in us, that there was no legal reason why he should be denied
20 that.

21 **THE COURT:** Okay, if that is the way you run your
22 practice, anybody who walks in the door, you don't have a
23 conflict you feel that obligation to represent him and you read
24 the Cannon of Ethics that way, I'll accept that.

25 I'll send somebody around next week.

1 **MR. WEINBERG:** I'd be happy to talk to them.

2 **THE COURT:** No, you would be happy to represent him.

3 **MR. WEINBERG:** I'll be happy to represent them.

4 **THE COURT:** Nice to know.

5 Let me take a break and get some dates for you that
6 I can be back and do this.

7 **MR. BALAZS:** Does the Court want me here at that
8 hearing?

9 **THE COURT:** Yes, I do.

10 **MR. BALAZS:** I think that is appropriate.

11 One other kind of unrelated point is that Mr. Locke
12 was asked to be relieved as counsel, we thought that I could be
13 able to handle post-trial --

14 **THE COURT:** Why would he be relieved? He doesn't --
15 strike that.

16 He doesn't have to be relieved just because he
17 doesn't want to appear on a particular day just because you are
18 here.

19 **MR. BALAZS:** I guess maybe a formal order is not
20 necessary, but just to advise the Court that I'm going to be
21 pursuing the -- continuing on the post-trial motions and, if
22 necessary, sentencing primarily by myself.

23 **THE COURT:** I don't have any problem with that, but
24 I don't think Mr. Locke ought to be relieved.

25 **MR. BALAZS:** Okay.

1 **THE COURT:** If for any reason --

2 **MR. BALAZS:** Something happens --

3 **THE COURT:** -- we want him back here, then he can
4 appear.

5 Do you have some dates here, Mr. Weinberg?

6 Is it going to be you or your partner that is going
7 to be arguing this?

8 **MR. WEINBERG:** I assume it would be Ms. Wilder, but
9 I want to set a date that I would be available. Since I can't
10 consult with her in the event she's unavailable I would know I
11 could be here.

12 I can be here this coming week, but if the Court
13 wants briefing, that might be too soon. I am away the week of
14 the 3rd, but I'm back on the week of the 10th.

15 **THE COURT:** I know right now the week of the 10th is
16 the Ninth Circuit conference, so I'm not available anywhere
17 that week.

18 **MS. HARRIS:** So it would have to be the week of the
19 17th, sounds like.

20 **THE COURT:** Or sometime after that. I do have
21 matters in Sacramento that are set.

22 I didn't know this was going to happen at the
23 beginning of this week, and so I have other matters that I have
24 to attend to also.

25 **MS. HARRIS:** Okay.

1 I'm available any time during the last two weeks in
2 July except for not July 28th, but otherwise if that works for
3 Mr. Weinberg and the Court and Mr. Balazs?

4 **MR. WEINBERG:** I won't know for sure about that
5 because I may be unavailable those two weeks, but I would be
6 here Monday the 31st.

7 **MS. HARRIS:** I'm not available the 31st.

8 **MR. WEINBERG:** Any time later that week?

9 **MS. HARRIS:** Yeah.

10 **MR. WEINBERG:** The afternoon of the 1st, the morning
11 of the 2nd, the afternoon of 4th.

12 **MR. BALAZS:** Maybe the more appropriate thing is, if
13 Mr. Weinberg's associate is coming back Monday, for counsel to
14 confer and talk with the Court's clerk and then come up with an
15 agreeable date?

16 **MS. HARRIS:** Maybe we should get some dates.

17 **THE COURT:** Since it's not before trial, we don't
18 have the Speedy Trial Act involved.

19 It's Mr. Mohsen that is being prejudiced, I assume,
20 by the delay, and so if this is what he wants to do, then I
21 don't see any reason why we can't accommodate him. He looks
22 like he is in the Alameda County Jail from the monogram on his
23 shirt.

24 How is it over there?

25 **THE DEFENDANT:** Difficult.

1 **THE COURT:** Is it better than where you were before?

2 **THE DEFENDANT:** Just being in yellow, yes, but it's
3 very difficult.

4 **THE COURT:** But you recognize that as long as we are
5 involved in these post-trial motions we can't get you to
6 another federal institution?

7 **THE DEFENDANT:** Yes.

8 **THE COURT:** This has been a curve that was thrown to
9 the Court.

10 Unless you just want to agree --

11 **MR. WEINBERG:** I think Mr. Balazs' suggestion is
12 best; if we can do a telephone status conference early next
13 week when Ms. Wilder is back and then agree on a date that way?

14 **MS. HARRIS:** Can we get some dates that the Court is
15 available and then narrow it down so we don't pick something
16 where the Court is unavailable?

17 **THE COURT:** Yeah. I think it's going to have to be
18 the latter part of July or the first part of August.

19 **MR. WEINBERG:** I'm prepared to schedule that first
20 week of August. I can schedule --

21 **THE COURT:** Why don't we take Mr. Balazs'
22 suggestion, get a couple of dates and -- can we agree that we
23 don't have to do it on the record?

24 **MS. HARRIS:** Just for scheduling, yes, Your Honor.

25 **THE COURT:** Right. Because Mr. Mohsen is in custody

1 so there is no problem with putting him on notice as to the
2 date. And everybody else is an officer of the Court that can
3 agree to be here on a date specified.

4 **MR. WEINBERG:** There is a control date, anyway, of
5 September 15, or something, if I recall.

6 **THE COURT:** Is that sentencing date?

7 **MS. HARRIS:** The sentencing.

8 **MR. WEINBERG:** But we are not going to lose control
9 of the case. We don't expect to go that far.

10 **MS. HARRIS:** Your Honor, could I ask about the
11 Court's availability on the 2nd or 3rd of August? On Friday
12 the 4th I'm only available in the morning, and I have a feeling
13 this may take more than just the morning.

14 **THE COURT:** Who knows what will happen between now
15 and then.

16 Let me check my calendar and I'll tell you about
17 those dates.

18 **MR. BALAZS:** I have a court appearance in Sacramento
19 on the afternoon of August 2nd.

20 **THE COURT:** What day of the week?

21 **MR. BALAZS:** A Wednesday.

22 **MS. HARRIS:** So August 3rd.

23 **MR. BALAZS:** That's okay.

24 **THE COURT:** That is a Thursday?

25 **MR. WEINBERG:** I have an afternoon appearance at

1 4:00 p.m. I could start at 10:00 or 10:30.

2 **THE COURT:** Where is your appearance?

3 **MR. WEINBERG:** In front of Magistrate Judge Brazil
4 in Oakland.

5 **THE COURT:** You can get over to Oakland in 20
6 minutes.

7 **MR. WEINBERG:** Probably. If it turns out to be me
8 rather than Ms. Wilder we could be done by 3:00, even with a
9 break.

10 **THE COURT:** Let me check August 3rd.

11 (Brief recess taken at 11:48 a.m.)

12 (Proceedings resume at 12:15 p.m.)

13 **THE COURT:** I couldn't get a hold of anybody in
14 Sacramento to get an answer on that.

15 Why don't we go ahead and tentatively set it for
16 August 3rd at 10:00 a.m., give us a little more time than
17 starting at 10:30.

18 **MR. WEINBERG:** And it would be the Court's
19 expectation that Ms. Metwally would personally be here to
20 answer questions and to make waivers?

21 **THE COURT:** Right. Now, at that hearing you are
22 going to represent her and represent -- you are going to seek
23 to represent Mr. Mohsen also? So you are going to be her
24 lawyer at that meeting, just so we are clear.

25 **MR. WEINBERG:** Assuming that she wants us to be,

1 yes.

2 **THE COURT:** Well, the point is, if she shows up and
3 we set aside that whole day, and she comes and says I don't
4 want Mr. Weinberg to represent me anymore, and I don't want to
5 answer questions, I want to assert the Fifth, and all that --

6 **MR. WEINBERG:** I'll alert the Court in advance if
7 there is any question of Ms. Metwally's willingness to go
8 forward as indicated, that is, to waive any conflict and to
9 answer questions about the source of funds.

10 **THE COURT:** All right. I just want to make sure
11 that we don't show up and we have another monkey wrench thrown
12 into this.

13 **MR. WEINBERG:** I'll let the Court know if there is
14 any question about that.

15 **THE COURT:** The other thing is I don't want her to
16 say I don't have a lawyer and I want a lawyer.

17 **MR. WEINBERG:** I will make sure --

18 **THE COURT:** All right.

19 So 10:00 o'clock on August 3rd Ms. Metwally be here.
20 She will be prepared to testify. She will have counsel, which
21 will be you or somebody in your office. Mr. Mohsen will be
22 prepared to answer any questions.

23 And then I want you to both brief this, as we said,
24 so let's have a date for that briefing.

25 **MS. HARRIS:** Your Honor, I was going to propose that

1 we file simultaneous briefs on July 20th and then respond to
2 each other's briefs on the 27th. Would that give the Court
3 enough time before the hearing?

4 **THE COURT:** That would be fine.

5 **MS. HARRIS:** Okay.

6 **THE COURT:** Particularly, I want the Government to
7 give me all the subjects that you think I need to raise with
8 both of them and to not give me a script, per se, but give me
9 everything you think I need to cover in my questioning of both
10 Mr. Mohsen and Ms. Metwally, and a brief -- if you have the
11 case that you want to call to my attention on the Court's
12 discretion and how I ought to exercise the discretion in
13 proceeding on this, any other thoughts that either of you have
14 as a result of discussion that we have had today, any other
15 cases that you can cite as a result --

16 **MS. HARRIS:** Okay.

17 **THE COURT:** -- of the discussion we have had today.

18 **MS. HARRIS:** I will do that.

19 **THE COURT:** If you think that there is anything
20 fallacious in our thinking about what the consequences might
21 be, if I err on the side of allowing Mr. Mohsen to do this or
22 if I err on the side of not doing this, I would like to have
23 the result of your thinking on that also.

24 **MS. HARRIS:** Okay.

25 **MR. WEINBERG:** Thank you.

1 **MS. HARRIS:** Then I assume we would not be arguing
2 the motions that have been briefed until some date after this;
3 is that correct?

4 **THE COURT:** No, you are not -- especially if I let
5 Mr. Weinberg in this case, he is going to ask for time. If I
6 didn't, theoretically if you are all ready to argue it maybe we
7 could go ahead and argue it.

8 **MS. HARRIS:** Okay, I'll be prepared.

9 **THE COURT:** Just in case. I've been over these and
10 I'm ready to hear the arguments.

11 **MR. WEINBERG:** Thank you, Your Honor.

12 **MS. HARRIS:** Thank you, Your Honor.

13 **THE COURT:** All right.

14 **THE CLERK:** Court is in recess.

15 **(Proceedings adjourned at 12:25 p.m.)**

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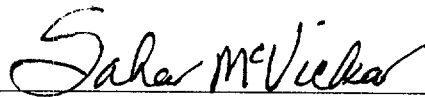
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Sahar McVickar, RPR, CSR No. 12963

July 5, 2006