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

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

13 UNITED STATES OF AMERICA)

14 Plaintiff,)

15 vs.)

16 AMR MOHSEN,)

17 Defendant.)

No. CR-03-0095 WBS

**RESPONSE TO UNITED STATES’
MEMORANDUM RE: CONFLICT
OF INTEREST AND WAIVERS**

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

18 The government argues that the retention of Weinberg & Wilder as post-conviction
19 counsel raises so great a risk of conflict of interest that the requested substitution should be
20 denied. The government is mistaken on every point. Its arguments are based entirely on
21 speculation regarding non-existent confidential communications, and projections of possible
22 conflicts, which could only occur, if ever, at a retrial. The government never addresses the
23 actual, quite narrow question at hand: whether Dr. Mohsen may be denied *post-trial* – as
24 opposed to trial – counsel of choice. The answer is “no,” because neither the verdict nor the high
25 ethical standards of the Court will be compromised by the proposed substitution. The
26 substitution should be permitted, therefore.

1 **1. Facts Relating to Mohsen’s Criminal Representation**

2 This extended historical recitation is neither argument nor factual background. Rather, it
3 is largely innuendo, and largely beside the point, at that. Surely, the government does not
4 contend that Dr. Mohsen should be penalized and denied retained post-conviction counsel
5 because (1) he has been represented by too many attorneys; (2) he has been represented by
6 appointed attorneys; or (3) he has simply caused too much delay. (Gov.Mem. 2-5.)

7 Nonetheless, any concerns the Court may have regarding the source of the retainer or
8 the timing of post-conviction litigation can be addressed at the hearing.

9 **2. Weinberg & Wilder’s Representation of Dr. Metwally**

10 Dr. Metwally has already testified at trial. Every fact to which she testified is, therefore,
11 no longer privileged or confidential. Every fact to which she testified was uncontested by the
12 defense.

13 Dr. Metwally was granted immunity. She testified truthfully. She faces no prosecution.
14 Dr. Mohsen heard Dr. Metwally’s testimony, the tape recording of their jail conversation, and
15 the government’s closing argument. He has heard several times that the government intends to
16 seek an obstruction of justice enhancement based upon the tape recorded conversation.

17 Thus, the potential impact of Weinberg & Wilder’s representation of Dr. Metwally on Dr.
18 Mohsen’s subsequent, post-trial representation is circumscribed and easily forecast.
19 Consequently, the government’s request that the Court obtain complete waivers from both
20 clients is easily met.

21 **3. The Law**

22 The government’s discussion of the case law is deficient in several key respects. First,
23 the government cites no law on the constitutional right to counsel of choice. The rule of
24 automatic reversal announced in *United States v. Gonzalez-Lopez* does not even merit a footnote.
25 2006 WL 1725573, 06 C.D.O.S. 5518 (June 26, 2006). That is a most telling omission.

26 Second, the government does not discuss the facts of any of the cited cases, relying
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1 instead on abstract, general principles – or so-called “headnote” law. While the cited principles
2 are sound, the facts of the cases are not even remotely analogous to the case at bar. Many of
3 these cases were fully discussed in the defense memorandum. The remainder are likewise
4 readily distinguishable from this case.

5 Two of the cited cases, *In re Grand Jury Subpoena*, 781 F.2d 238 (2nd Cir. 1986), and
6 *United States v. Wells*, 394 F.3d 725 (9th Cir. 2005) involve third-party payments of attorney’s
7 fees. The main issue in the grand jury matter was whether attorney-fee information is
8 privileged. It is not. However, in the context of a mob investigation, the Court cautioned against
9 accepting payment of client fees from third parties, particularly where the “third party is head of
10 a criminal enterprise of which the clients are members.” 781 F.2d at 248, n. 6.

11 In *Wells*, one of the defendants, Jones, paid the attorney’s fees of a co-defendant, Wells.
12 Wells and Jones were originally tried together. Wells’s conviction was affirmed; Jones’s
13 conviction was reversed and he was acquitted on retrial. In denying Wells’s 28 U.S.C. § 2255
14 motion, the district court emphasized that “this is not a case where a drug mule or courier was
15 represented by counsel provided by the codefendant drug boss.” 394 F.3d at 731. The Ninth
16 Circuit affirmed, holding that Jones’s payment of Wells’s attorney’s fees created at most a
17 “theoretical division of loyalties,” which had no adverse impact on Wells’s representation. *Id.*,
18 at 732.

19 *In re Grand Jury* and *Wells* thus stand for the same cautionary proposition as *United*
20 *States v. Allen*, 831 F.2d 1487 (9th Cir. 1987), which was discussed in detail in the defense
21 memorandum. *See also United States v. Ross*, 33 F.3d 1507 (11th Cir. 1994) (disqualification of
22 Oteri,[Martin G.] Weinberg and Lawson, same firm as in *Allen*.) That proposition has no
23 relevance here. Dr. Metwally is not a “crime boss,” or criminal of any sort. She is a caring
24 family member, and she is willing to be openly questioned about the retainer payment.

25 *Hoffman v. Leeke*, 903 F.2d 280 (4th Cir. 1990) and *United States v. Migliaccio*, 34 F.3d
26 1517 (10th Cir. 1994) are classic joint representation cases. Briefly, in *Hoffman*, the Court held

1 a defendant's waiver ineffective under the following circumstances: Defense counsel
2 represented two defendants in a murder prosecution. Counsel advised one of the defendants to
3 enter a plea bargain to implicate the other defendant at trial, but did not tell the other defendant
4 what the cooperating defendant's testimony would be or cross-examine the testifying defendant.
5 *Id.*, at 286. Accordingly, the Court held that the waiver of conflict by the non-cooperating
6 defendant was invalid, where he was not aware that the co-defendant was going to testify against
7 him, and was never told that his own attorney had advised the co-defendant to cooperate. *Id.*, at
8 288.

9 Similarly, in *Migliaccio*, the attorney had advised two jointly represented defendants that
10 the only conflict which could arise from their joint representation was an immunity-for-
11 testimony offer. That is exactly what occurred. 34 F.3d at 1526. Nonetheless, the Court upheld
12 the non-cooperating defendant's conflict waiver in view of the extensive questioning and
13 advisement by the magistrate judge. *Id.*, at 1527-28; compare *Lewis v. Mayle*, 391 F.3d 989,
14 996-97 (9th Cir. 2004) (murder defendant's waiver found invalid where he had only a cursory
15 discussion with the trial judge, and where he was advised only generally of the dangers and
16 consequences arising from his attorney's conflict of interest, but not that his attorney had
17 continuing obligations to state's key witness); *Belmontes v. Woodford*, 350 F.3d 861, 885 (9th
18 Cir. 2003) (same).

19 In short, the actual parallels between the cases cited by the government and this case are
20 non-existent. There simply is no case in which post-trial counsel has been disqualified for a
21 conflict of interest.

22 **4. The Alleged Conflict of Interest**

23 If the Ninth Circuit were to reverse Dr. Mohsen's conviction, and the case were
24 remanded, and Dr. Metwally were called as a prosecution witness, and Dr. Mohsen sought to
25 retain Weinberg & Wilder as counsel on retrial, then and only then would the conflict concerns
26 raised by the government be ripe. The only present concerns relate to the breadth of Dr.
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1 Mohsen’s allegation of ineffective assistance for failure to cross-examine witnesses,¹ and the
2 evidence of obstruction of justice at sentencing. Both of these subjects were addressed in the
3 defense memorandum and both can be further addressed at the hearing.

4 **5. Proposed Waiver of Conflict**

5 Both Drs. Metwally and Mohsen are highly intelligent and educated. Neither would have
6
7 any difficulty understanding – or demonstrating their understanding of – the Court’s
8 admonitions regarding possible conflicts of interest. The government has provided a
9 comprehensive list of areas for voir dire, covering every contingency including trial testimony.
10 As stated in the earlier memorandum, counsel invites such a thorough inquiry, believing that it
11 will persuade the Court that no disqualifying conflict exists and that the requested substitution
12 should be granted.

13 Dated: July 27, 2006

Respectfully submitted,

WEINBERG & WILDER

17 _____
18 /s/
19 NINA WILDER
20 Appearing Specially
21 for Defendant Amr Mohsen
22 On Motion for Substitution of Counsel

23 _____
24 ¹ The government notes parenthetically that Dr. Mohsen’s motion based on ineffective
25 assistance is undeveloped, self-serving, factually unsupported and *pro se*. The government is
26 correct that the motion is *pro se*. As for the rest, undersigned counsel believes Dr. Mohsen
27 raised concerns regarding his representation during trial. The government would not have been a
party to any such communications between Dr Mohsen and the Court. Undersigned counsel has
no view as to the merits or the timing of the motion. It is clear, however, that trial counsel
cannot represent Dr. Mohsen with respect to his ineffectiveness claims, and Dr. Mohsen, who is
represented, cannot proceed in *pro se*.

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CERTIFICATE OF SERVICE

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

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

RESPONSE TO UNITED STATES' MEMORANDUM RE: CONFLICT OF INTEREST AND WAIVERS

in the following manner:

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

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

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

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Executed on this day, July 27, 2006, at San Francisco, California.

/s/
Corey S. O'Connor