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

12 UNITED STATES OF AMERICA, )  
13 Plaintiff, )  
14 v. )  
15 AMR MOHSEN, )  
16 Defendant. )  
17

No. CR 03-0095 WBS

**UNITED STATES' REPLY  
MEMORANDUM RE: CONFLICT OF  
INTEREST AND REQUEST FOR CJA  
REIMBURSEMENT INQUIRY**

Date: August 3, 2006  
Time: 10:00 a.m.  
Courtroom: D, 15<sup>th</sup> Floor

18 **INTRODUCTION**

19 The United States submits this memorandum to address two issues raised in the  
20 July 20, 2006 submission from the law firm of Weinberg and Wilder. Weinberg and  
21 Wilder continue to urge this Court to permit Amr Mohsen to retain their services for all  
22 further proceedings in this case despite Weinberg and Wilder's conflict of interest.  
23 Weinberg and Wilder claim that the proposed substitution should be permitted because:  
24 (1) government witness Magda Metwally's interests are not adverse to defendant Amr  
25 Mohsen's interests in view of their familial relationship; and, (2) the proposed  
26 substitution is being sought post-trial. Both arguments are unavailing.

27 Finally, at the June 23, 2006 hearing, the Court expressed its concern regarding the  
28 source of eleventh hour funding for retained counsel in view of Mohsen's sworn

**FILED**

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RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

1 representations of indigency and the prior appointment of two attorneys under the  
2 Criminal Justice Act. Mr. Weinberg represented to the Court: "He [Mohsen] has no funds  
3 of his own. The Court probably is aware that he is in bankruptcy proceedings, and all of  
4 his funds have been accounted for. He has no other funds. *He has no access to funds.*"  
5 RT 7:24-8:2 (previously attached as Exhibit 1 to the government's July 20, 2006  
6 Memorandum). Emphasis supplied. The Court observed: "It [Mr. Weinberg's  
7 explanation of the source of funds for Weinberg and Wilder's retainer] doesn't satisfy me  
8 that there aren't some shenanigans going on here behind the scenes as to where the money  
9 is coming from." RT 11:6-8.

10 The court's concerns about Mohsen's possible financial "shenanigans" proved  
11 prescient. The government has recently received information that strongly contradicts  
12 Mohsen's financial representations to the Court. As is set forth in the accompanying  
13 declaration of AUSA Harris, Mohsen has received at least three checks since April 2005  
14 (when the Court deemed Mohsen eligible for CJA counsel) through July 19, 2006 totaling  
15 approximately \$76,468.00.<sup>1</sup> These checks were made payable to Amr Mohsen or, in one  
16 instance, to Advanced Investment Management c/o Amr Mohsen. Advanced Investment  
17 Management is a company controlled by Mohsen. The checks were all mailed to Mohsen  
18 at the Alameda County Jail by Cadence Design Systems ("Cadence"). These checks  
19 represent payments to Mohsen for an earn out from a company Mohsen invested in which  
20 is now owned by Cadence. Accordingly, the government respectfully requests the Court  
21 to conduct a full inquiry into the nature and source of the funds being used to pay for  
22 Mohsen's retained counsel. If the Court determines that Mohsen withheld from this  
23 Court, or the bankruptcy court, payments from Cadence, or any other source, the  
24 government requests the Court to order Mohsen to immediately reimburse the CJA  
25 program for funds expended on Mohsen's defense.

26 \_\_\_\_\_  
27 <sup>1</sup>The government is not at all suggesting that Mr. Weinberg misled the Court. To the  
28 contrary, the facts developed by the government reveal that Mohsen received the lion's share of  
the money from Cadence *after* the June 23, 2006 hearing. See Harris dec. ¶ 2.

1 ANALYSIS

2 *1. Weinberg and Wilder's Conflict of Interest*

3 Weinberg and Wilder claim they can simultaneously represent Mohsen and  
4 Metwally because "Dr. Mohsen's and Dr. Metwally's interests and objectives are wholly  
5 consistent." Def. Memo at pg. 10. No analysis is offered in support of this conclusion.  
6 We assume that counsel's argument of "consistent" positions between Metwally and  
7 Mohsen relates to the fact that Metwally bears no ill will toward her brother and would  
8 have preferred a different outcome of the trial.

9 An adverse witness, however, is not necessarily a witness who has personal  
10 animus toward the party against whom the witness is called to testify. Metwally offered  
11 significant, incriminating trial testimony—under a grant of use immunity—against Mohsen.  
12 The fact that Metwally is Mohsen's sister does not alter the essential nature of the conflict  
13 of interest posed by having Metwally's attorney simultaneously represent Mohsen. We  
14 note that Mohsen's brother, Aly Mohsen, is a co-defendant in this case. We assume that  
15 Weinberg and Wilder would not argue that their law firm could simultaneously represent  
16 defendants Amr and Aly Mohsen because the brothers have no personal hostility toward  
17 one another. In the same vein, the familial relationship between Metwally and Mohsen  
18 does not alter the fundamental nature of Weinberg and Wilder's conflict of interest. *See*  
19 *e.g. Sanders v. Ratelle*, 21 F.3d 1446, 1453 (9<sup>th</sup> Cir. 1994) (conviction reversed where  
20 same attorney successively represented brothers who were accused of the same murder).

21 Simply put, Mohsen seeks representation by a law firm that has an ongoing duty of  
22 loyalty to a client (Metwally) who wittingly or unwittingly participated in Mohsen's  
23 crimes of attempted witness tampering and solicitation of arson. Metwally's testimony  
24 incriminated Mohsen in these crimes. As such, she is an adverse witness to Mohsen  
25 regardless of her familial affection for him. "Indeed it is not hard to imagine the potential  
26 for conflicting pressures upon an attorney from parents concerned with protecting not  
27 only one, but two of their sons. . . ." *Id.* So too, with the pressures of protecting the  
28 interests of two siblings, one of whom has been convicted of a host of serious crimes and

1 the other of whom received use immunity for her role in some of those crimes.

2 As to Weinberg and Wilder's argument that the potential adverse consequences to  
3 either Mohsen or Metwally are somehow mitigated because the proposed substitution is  
4 post-trial, we respectfully disagree. Mohsen's right to conflict-free representation persists  
5 throughout the entire course of his representation not simply during the pre-trial period  
6 and at trial. *See e.g. United States v. Migliaccio*, 34 F.3d 1517, 1528 (10<sup>th</sup> Cir. 1994).

7 "The district court has a continuing obligation under rule 44(c) to guard against conflicts  
8 of interest that may worsen as circumstances change during the course of representation."  
9 *Id.* Mohsen's post-trial motions and sentencing continue to raise the specter of divided  
10 loyalties, regardless of the fact that Metwally has already testified during the trial.

11 Finally, the fact that Mohsen has filed a *pro se* motion accusing his current CJA  
12 counsel of rendering ineffective assistance does not require the court to permit Weinberg  
13 and Wilder's substitution. Typically claims of ineffective assistance of counsel are  
14 inappropriate on direct appeal and should instead be raised in habeas corpus proceedings.  
15 *United States v. Ross*, 206 F.3d 896, 900 (9<sup>th</sup> Cir. 2000).

## 16 **2. The Source of Funds For Retained Counsel**

17 The government has recently learned that Mohsen has received numerous checks  
18 from Cadence Design Systems while Mohsen has been incarcerated at the Alameda  
19 County jail. At least three of these checks were mailed to Mohsen at the jail during the  
20 time period of April 2005 through July 19, 2006. The Court declared Mohsen eligible for  
21 CJA counsel on April 26, 2005 (CR 311), pursuant to a CJA financial application that  
22 was earlier filed under seal over the government's objection. The government is  
23 endeavoring to obtain copies of these checks as well as any property release forms  
24 Mohsen executed to transfer these checks to his family members. An inquiry to Cadence  
25 and to Sargent Melanie Ditzenberger of the Alameda County jail by the government  
26 revealed the following information:

27 On April 14, 2005, Cadence mailed Mohsen check # 330843 in the amount of  
28 \$8062.04. This check was cashed on June 17, 2005, after the Court had already

1 appointed counsel for Mohsen under the Criminal Justice Act. Harris decl. ¶ 3. On July  
2 12, 2006, Cadence mailed Mohsen check # 352267 in the amount of \$47,148.85. Harris  
3 decl. ¶ 3.<sup>2</sup> On July 19, 2006, Mohsen executed a Property Release Form<sup>3</sup> which released  
4 the \$47,148.85 check to his wife, Mervat Mohsen. Harris decl. ¶ 2. Significantly, this  
5 \$47,148.85 check was received by Mohsen and surreptitiously released to Mohsen's wife  
6 *after* Mohsen was in court during Mr. Weinberg's representation that "he [Mohsen] has  
7 no funds of his own. . . .He has no other funds. He has no access to funds." RT 7:24-8:2.  
8 Finally, on July 19, 2006, Cadence mailed Mohsen check # 352962 in the amount of  
9 \$21,258.57. Harris decl. ¶ 3. Mohsen has neither transmitted these payments to the  
10 bankruptcy court (as an asset to repay his creditors, including attorneys John Williams  
11 and Ed Swanson, both of whom are unsecured creditors of Mohsen's estate) nor to this  
12 Court for reimbursement of the government for fees expended on Mohsen's behalf under  
13 the Criminal Justice Act.

14 The Criminal Justice Act authorizes the Court to order that available funds be  
15 used to reimburse the government for money expended for appointed counsel. The Act  
16 provides, in relevant part:

17 Whenever the United States magistrate or the court finds that  
18 funds are available for payment from or on behalf of a person  
19 furnished representation, it may authorize or direct that such  
20 funds be paid to . . . the court for deposit in the Treasury as a  
21 reimbursement to the appropriation, current at the time of  
22 payment, to carry out the provisions of this section.

23 18 U.S.C. § 3006A(f).

24 The burden is on the defendant to prove by a preponderance of the evidence that  
25 he is financially unable to reimburse the cost of representation. *United States v. Evans*,  
26 155 F.3d 245, 252 (3<sup>rd</sup> Cir. 1998); *United States v. Lefkowitz*, 125 F.3d 608, 621 (8<sup>th</sup> Cir.

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27 <sup>2</sup>The Declaration of Assistant United States Attorney Robin L. Harris is submitted  
28 herewith under separate caption.

<sup>3</sup>The government has subpoenaed copies of all checks and Property Release Forms  
relating to payments from Cadence to Amr Mohsen for the August 3, 2006 evidentiary hearing.

1 1997); *United States v. Harris*, 707 F.2d 653, 660 (2<sup>nd</sup> Cir. 1983); *United States v.*  
2 *Bedoya*, No. 89 CR 803 (JMC), 1990 WL 194934 (S.D.N.Y. Nov. 28, 1990); *United*  
3 *States v. Thomas*, 630 F. Supp. 820, 821 (E.D. Mich. 1986), *aff'd*, 815 F.2d 81 (6<sup>th</sup> Cir.  
4 1987).

5 Before ordering reimbursement under the Criminal Justice Act, the Court first  
6 must “mak[e] the requisite finding that ‘funds are available for payment’ of the fees.”  
7 *United States v. Seminole*, 882 F.2d 441, 443 (9<sup>th</sup> Cir. 1989) (quoting 18 U.S.C. §  
8 3006A(f)); *see also United States v. Lorenzini*, 71 F.3d 1489, 1494 (9<sup>th</sup> Cir. 1995)  
9 (focusing on present ability to pay). In order to consider whether such a finding is  
10 appropriate, the Court must conduct a “wide-ranging inquiry into the defendant’s financial  
11 status.” *United States v. Thomas*, 630 F. Supp. 820, 821 (E.D. Mich. 1986), *aff'd*, 815  
12 F.2d 81 (6<sup>th</sup> Cir. 1987); *see also United States v. Evans*, 155 F.3d 245, 252 (3<sup>rd</sup> Cir. 1998)  
13 (court has responsibility to inquire into defendant’s financial status in determining  
14 whether reimbursement order is proper); *United States v. Fraza*, 106 F.3d 1050, 1056 (1<sup>st</sup>  
15 Cir. 1997) (to order repayment, court must conduct hearing and make findings regarding  
16 the defendant’s financial viability).

17 In this case, there can be no dispute that there are now funds available from or on  
18 behalf of Mohsen, insofar as the Mohsen is now requesting to be represented by retained  
19 counsel. Further, the funds which have materialized must be substantial; this is an  
20 extremely complex case, which will require the review of voluminous discovery and the  
21 entire six week trial transcript in order to properly represent Mohsen in post-trial motions  
22 and at sentencing. While Mr. Weinberg suggested during the June 23, 2006 hearing that  
23 the defendant’s “family” is paying for his representation, there is nothing in the Criminal  
24 Justice Act suggesting that such funds are insulated from the reimbursement provisions of  
25 Section 3006A(f). In fact, the express language of that subsection states that the Court  
26 may order reimbursement when it finds that funds “are available *from or on behalf of a*  
27 *person furnished representation.*” 18 U.S.C. § 3006A(f) (emphasis added). *See also VII*  
28 *Guide to Judiciary Policies and Procedures* ¶ 2.06 (suggesting that court may consider

1 financial ability of defendant's family to pay for or reimburse CJA fees where family  
2 "indicates willingness and financial ability to retain counsel.")

3 If there are now funds available to pay for Mohsen to have retained counsel in a  
4 case of this magnitude, then there are likely funds available to reimburse the government  
5 for the substantial CJA monies spent on the appointment of attorneys Locke and Balazs,  
6 who spent a considerable amount of time on this matter, and on the valuable CJA-funded  
7 services provided to the defendant, including the transcriptions of phone calls, the  
8 retention of costly expert witnesses and the production of voluminous discovery.

9 In light of the information proffered by the United States concerning Mohsen's  
10 receipt of significant payments during the time period he has been deemed indigent, the  
11 government respectfully urges the Court to conduct a full inquiry into the nature and  
12 source of the funds being used to pay for Mohsen's retained counsel. As with the initial  
13 affidavit required to be submitted by Mohsen in order to obtain CJA counsel, the Court  
14 should require sworn statements and/or testimony from Mohsen and any persons making  
15 funds available on his behalf, regarding the source and amount of money available to pay  
16 for the defendant's representation.

17 ***3. The United States Should Be Allowed To Participate In These Proceedings***

18 The government's primary interest in this matter is to protect the record against a  
19 future claim of ineffective assistance of counsel by Mohsen and to assist the Court in  
20 ensuring that the Criminal Justice Act is being properly applied. It is appropriate for the  
21 United States Attorney to be heard on this issue. *See United States v. Barger*, 672 F.2d  
22 772, 774 (9<sup>th</sup> Cir. 1982) (finding that it was proper for the United States Attorney to  
23 represent the district court in an appeal of an order denying payment of certain fees under  
24 the Criminal Justice Act and noting that "the United States . . . has a great interest in  
25 outcome as any money awarded will be paid by the Government").

26 As a properly interested party, the United States should be privy to the information  
27 provided by the defendant in his effort to meet his burden discussed above. An ex parte  
28 hearing is not required or authorized under the Criminal Justice Act. In *United States v.*

1 *Harris*, 707 F.2d 653 (2<sup>nd</sup> Cir. 1983), both the Magistrate Court and, later, the District  
2 Court, denied the defendant's request that the inquiry into his ability to afford counsel be  
3 conducted in an ex parte, in camera proceeding. The Second Circuit affirmed, stating:

4 [T]he [CJA] Act specifically provides for ex parte  
5 applications for services other than counsel, see 18 U.S.C. §  
6 3006A(e)(1), while there is no such requirement for  
7 proceedings involving the appointment or termination of  
8 counsel. Apparently, ex parte proceedings for services other  
9 than counsel are provided for to ensure that a defense would  
10 not be "prematurely" or "ill-advisedly" disclosed. See  
11 Criminal Justice Act of 1963: Hearings on S.63 and S.1057  
12 Before the Senate Comm. on the Judiciary, 88th Cong., 1st  
13 Sess. 173 (1963). Such considerations are not relevant to  
14 proceedings concerning the appointment or termination of  
15 counsel. But since Congress obviously knew how to provide  
16 for an ex parte proceeding when it seemed appropriate, the  
17 failure to do so in the context of appointment of counsel  
18 seems significant. Moreover, our legal system is rooted in the  
19 idea that facts are best determined in adversary proceedings;  
20 secret, ex parte hearings "are manifestly conceptually  
21 incompatible with our system of criminal jurisprudence,"  
22 *United States v. Arroyo-Angulo*, 580 F.2d 1137, 1141 (2<sup>nd</sup>  
23 Cir.), *cert. denied*, 439 U.S. 913, 99 S. Ct. 285, 58 L.Ed.2d  
24 260 (1978) (citations omitted).

25 Insofar as the issue of the defendant's financial status is irrelevant to the criminal  
26 charges in this case, the defendant's Fifth Amendment rights are not implicated, and there  
27 is no basis for ex parte proceedings. *See Seattle Times v. United States District Court*,  
28 845 F.2d 1513, 1520 (9<sup>th</sup> Cir. 1988) (holding that unsealing financial affidavit in a  
product tampering case would not result in real and appreciable hazards of self-  
incrimination).

29 The fact that someone other than Mohsen may be paying for his proposed retained  
30 counsel is of no consequence to the government's right to participate in these  
31 proceedings, nor does it warrant an ex parte hearing. Neither the identity of a benefactor  
32 who pays for a defendant's attorney's fees, nor the fee arrangement itself, is privileged.  
33 *In re Grand Jury Proceedings (Goodman)*, 33 F.3d 1060, 1063 (9<sup>th</sup> Cir. 1994)  
34 (attorney-client privilege does not safeguard against the disclosure of either the identity of  
35 the fee-payer or the fee arrangement). This is especially true where, as here, the identity  
36 of the fee payer (Magda Metwally) may present a conflict that the government has an

1 obligation to bring to the Court's attention.

2

3

### CONCLUSION

4 Based on the foregoing, the United States respectfully requests the Court to deny  
5 defendant Amr Mohsen's request to substitute the law firm of Weinberg and Wilder in  
6 place of current CJA counsel. The government further requests the Court to conduct a  
7 full inquiry into Mohsen's financial status since April 2005 and to require an accounting  
8 for all checks, payments or other sources of income received by Mohsen either directly or  
9 indirectly during the period of time Mohsen has received assistance under the Criminal  
10 Justice Act.

11 Dated: July 27, 2006

Respectfully Submitted,

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