

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 15-49 (MJD/FLN)

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 HAMZA AHMED (01),)
 MOHAMED ABDIHAMID FARAH (02),)
 ADNAN ABDIHAMID FARAH (03),)
 ABDIRAHMAN YASIN DAUD (04), and)
 GULED ALI OMAR (07),)
)
 Defendants.)

**GOVERNMENT’S MOTION
FOR INQUIRY**

The United States of America, by and through its attorneys Andrew M. Luger, United States Attorney for the District of Minnesota, and Andrew Winter, John Docherty, and Julie Allyn, Assistant United States Attorneys, hereby respectfully moves this Court to conduct an inquiry into the propriety of the continued participation of Mr. Hassan Jami in assisting in the representation of defendant Mohamed Farah. Defendant Mohamed Farah is represented by P. Chinedu Nwaneri, Esq. and Murad Mohamed, Esq. The undersigned is of the understanding that Hassan Jami is a law school graduate but is not licensed to practice law in the State of Minnesota nor in federal court. The government brings this motion not to interfere with the defendant’s right to counsel of his choice, but to ensure the integrity of the proceedings before this Court, specifically by ensuring that defendant Mohamed Farah is represented by counsel who is free of a conflict of interest.

Factual Background

On June 12, 2015, the government made all recordings produced by the CHS available to defense counsel. The government proceeded to transcribe the recordings – a time-consuming, laborious, and difficult task given the quantity of recordings, the three languages spoken, and the variety of recording conditions encountered. A transcript of an April 2, 2015 recording was completed in September of 2015. Upon recent review of that transcript and recording, the government noted a co-conspirator had made reference to learning about prayer during *jihad* from a person identified in the recording as “Sheikh Hassan”. Confirmation of the identity of Hassan Jami as the “Sheikh Hassan” referenced in the April 2, 2015 transcript was obtained in a March 2, 2016 proffer session, after the co-conspirator began to cooperate in the government’s investigation. The government disclosed the transcript at issue, as well as an FBI 302 of the March 2, 2016 proffer, on Friday, March 25, 2016. Also on Friday, March 25, the government sent to all defense counsel a letter about the government’s concerns about this situation. The court also received a copy of this letter.

The government is concerned that Hassan Jami’s participation will create prejudice to Mohamed Farah, and possibly his co-defendants at trial, when the cooperating defendant testifies at trial to having learned how to pray in battle from a member of a co-defendant’s defense team. The government requests that this Court determine if Hassan Jami’s participation in the defense of Mohamed Farah creates unfair prejudice to Mohamed Farah and the co-defendants proceeding to trial, and to consider appropriate remedies.

The government cannot recommend one particular remedy without first reading the pleadings of the defendants, which will be filed on Thursday, March 31, and hearing presentations that will be made at the hearing this Court has scheduled for Friday, April 1. In this motion we therefore do no more than set forth the options available to the Court, and summarize the law applicable to each such option.

Among the remedies available to the court is an order directing the attorneys representing Mohamed Farah not to use the services of Hassan Jami. In addition, Mohamed Farah is represented by two licensed attorneys, one of whom employs Hassan Jami, the other of whom does not, meaning it may be possible, if necessary, for the Court to disqualify only the attorney who employs Hassan Jami. Finally, although the government is loath to suggest it, should Mohamed Farah need a new defense team as a result of this situation, it should be possible to sever the trial of Mohamed Farah from the trial of his co-defendants, who could proceed to trial on May 9 as currently scheduled.

Applicable Law

When the cooperating defendant testifies about how he came to believe that traveling to Syria for jihad was incumbent on him as a religious duty, part of his testimony will be a description of the interaction with Hassan Jami about the proper way to pray while on the battlefield. To have Mr. Jami sitting at the defense table at that time would almost certainly diminish in the eyes of the jury at least defendant Mohamed Farah's lawyers, and perhaps other defense attorneys in the case as well. This result can be predicted notwithstanding that no defense attorney, including those for defendant Mohamed Farah, is implicated in Mr. Jami's conduct. Such an event would be unfairly

prejudicial, and can be cured either by removing Mr. Jami from the case, or by directing that Mr. Jami not sit at counsel table, and instructing all counsel not to mention in the presence of the jury Mr. Jami's affiliation with Mohamed Farah's defense team.

However, such an instruction may not be sufficient because Mr. Jami's conduct may have created a conflict of interest with defendant Mohamed Farah. In order to rebut the implication of the cooperating defendant's testimony about a member of the defense team, Mr. Jami may have to testify. Although not himself a licensed lawyer, Mr. Jami is employed by a lawyer, and his conduct may implicate Minnesota Rule of Professional Conduct 5.3 ("Responsibilities Regarding Nonlawyer Assistants"). If Mr. Jami is needed as a witness for the defense, his testimony would be governed by Minnesota Rule of Professional Conduct 3.7, which states:

- (a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless:
 - (1) The testimony relates to an uncontested issue;
 - (2) The testimony relates to the nature and value of legal services rendered in the case; or
 - (3) disqualification of the lawyer would work substantial hardship on the client.

The Minnesota Supreme Court has held that

To be disqualified, an attorney's testimony must be "necessary." Simply to assert that the attorney will be called as a witness, a too-frequent trial tactic, is not enough. If the testimony sought to be elicited from the attorney-witness can be produced in some other effective way, it may be that the attorney is not necessary as a witness. If the lawyer's testimony is merely cumulative, or quite peripheral, or already contained in a document admissible as an exhibit, ordinarily the lawyer is not a necessary witness and need not recuse as trial counsel.

Minnesota v. McLaren, 402 N.W. 2d 535, 541 (Minn. 1987).

In the case at bar, the government does not assess Mr. Jami's potential testimony as cumulative or peripheral. The government is not aware of Mr. Jami's testimony being contained in a document. Of course, whether Mr. Jami is called as a defense witness is not in the government's hands, and therefore any finding that he is a necessary witness must await the defense's responsive pleadings and perhaps the hearing scheduled before this Court.

Mr. Jami has not been accused of criminal conduct, but the case law arising from those scenarios may be instructive. Courts have held that when an attorney is alleged to be involved in the same criminal conduct as the client, the attorney has an actual conflict of interest. *See United States v. Cancilla*, 725 F.2d 867, 869-70 (2nd Cir. 1984) (actual conflict, and showing of adverse impact on representation not necessary for relief to be granted, where there is a reasonable possibility that the defendant's attorney engaged in the defendant's wrongdoing); *Government of the Virgin Islands v. Zepp*, 748 F.2d 125, 136 (3rd Cir. 1984) (actual conflict where attorney was only other person in house with client at the time drugs were flushed down the toilet); *Mannhalt v. Reed*, 847 F.2d 576, 581 (2nd Cir. 1988) ("we find that when an attorney is accused of crimes similar or related to those of his client, an actual conflict exists because the potential for diminished effectiveness in representation is so great."); *United States v. Greig*, 967 F.2d 1018, 1023 (5th Cir. 1992) (following *Govt. of the Virgin Islands v. Zepp, supra*, and finding actual conflict where attorney directly participated in client's obstruction of justice and was notified by district court that he would be sanctioned for his conduct); *Fulton v. Warden*, 5 F.3d 605, 610 (2nd Cir. 1993) (actual conflict where government witness in heroin

importation case reported that defendant's attorney was directly involved in heroin trafficking); *United States v. Levy*, 25 F.3d 146, 156 (2nd Cir. 1994) (actual conflict where attorney was awaiting sentencing in case brought by same U.S. Attorney's office prosecuting client, and where attorney was under criminal investigation for helping a codefendant flee prosecution); and *United States v. Edelman*, 458 F.3d 794, 806 -07 (8th Cir. 2006) (actual conflict where attorney of defendant charged with fraud was under criminal investigation for fraud by the same U.S. Attorney's office prosecuting defendant).

Duty to Inquire

A criminal defendant has a right to counsel of his own choosing. *United States v. Edelman*, 458 F.3d 794, 806 (8th Cir. 2006). However, when the possibility that a defendant's attorney may have a conflict arises, the court must balance the defendant's right to counsel of his choosing against "the court's interest in the administration of justice." *Id.* "Whenever the court's inquiry reveals that a criminal defendant's attorney in fact suffers from an actual or potential conflict, the court has a subsequent 'disqualification/waiver' obligation." *Edelman*, 458 F. 3d at 807, *quoting Levy*, 25 F.3d at 153. "If the court discovers that the attorney suffers from a severe conflict—such that no rational defendant would knowingly and intelligently desire the conflicted lawyer's representation—the court is obligated to disqualify the attorney." *Id.* If the conflict is only a potential conflict—"such that a rational defendant could knowingly and intelligently desire the conflicted lawyer's representation"—the court should obtain from

the defendant a valid waiver of his right to a non-conflicted lawyer. *Id.* If, however, the court finds that no conflict exists at all, the court has no further obligation. *Id.*

The government respectfully asks that at the hearing on Friday, April 1, the Court determine whether an actual or potential conflict arises from one defense lawyer's employment of a paralegal who has been alleged, by a government witness, to have informed that defendant of the manner in which to pray on a battlefield where one is engaged in *jihad*. If so, it may be possible for defendant Mohamed Farah to make a knowing and intelligent waiver of any resulting conflict. If a knowing and intelligent waiver cannot be obtained, then it will be necessary to consider the options of partial or full disqualification of Mohamed Farah's present counsel, and potentially, severance of Mohamed Farah's trial.

Dated: March 28, 2016

Respectfully submitted,

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United States Attorney

s/ Andrew R. Winter

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