

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

HOLY LAND FOUNDATION,

Defendant.

NO. 3:04-CR-240-P

Hon. Jorge A. Solis

ECF

**DEFENDANT’S OPPOSITION TO GOVERNMENT’S MOTION TO STRIKE ENTRY OF
APPEARANCE OF COUNSEL AND NOTICE OF APPEAL OR, IN THE ALTERNATIVE,
MOTION TO SHOW CAUSE WHY SUCH PLEADINGS SHOULD NOT BE STRICKEN**

INTRODUCTION

Defendant Holy Land Foundation for Relief and Development (“HLF”) was tried and sentenced after a trial at which it was not present. The government pursued the conviction and sentence even though HLF, a non-profit corporation, was not present at trial through counsel or representatives, and even though no one appeared on behalf of HLF to waive its right to be present or to be represented by counsel. The trial and sentence violated HLF’s rights under the Constitution and the Federal Rules of Criminal Procedure. Now the government seeks to prevent HLF, through undersigned counsel, from appealing its unconstitutional conviction and sentence, which the Court should not allow.

The trial and sentencing violated HLF’s right to be physically present at trial through counsel, as guaranteed by the Confrontation Clause of the Sixth Amendment, the Due Process Clause of the Fifth Amendment, and Federal Rule of Criminal Procedure 43. The trial and sentencing also violated HLF’s right to obtain and be represented by counsel of its own choosing, as guaranteed by the Sixth

Amendment. The government went forward with the trial and sentencing despite being fully aware that HLF was not present or represented, in part because of the government's own actions. By the time that trial was to commence in 2007, once prior counsel withdrew on the basis of potential conflicts, HLF was unable to obtain paid counsel because it seemed that no former officer could transact business on its behalf any longer. Since its assets had been frozen and seized by the government, it also seemed unlikely that counsel could be paid. As a result, HLF was unrepresented and not present at trial. Undersigned counsel seeks to represent HLF pro bono in its appeal of the conviction and sentence, and will make a motion to be appointed as pro bono counsel to the Court of Appeals for the Fifth Circuit.

Having pursued a trial that violated HLF's constitutional and statutory rights, the government now seeks to prevent HLF from pursuing its appeal. The government's motion to strike the notice of appeal and notice of appearance on behalf of HLF should be denied. First, the Court should deny the motion because it is premature and is made in the wrong forum. Under the Federal Rules of Appellate Procedure, all that is required for a valid appeal is the timely filing of a notice of appeal, which occurred here. Any other objections to the appeal, such as the government's argument that no natural person has authorized undersigned counsel to represent HLF on appeal, should be made to the Fifth Circuit as grounds to dismiss the appeal. Since this Court no longer has jurisdiction over the matter, and the dispute is more properly addressed to the appellate court, the motion should be denied. Undersigned counsel intends to move for appointment as HLF's pro bono counsel before the Fifth Circuit. The government may make its objections then without suffering any prejudice. HLF, however, would suffer great prejudice if the government's motion were granted now because its appeal would be precluded before undersigned counsel has the opportunity to seek appointment as pro bono counsel for HLF's appeal.

Second, the Court should deny the motion because the government has not shown any reason why HLF may not appeal its conviction with the assistance of pro bono counsel. At most, the government has shown that no former officer or other person can act on behalf of HLF to retain counsel, but that does not preclude the Fifth Circuit from appointing undersigned counsel to represent HLF on appeal pro bono. Moreover, appointment of undersigned counsel pro bono is appropriate and likely because without counsel, HLF would be deprived of the opportunity to remedy the Constitutionally infirm conviction and sentence.

ARGUMENT

I. THE IN ABSENTIA CONVICTION AND SENTENCE OF HLF VIOLATED THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE, FIFTH AMENDMENT DUE PROCESS, AND FEDERAL RULE OF CRIMINAL PROCEDURE 43.

The Confrontation Clause of the Sixth Amendment provides that in all criminal prosecutions, the accused "shall enjoy the right... to be confronted with the witnesses against him." U.S. Const., Amend. VI. This clause secures the right of cross-examination of evidence and witnesses and promotes reliability in the truth-finding function of a trial. *Kentucky v. Stincer*, 482 U.S. 730, 736-37 (1987) ("The opportunity for cross-examination, protected by the Confrontation Clause, is critical for ensuring the integrity of the fact-finding process."). Among other things, the Confrontation Clause requires a criminal defendant to be physically present at trial to ensure that the accused has the opportunity to confront personally the evidence against him. *Maryland v. Craig*, 497 U.S. 836, 846-47 (1990) ("The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."). Although physical presence is not an absolute rule, it may not be dispensed with unless an important public policy requires denial of the confrontation right and where the reliability of testimony is otherwise assured. *Maryland v. Craig*, 497 U.S. at 850.

The Confrontation Clause applies equally to all criminally “accused,” including corporate defendants. *United States v. Thevis*, 665 F.2d 616, 645 n. 35 (5th Cir. 1982), citing *United States v. Rad-o-Lite*, 612 F.2d 740 (3rd Cir. 1979). It is well-settled that a corporation, however, must make its presence in court through counsel. *Rowland v. California Men’s Colony*, 506 U.S. 194, 201-03 (1993) (“It has been the law for the better part of two centuries... that a corporation may appear in the federal courts only through licensed counsel.”); *Jones v. Niagara Frontier Transportation Auth.*, 722 F.2d 20, 22 (2nd Cir. 1983) (collecting cases that explain the purpose of requiring a corporation to appear through counsel); *United States v. Unimex*, 991 F.2d 546 (9th Cir. 1993) (“Counsel is essential for a corporation at a trial, because it cannot appear pro se.”); *Schreibman v. Heller*, 446 F.Supp. 141 (D.P.R. 1978). Therefore, a corporation is present for purposes of the Confrontation Clause only if it is represented by counsel.

The Due Process Clause of the Fifth Amendment likewise guarantees a criminal defendant the right to be present at any critical stage of the criminal proceeding “if his presence would contribute to the fairness of the proceeding.” *Kentucky v. Stincer*, 482 U.S. at 745; see also *United States v. Gagnon*, 470 U.S. 522, 526-27 (1985). Although due process may not require physical presence at every stage of trial, presence is required where the defendant’s absence “might frustrate the fairness of the proceedings.” *Faretta v. California*, 422 U.S. 806, 819 n. 15 (1975).

Likewise, Federal Rule of Criminal Procedure 43 entitles a criminal defendant, including a corporate defendant, to be present at trial. Fed.R. Cr. P. 43(a). Rule 43 also specifically provides that an organizational or corporate defendant such as HLF may be present through counsel. Fed.R. Cr. P. 43(b)(1).

In this case, HLF’s right to be physically present at trial, as guaranteed by the Confrontation Clause, the Due Process Clause and Fed. R. Cr. P. 43, was undoubtedly violated. Although HLF was

initially represented by Nancy Hollander's law firm of Freedman Boyd Daniels Hollander & Goldberg P.A. ("Freedman Boyd"), as the government notes, that law firm withdrew from representation of HLF prior to trial because of questions raised by the government regarding a possible conflict of interest based on the firm's representation of Shukri Abu Baker, the former President and CEO of HLF. *See* Government's Motion to Strike Entry of Appearance of Counsel and Notice of Appeal or, In the Alternative, Motion to Show Cause Why Such Pleadings Should Not Be Stricken ("Gov. Mot.") at 5. As the government notes, it was unclear to counsel for Mr. Abu Baker and to counsel for Mr. Elashi, a former chair of the board of directors of HLF, whether any natural person had the authority to act on behalf of HLF. Gov. Mot. at 4-5 (citing court transcripts). As a result, the law firm of Freedman Boyd withdrew from its representation of HLF.

As the government concedes, HLF was unrepresented for the remainder of the proceeding, including at trial and sentencing. Gov. Mot. at 5. Since a corporation must appear through counsel, and HLF did not thereafter obtain counsel, HLF was not present at trial. There can be no doubt, therefore, that HLF was tried and sentenced in absentia, in violation of its Constitutional and statutory rights. *See United States v. Brown*, 456 F.2d 1112, 1113 (5th Cir. 1972) ("Only in the most extraordinary circumstances, and where it would otherwise work an injustice, should a court sentence a defendant in absentia, and then only under appropriate safeguards, as where the defendant has expressly waived his right to be present either by sworn affidavit or in open court for the record."). The government does not address or dispute this point in its motion.

These Constitutional violations were not "harmless errors." *See Chapman v. California*, 368 U.S. 18, 20 (1967). HLF suffered tremendous prejudice as a result of being absent from its trial and sentencing. The trial was fundamentally unfair in HLF's absence, and the adversarial process was severely undermined. Since HLF was not present at trial, it was not able to cross-examine the

government's witnesses, contest its voluminous documentary evidence, or present evidence in its own defense. HLF was unable to make legal arguments in its defense that counsel for the five individual defendants would not have made, including arguments that any arguably illegal activities of the former HLF officers and directors were not engaged in on behalf of or for the benefit of the corporation, and were not within the scope of employment by the corporation. HLF would have cross-examined the evidence through counsel, which it was unable to do. As a result of being absent at trial and sentencing, HLF was subject to a sentence of one year of unsupervised probation and a money judgment for \$12.4 million, including eighteen bank accounts that were forfeited. *See* Judgment In a Criminal Case, entered May 29, 2009 (Dkt. No. 1297). The outcome might have been vastly different if HLF had been present through counsel for trial.

Moreover, once the law firm of Freedman Boyd withdrew from its representation of HLF, HLF could not obtain new counsel. As the Court is aware, the government shut down HLF and designated it as a Specially Designated Global Terrorist pursuant to Executive Order 13224, 66 Fed. Reg. 49079 (Sept. 25, 2001), on December 4, 2001. That required HLF to cease its operations immediately. The government also seized all of HLF's assets at the same time. Therefore, by 2007, when the law firm of Freedman Boyd withdrew from its representation of HLF, HLF apparently had no current or former officers or employees to act on its behalf, and it was unlikely that the government would permit it to use its frozen assets to pay counsel. Thus, it could not obtain paid counsel. Neither was it entitled to appointed counsel at public expense. *See* 18 U.S.C. 3006A; *United States v. Hartsell*, 127 F.3d 343, 350 (4th Cir. 1997) (no appointed counsel at public expense for corporate defendants); *Unimex*, 991 F.2d at 550 (same). Not only was HLF absent from trial, but it was unable to remedy its absence, in part because of the government's actions against it. In addition, there can be no question that HLF's absence from trial and sentencing was involuntary. Mr. Abu Baker and Mr. Elashi had initially retained the law

firm of Freedman Boyd as counsel for HLF, signaling their intent for HLF to be present at trial through counsel. Due to lack of authorized representatives and funds, however, HLF could not later obtain counsel after the firm of Freedman Boyd withdrew.

In addition, HLF's Sixth Amendment right to obtain counsel of its choice was also violated. It is well-settled that a criminal defendant has the right to retain counsel of its choice under the Sixth Amendment. *Wheat v. United States*, 486 U.S. 153, 159 (1988). This right extends to corporate defendants as well. *Unimex*, 991 F.2d at 549; *see also, Rad-o-Lite*, 612 F.2d at 743-44 (corporate defendant has right to effective assistance of counsel). Also, the Sixth Amendment requires a criminal defendant to have access to counsel at critical stages of trial, with limited exceptions. *United States v. Bohn*, 890 F.2d 1079, 1080 (9th Cir. 1989) ("the sixth amendment is violated whenever 'the accused is denied counsel at a critical stage of his trial'") *citing United States v. Cronin*, 466 U.S. 648, 659 (1984); *Unimex*, 991 F.2d at 549.

The government's actions in shutting down HLF and freezing all of its assets ultimately led in part to HLF's inability to retain paid counsel. The shut-down of HLF ultimately led to the apparent elimination of employees or officers who could act as authorized representatives as well as funds for paying counsel. Thus, by 2007, HLF could not obtain paid counsel. As a result, HLF could not exercise its Sixth Amendment right to be represented by counsel of its choice, and it was forced to trial while deprived of counsel. Under similar circumstances in which government actions interfered with a corporate defendant's ability to obtain paid counsel for trial, the Ninth Circuit found that the defendant's Sixth Amendment right to counsel had been violated and reversed a conviction. *Unimex*, 991 F.2d at 549-550.

The government undoubtedly knows now and knew before trial that HLF, like any corporate defendant, must be present at trial through counsel. The government also knew that in large part

because of HLF having been shut down and having had its assets seized, HLF could not obtain paid counsel. No waiver of the right to be present at trial or of the right to be represented was obtained from HLF, and arguably, no such waiver could have been obtained since HLF no longer had any authorized representatives by 2007. Therefore, the in absentia trial and sentencing of HLF violated the Sixth Amendment's right to counsel.

II. HLF SHOULD BE ALLOWED TO APPEAL THE UNCONSTITUTIONAL CONVICTION AND SENTENCE WITH THE ASSISTANCE OF COUNSEL

By its motion, the government effectively seeks to preclude HLF from appealing the unconstitutional conviction and sentence. The government argues that no natural person can authorize undersigned counsel (or presumably, any counsel) to represent HLF in its appeal. Gov. Mot. at 5-6. By submitting its motion to this Court rather than waiting to make its objections before the Court of Appeals for the Fifth Circuit once the appeal commences, the government seeks to shield the unconstitutional conviction and sentence from appeal and from reversal, which it should not be allowed to do.

The notice of appeal and notice of appearance should not be stricken simply because, as the government argues, no authorized representative of HLF has retained counsel and signaled an intention to appeal. Gov. Mot. at 5-6. Requiring an authorized representative of HLF to retain counsel for the appeal would be tantamount to denying HLF the opportunity to appeal this unconstitutional conviction and sentence. It is undisputed that HLF currently does not have any employees or officers. Nor apparently are former officers or employees authorized to transact business on its behalf because of the government's actions in shutting down the organization and freezing its assets. As such, HLF cannot appeal its conviction except with the assistance of appointed pro bono counsel. Undersigned counsel intends to seek pro bono appointment by the Fifth Circuit but cannot do so without docketing the notice of appeal in this court first. Fed.R. App. P. 3(a)(1). Undersigned counsel could not docket the notice of

appeal without also docketing the notice of appearance. In addition, undersigned counsel is not able to move this Court for pro bono appointment for representation of HLF on appeal, since the motion for appointment for purposes of appeal must be directed to the Fifth Circuit, which has jurisdiction over the appeal.

The government's motion should be made to the Fifth Circuit once the appeal commences. Once undersigned counsel moves for appointment before the Fifth Circuit, the government will have the opportunity to object. The government may then make all of its arguments regarding why such an appeal should be dismissed. Fed. R. App. P. 3(a)(2). Under the Federal Rules of Appellate Procedure, all that is required for a valid appeal is the timely filing of the notice of appeal, which undisputedly occurred here. *Id.* Any other defect, such as the government's complaint of lack of client authorization, is "ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal." *Id.* The Fifth Circuit is the proper forum, therefore, to determine whether to appoint pro bono counsel for HLF on appeal, and whether to allow HLF to appeal with the assistance of appointed counsel.

As explained above, HLF's Constitutional and statutory rights were violated by the in absentia trial and sentencing, and the only way to remedy these violations is for HLF to appeal through appointed pro bono counsel. Given the Constitutional violations underlying the conviction and sentence, the Fifth Circuit is likely to appoint counsel for HLF so that it may pursue an appeal to remedy these grave violations. *See e.g. United States v. Rivera*, 912 F.Supp. 634 (D.P.R. 1996) (magistrate opinion recommending appointment of counsel for corporate defendant based on inherent power of district court to ensure orderly and fair criminal trials).

The government's motion to strike is therefore made in the wrong forum and is premature. Further, the relief sought by the motion would compound the harms already caused by the in absentia trial and sentencing by precluding appeal of an unconstitutional trial and sentence. The Fifth Circuit

should be allowed to decide this issue once the appeal commences and once undersigned counsel moved for appointment of pro bono counsel. The government may make its objections then to the Fifth Circuit. The Court should therefore deny the government's motion at this time, as the government will not suffer any prejudice.

CONCLUSION

For the foregoing reasons, undersigned counsel respectfully requests that the Court deny the government motion in its entirety.

Dated: June 22, 2009

Respectfully submitted,

/s/ Ranjana Natarajan

Ranjana Natarajan
CA Bar No. 230149
National Security Clinic
UNIVERSITY OF TEXAS SCHOOL OF LAW
727 East Dean Keeton St.
Austin, TX 78705
Tel: 512-232-7222
Fax: 512-232-0800
Admitted Pro Hac Vice

CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2009, I electronically filed the foregoing DEFENDANT'S OPPOSITION TO GOVERNMENT'S MOTION TO STRIKE ENTRY OF APPEARANCE OF COUNSEL AND NOTICE OF APPEAL OR, IN THE ALTERNATIVE, MOTION TO SHOW CAUSE WHY SUCH PLEADINGS SHOULD NOT BE STRICKEN with the Clerk of the Court by using the Electronic Case Filing (CM/ECF) system, which will send a notice of the electronic filing to all counsel of record.

Dated: June 22, 2009

/s/ Sonja Hartley
SONJA HARTLEY