

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

NO. 09-10560

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v .

**MOHAMMAD EL-MEZAIN; GHASSAN ELASHI; SHUKRI ABU BAKER;
MUFID ABDULQADER; ABDULRAHAM ODEH; HOLY LAND
FOUNDATION FOR RELIEF AND DEVELOPMENT, also known as HLF,**

Defendants- Appellants

**CONSOLIDATED WITH
08-10664, 08-10774, 10-10590, & 10-10586**

**Appeal from the United States District Court
For the Northern District of Texas
Dallas Division**

Cause No. 3:04-CR-240-P (08)

OPENING BRIEF FOR APPELLANT ABDULRAHMAN ODEH

**GREG WESTFALL
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ATTORNEY FOR APPELLANT

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08-10664

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v .

**SHUKRI ABU BAKER; MOHAMMAD EL-MEZAIN; GHASSAN ELASHI;
MUFID ABDULQADER; ABDULRAHMAN ODEH,**

Defendants - Appellants

CONSOLIDATED WITH

08-10774

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v .

MOHAMMAD EL-MEZAIN

Defendant - Appellant

CONSOLIDATED WITH

10-10590

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v .

**HOLY LAND FOUNDATION FOR RELIEF AND DEVELOPMENT, also
known as HLF,**

Defendant-Appellant-Cross-Appellee

CONSOLIDATED WITH

10-10586

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v .

SHUKRI ABU BAKER,

Defendant

NANCY HOLLANDER,

Appellant

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for appellant Abdulrahman Odeh certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

Abdulqader, Mufid
Abu Baker, Shukri
Boyd, John W.
Cadeddu, Marlo
Cline, John D.
Cowger, Susan
Dratel, Joshua L.
Duncan, Theresa M.
El-Mezain, Mohammad
Hollander, Nancy
Holy Land Foundation for Relief and Development
Huskey, Kristine
Jacks, James
Jonas, Barry
Junker, Walt
Moreno, Linda
Mysliwicz, Aaron
Natarajan, Ranjana
National Security Clinic, University of Texas School of Law
Odeh, Abdulrahman
Office of United States Attorney, Northern District of Texas
Palmer, Joseph F, Department of Justice
Shapiro, Elizabeth
Solis, Honorable Jorge
Tigar, Michael
Westfall, Gregory B.

Respectfully submitted,

/s/ Greg Westfall

ATTORNEY FOR
ABDULRAHMAN ODEH

STATEMENT REGARDING ORAL ARGUMENT

Appellant believes that oral argument would be helpful to both the Court and the parties to address specific questions the Court may have and to fully discuss the issues. This was a six-week trial with nine days of deliberations which involved some very novel issues including the use of an anonymous expert. Appellant respectfully requests oral argument.

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In addition, under FED. R. APP. P. 28(i), Odeh adopts

(1) the Table of Authorities which appears in the Opening Brief of co-appellant Ghassan Elashi. Ghassan Elashi's Table of Authorities pertains to Points

of Error One through Six, Eight and Nine in this brief;

(2) the Table of Authorities which appears in the Opening Brief of co-appellant Shukri Abu Baker. Shukri Abu Baker's Table of Authorities pertains to Points of Error Seven, Ten and Eleven in this brief; and

(3) the Table of Authorities which appears in the Opening Brief of co-appellant Mufid Abdulqader. Mufid Abdulqader's Table of Authorities pertains to Points of Error Twelve and Thirteen in this brief.

STATEMENT OF JURISDICTION

Appellant filed a timely notice of appeal on May 29, 2009 from the judgment entered by the trial court on May 28, 2009. 45 R. 1604.¹ This Court has jurisdiction to hear this case pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

¹Citations to the record on appeal ("R.") are in the following format: The first number represents the "Holyland" folder number in the electronic record provided to counsel. The second number represents the "USCA5" number in the lower right-hand corner of each page of the electronic record. For the convenience of the Court, where possible citations in this consolidated appeal are to the Baker record.

STATEMENT OF THE ISSUES

POINT OF ERROR NUMBER ONE:

Odeh adopts by reference the issue stated as to Point of Error I from the brief of co-appellant Ghassan Elashi under the authority of FED. R. APP. P. 28(i).

POINT OF ERROR NUMBER TWO:

Odeh adopts by reference the issue stated as to Point of Error II from the brief of co-appellant Ghassan Elashi under the authority of FED. R. APP. P. 28(i).

POINT OF ERROR NUMBER THREE:

Odeh adopts by reference the issue stated as to Point of Error III from the brief of co-appellant Ghassan Elashi under the authority of FED. R. APP. P. 28(i).

POINT OF ERROR NUMBER FOUR:

Odeh adopts by reference the issue stated as to Point of Error IV from the brief of co-appellant Ghassan Elashi under the authority of FED. R. APP. P. 28(i).

POINT OF ERROR NUMBER FIVE:

Odeh adopts by reference the issue stated as to Point of Error V from the brief of co-appellant Ghassan Elashi under the authority of FED. R. APP. P. 28(i).

POINT OF ERROR NUMBER SIX:

Odeh adopts by reference the issue stated as to Point of Error VI from the brief of co-appellant Ghassan Elashi under the authority of FED. R. APP. P. 28(i).

POINT OF ERROR NUMBER SEVEN:

Odeh adopts by reference the issue stated as to Point of Error VIII from the brief of co-appellant Shukri Abu Baker under the authority of FED. R. APP. P. 28(i).

POINT OF ERROR NUMBER EIGHT:

Odeh adopts by reference the issue stated as to Point of Error VIII from the brief of co-appellant Ghassan Elashi under the authority of FED. R. APP. P. 28(i).

POINT OF ERROR NUMBER NINE:

Odeh adopts by reference the issue stated as to Point of Error X from the brief of co-appellant Ghassan Elashi under the authority of FED. R. APP. P. 28(I).

POINT OF ERROR NUMBER TEN:

Odeh adopts by reference the issue stated as to Point of Error VII from the brief of co-appellant Shukri Abu Baker under the authority of FED. R. APP. P. 28(i).

POINT OF ERROR ELEVEN:

Odeh adopts by reference the issue stated as to Point of Error IX from the brief of co-appellant Shukri Abu Baker under the authority of FED. R. APP. P. 28(I).

POINT OF ERROR TWELVE:

Odeh adopts by reference the issue stated as to Point of Error I from the brief of co-appellant Mufid Abdulqader under the authority of FED. R. APP. P. 28(I).

POINT OF ERROR THIRTEEN:

Odeh adopts by reference the issue stated as to Point of Error II from the brief of co-appellant Mufid Abdulqader under the authority of FED. R. APP. P. 28(I).

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

Nature of the Case:

The government prosecuted the Holy Land Foundation for Relief and Development ("HLF"), three of its former officers (Shukri Abu Baker, Mohammed El-Mezain and Ghassan Elashi), a former employee (Abdulrahman Odeh), and a performer at fundraising events (Mufid Abdulqader) for providing charitable support -- food, school supplies, monthly stipends, and the like -- to needy Palestinians through local zakat (or "charity") committees that, according to the government, were controlled by Hamas. *See generally*, 45 R. 1708 (Superseding Indictment).

Course of Proceedings and Disposition Below:

The grand jury indicted appellants on July 26, 2004. 45 R.1669. The indictment -- as superseded before trial -- charged conspiracy to provide material support to Hamas (18 U.S.C. § 2339B(a)(1)); substantive material support offenses; conspiracy to violate the International Emergency Economic Powers Act ("IEEPA") (18 U.S.C. § 371, 50 U.S.C. §§ 1701-1706); substantive IEEPA offenses; conspiracy to commit money laundering (18 U.S.C. § 1956(h)); substantive money laundering offenses; and, as to Baker, Elashi, and HLF, conspiracy to file false tax returns and substantive false tax return offenses (26

U.S.C. § 7206(2)). 45 R. 1669-1747.

There were two trials. The first trial began on July 24, 2007 before the Honorable A. Joe Fish. After eight weeks of evidence and twenty days of deliberations, the jury returned a partial verdict on October 22, 2007. It acquitted El-Mezain on all charges except Count 1 (conspiracy to provide material support to Hamas). It initially acquitted Abdulqader on all counts, but one juror changed her mind when polled and thus the jury hung 11-1 for acquittal on all counts as to him. The jury hung on all counts as to all other appellants.

Following the partial verdict, the case was reassigned to the Honorable Jorge Solis. The government later dismissed all charges against Odeh and Abdulqader except Counts 1, 11, and 22 (conspiracies to provide material support to Hamas, to violate IEEPA, and to commit money laundering). 45 R. 1209-48 (revised indictment).

After extensive motions practice, including interlocutory appeals from the district court's rulings on double jeopardy issues, jury selection for the retrial began before Judge Solis on September 4, 2008, and trial began September 22. 45 R. 117, 120. After six weeks of evidence and nine days of deliberations, the jury found the appellants guilty on all counts. Thus, El-Mezain was convicted on Count 1, Abdulqader and Odeh were convicted on Counts 1, 11, and 22, and HLF, Baker,

and Elashi were convicted on all counts. 45 R. 1254-66. The same jury then imposed a criminal forfeiture in the amount of \$12,400,000 against all defendants but El-Mezain. 45 R. 1267-68.

The district court sentenced the defendants on May 27, 2009. Odeh was sentenced to 15 years in prison and ordered to forfeit \$12.4 million. 45 R. 1593. Baker and Elashi were sentenced to 65 years in prison and a \$12.4 million forfeiture. 17 R.1539; 30 R. 142. Abdulqader was sentenced to 20 years in prison and a \$12.4 million forfeiture. 38 R.1584. El-Mezain was sentenced to 15 years in prison. 20 R.470. HLF was sentenced to a year of probation and ordered to forfeit \$12.4 million in the form of a money judgment and several million dollars held in various bank accounts. 3 R.7387.

All defendants timely appealed. The individual defendants are incarcerated.

Statement of the Case:

Under FED. R. APP. P. 28(i), Odeh adopts as his Statement of the Case the "STATEMENT OF FACTS" in the opening brief for co-defendant Ghassan Elashi. Odeh adds to Elashi's STATEMENT OF FACTS as follows:

Abdulrahman Odeh was hired in February, 1994, to open and run a New Jersey office for the Holy Land Foundation. 4 R. 5117-23, 5133. Thus he became one of at least eight state representatives employed at the Holy Land Foundation

across the nation. 4 R. 5115. In addition to being the manager (and sole employee) of that office, he was also a relief worker for the Holy Land Foundation. Odeh was not a board member or an officer of the HLF. 4 R. 5108. 5110. He was not on the Palestine Committee, not in the Muslim Brotherhood, and did not attend or was even invited to attend the Philadelphia Meeting. 4 R. 5108. Abdulrahman Odeh did not send money to Palestine. In fact, any money he raised went to the Holy Land Foundation in Richardson. He never dealt with any organization in Palestine, including the zakat committees.

Odeh went on a number of actual relief missions on behalf of the HLF. 4 R. 5120-21, 5130, 5134-36. He went to Kosovo and delivered flour and a bread machine to survivors of Slobodon Milosevic's ethnic cleansing campaign. He went to Jordan twice to deliver food to refugee camps. He went to a United Nations refugee camp in Egypt and delivered food. He never did, however, go to Palestine.

From the totality of the evidence, it was abundantly clear that Odeh did not take part in any of the management decisions of the Holy Land Foundation. Nor did he take part in any decision about where money should go. At sentencing, the government conceded that Odeh was the least culpable of the defendants. 46 R. 174. Indeed, at trial the government's "proof" against Odeh included two books he

had in his office in New Jersey, a small handful of phone conversations, one of which captured him celebrating after a suicide bombing, a picture of Sheikh Yassin and another picture, torn from a newspaper, featuring, among others, Khaled Mishal. Odeh had also sponsored through the HLF the infant son of a Hamas operative after his death.

SUMMARY OF THE ARGUMENTS

POINT OF ERROR NUMBER ONE:

THE DISTRICT COURT ERRED IN BARRING THE DEFENSE FROM LEARNING THE NAMES OF A KEY GOVERNMENT EXPERT AND A SECOND GOVERNMENT WITNESS.

Under FED. R. APP. P. 28(i), Odeh adopts the summary of argument with respect to Point of Error I set forth in the Opening Brief for co-appellant Ghassan Elashi.

POINT OF ERROR NUMBER TWO:

THE DISTRICT COURT ERRED IN ADMITTING HIGHLY PREJUDICIAL HEARSAY EVIDENCE.

Under FED. R. APP. P. 28(i), Odeh adopts the summary of argument with respect to Point of Error II set forth in the Opening Brief for co-appellant Ghassan Elashi.

POINT OF ERROR NUMBER THREE:

THE DISTRICT COURT ERRED IN REFUSING TO EXCLUDE EVIDENCE UNDER RULE 403.

Under FED. R. APP. P. 28(i), Odeh adopts the summary of argument with respect to Point of Error III set forth in the Opening Brief for co-appellant Ghassan Elashi.

POINT OF ERROR NUMBER FOUR:

THE DISTRICT COURT ERRED IN ITS RULINGS ON ISSUES INVOLVING OPINION TESTIMONY.

Under FED. R. APP. P. 28(i), Odeh adopts the summary of argument with respect to Point of Error IV set forth in the Opening Brief for co-appellant Ghassan Elashi.

POINT OF ERROR NUMBER FIVE:

THE DISTRICT COURT ERRED IN FAILING TO GRANT APPELLANTS' MOTION FOR LETTERS ROGATORY.

Under FED. R. APP. P. 28(i), Odeh adopts the summary of argument with respect to Point of Error V set forth in the Opening Brief for co-appellant Ghassan Elashi.

POINT OF ERROR NUMBER SIX:

THE DISTRICT COURT ERRED IN REFUSING TO REQUIRE PRODUCTION TO THE APPELLANTS OF THEIR OWN STATEMENTS.

Under FED. R. APP. P. 28(i), Odeh adopts the summary of argument with respect to Point of Error VI set forth in the Opening Brief for co-appellant Ghassan Elashi.

POINT OF ERROR NUMBER SEVEN:

THE DISTRICT COURT ERRED IN REFUSING TO SUPPRESS THE FISA INTERCEPTS.

Under FED. R. APP. P. 28(i), Odeh adopts the summary of argument set forth in Point of Error VIII in the Opening Brief for co-appellant Shukri Abu Baker.

POINT OF ERROR NUMBER EIGHT:

THE CUMULATIVE EFFECT OF THE ERRORS REQUIRES REVERSAL.

Under FED. R. APP. P. 28(i), Odeh adopts the summary of argument with respect to Point of Error VIII set forth in the Opening Brief for co-appellant Ghassan Elashi.

POINT OF ERROR NUMBER NINE:

THE DISTRICT COURT ERRED IN SENTENCING ODEH.

Under FED. R. APP. P. 28(i), Odeh adopts the summary of argument with respect to Point of Error X set forth in the Opening Brief for co-appellant Ghassan Elashi.

POINT OF ERROR NUMBER TEN:

THE DISTRICT COURT ERRED IN REFUSING TO COMPEL PRODUCTION OF THE FISA APPLICATIONS AND ORDERS.

Under FED. R. APP. P. 28(i), Odeh adopts the summary of argument set forth in Point of Error VII in the Opening Brief for co-appellant Shukri Abu Baker.

POINT OF ERROR ELEVEN:

THE DISTRICT COURT ERRED IN REFUSING TO SUPPRESS EVIDENCE UNLAWFULLY SEIZED FROM THE OFFICES OF THE HOLY LAND FOUNDATION.

Under FED. R. APP. P. 28(i), Odeh adopts the summary of argument set forth in Point of Error IX in the Opening Brief for co-appellant Shukri Abu Baker.

POINT OF ERROR TWELVE:

THE DISTRICT COURT ERRED IN GIVING A FIRST AMENDMENT INSTRUCTION THAT MISSTATED THE LAW AS APPLIED TO THE FACTS OF THE CASE.

Under FED. R. APP. P. 28(i), Odeh adopts the summary of argument set forth in Point of Error I in the Opening Brief for co-appellant Mufid Abdulqader.

POINT OF ERROR THIRTEEN:

THE DISTRICT COURT ERRED IN DENYING APPELLANTS' MOTION TO DISMISS ON DOUBLE JEOPARDY GROUNDS.

Under FED. R. APP. P. 28(i), Odeh adopts the summary of argument set forth in Point of Error II in the Opening Brief for co-appellant Mufid Abdulqader.

POINTS, ARGUMENTS AND AUTHORITIES

POINT OF ERROR NUMBER ONE:

THE DISTRICT COURT ERRED IN BARRING THE DEFENSE FROM LEARNING THE NAMES OF A KEY GOVERNMENT EXPERT AND A SECOND GOVERNMENT WITNESS.

Under FED. R. APP. P. 28(i), Odeh adopts the argument with respect to Point of Error I set forth in the Opening Brief for co-appellant Ghassan Elashi.

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POINT OF ERROR NUMBER FOUR:

THE DISTRICT COURT ERRED IN ITS RULINGS ON ISSUES INVOLVING OPINION TESTIMONY.

Under FED. R. APP. P. 28(i), Odeh adopts the argument with respect to Point of Error IV set forth in the Opening Brief for co-appellant Ghassan Elashi.

POINT OF ERROR NUMBER FIVE:

THE DISTRICT COURT ERRED IN FAILING TO GRANT APPELLANTS' MOTION FOR LETTER ROGATORY.

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POINT OF ERROR NUMBER SIX:

THE DISTRICT COURT ERRED IN REFUSING TO REQUIRE PRODUCTION TO THE APPELLANTS OF THEIR OWN STATEMENTS.

Under FED. R. APP. P. 28(i), Odeh adopts the argument with respect to Point of Error VI set forth in the Opening Brief for co-appellant Ghassan Elashi.

POINT OF ERROR NUMBER SEVEN:

THE DISTRICT COURT ERRED IN REFUSING TO SUPPRESS THE FISA INTERCEPTS.

Under FED. R. APP. P. 28(i), Odeh adopts the argument with respect to Point of Error VIII set forth in the Opening Brief for co-appellant Shukri Abu Baker.

POINT OF ERROR NUMBER EIGHT:

THE CUMULATIVE EFFECT OF THE ERRORS REQUIRES REVERSAL.

Under FED. R. APP. P. 28(i), Odeh adopts the argument with respect to Point of Error VIII set forth in the Opening Brief for co-appellant Ghassan Elashi.

POINT OF ERROR NUMBER NINE:

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Under FED. R. APP. P. 28(i), Odeh adopts the argument with respect to Point of Error IX set forth in the Opening Brief for co-appellant Shukri Abu Baker.

POINT OF ERROR TWELVE:

THE DISTRICT COURT ERRED IN GIVING A FIRST AMENDMENT INSTRUCTION THAT MISSTATED THE LAW AS APPLIED TO THE FACTS OF THE CASE.

Under FED. R. APP. P. 28(i), Odeh adopts the argument with respect to Point of Error I set forth in the Opening Brief for co-appellant Mufid Abdulqader.

POINT OF ERROR THIRTEEN:

THE DISTRICT COURT ERRED IN DENYING APPELLANTS' MOTION TO DISMISS ON DOUBLE JEOPARDY GROUNDS.

Under FED. R. APP. P. 28(i), Odeh adopts the argument set forth in Point of Error II in the Opening Brief for co-appellant Mufid Abdulqader.

PRAYER

For the foregoing reasons, the Court should reverse Odeh's conviction and remand for a new trial. If the Court does not reverse Odeh's conviction, it should vacate his sentence and remand for resentencing.

Respectfully submitted,

s/Greg Westfall

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ATTORNEY FOR APPELLANT
ABDULRAHMAN ODEH

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2010, I electronically filed the foregoing document with the clerk of the Fifth Circuit Court of Appeals, using the electronic case filing (ECF) system of that court. The ECF system sent a “Notice of Electronic Filing” to the attorneys of record who have consented in writing to accept this notice as service of this document by electronic means.

s/Greg Westfall

GREG WESTFALL

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because:

this brief contains 2,781 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii)

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because:

this brief has been prepared in a proportionally spaced typeface using WordPerfect X3 and 14 point Times New Roman font

s/Greg Westfall

GREG WESTFALL

September 10, 2010.