

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

11/28/11 11:30

FBI/AA.

YASER ESAM HAMDI,

ESAM FOUAD HAMDI, As Next
Friend of Yaser Esam Hamdi,

Petitioners,

v.

Civil Action No. 2:02cv439

DONALD RUMSFELD,
Secretary of Defense,

COMMANDER W.R. PAULETTE,
Norfolk Naval Brig,

Respondents.

REPLY IN SUPPORT OF RESPONDENTS' MOTION TO TERMINATE APPOINTMENT OF
COUNSEL OR, IN THE ALTERNATIVE, FOR AN ORDER
TO SHOW CAUSE WHY THE FINANCIAL ELIGIBILITY
REQUIREMENTS OF 18 U.S.C. 3006A ARE MET

Petitioners' Response to Respondents' Motion to Terminate Appointment of Counsel ("Resp.") contains no affirmative explanation why, much less any demonstrative showing that, the "person who * * * is seeking relief" in this case is "financially eligible" for appointment of counsel. 18 U.S.C. 3006A(a)(2)(B). Because that showing has never been made in this case – by either the federal public defender or the next friend who initiated this action – the Court's appointment of taxpayer funded counsel should be terminated or, at a minimum, the Court should issue an order to show cause why the financial eligibility requirements are met.

1. Petitioners attempt to divert the focus of the appointment issue from the financial eligibility of the next friend who brought this habeas action, i.e., the detainee's father, to the financial

needs of the detainee himself. That effort should be rejected. Respondents do not dispute that the detainee could meet the financial eligibility requirements of 18 U.S.C. 3006A. But that does not mean that the next friend who initiated this action is entitled to taxpayer funded counsel, if, as the reports discussed in respondents' opening memorandum (at 6) indicate, that next friend himself has the financial wherewithal to pay for legal representation to maintain this action. In enacting Section 3006A, Congress sought to pay only for the appointment of counsel to maintain litigation for those who could not afford to pay for their own counsel. It plainly did not intend to allocate federal tax dollars to fund litigation, next-friend or not, for persons who could pay for it themselves.

Petitioners claim that "Yaser Esam Hamdi [the detainee] * * * is the real party in interest in this case, and the only 'party' seeking relief from this Court." Resp. 1; see *id.* at 3-4 (arguing that the next friend himself does not become a "party" to a habeas action) (citing cases). But petitioners' focus on the "parties" before this Court misses the mark. Section 3006A authorizes appointment of counsel for a financially eligible "person who * * * is seeking relief." 18 U.S.C. 3006A(a)(2)(B) (emphasis added). Regardless of whether, or to what extent, he is a "party" to this case, the detainee's father and next friend is of course a "person." And, as the opening paragraph of the petition for a writ of habeas corpus makes clear, he is plainly a "person who is seeking relief" in this case. See Pet. ¶ 1 ("Esam Fouad Hamdi, on behalf of his son, Yaser Esam Hamdi, requests that this Court issue a Writ of Habeas Corpus."). To be sure, the detainee's father is seeking relief "on behalf of" his son, but he is nevertheless still here seeking relief. In addition, the detainee's father has also sought relief in this case on his own behalf. See Pet. at 7 (requesting that the Court "[g]rant Petitioner Esam Fouad Hamdi Next Friend status"). In short, as explained in our opening memorandum, under any plain-meaning construction of Section 3006A, the detainee's father is the

“person who is seeking relief” in this case and, therefore, a person who must meet the financial eligibility requirements of Section 3006A to qualify for taxpayer funded legal services.

2. Petitioners state that “nothing submitted by Respondents suggests that Petitioner’s father has sufficient funds to hire counsel in this country, even if he is a ‘successful engineer.’” Resp. at 6 (emphasis added). But petitioners have it backwards. As we explained in our opening memorandum (at 4) – and as petitioners have not tried to refute – the one seeking appointment of counsel pursuant to Section 3006A bears the burden of establishing that the financial eligibility requirements are met, and not the person opposing appointment of counsel (who lacks access to the personal financial information necessary to make that showing). See United States v. Bauer, 956 F.2d 693, 694 (7th Cir. 1992) (“The burden of proving inadequate financial means * * * lies with the [party seeking appointment].”), cert. denied, 506 U.S. 882 (1992). Petitioners have utterly failed to meet that burden and, indeed, even to this date have never genuinely tried to do so.

Petitioners decline to rebut the press reports discussed in our opening memorandum (at 6) indicating that the detainee’s father is a person of not insignificant financial means, or to attempt to explain how those reports are consistent with the notion that the father is financially in need of appointment of counsel in order to press this litigation. Instead, petitioners refer to the affidavit attached to the petition, which, in pertinent part, states simply – in general language that could provide cover for any number of explanations not tied to the father’s assets, income, or other means of paying for an attorney – that the detainee’s father “personally will be unable to provide funds for the legal services which my son will require.” Aff. of Esam Faoud Amin Hamdi, Pet., Exh. D. As we have explained, that kind of generalized statement of inability to provide funds is insufficient to satisfy Section 3006A’s requirement of financial need for an attorney. See Mem. at 5-6. Indeed, in

the typical case, those seeking appointment of counsel are required to complete a form listing their assets, income, and other sources of funds. See Mem., Exh. 1. Petitioners not only have declined to submit such form, they have never even disclosed the detainee's father's assets, income, or other financial means, even in the face of press reports indicating that such means may be significant.

3. As we have explained (Mem. at 7), the Fourth Circuit has made clear that the extraordinary nature of this litigation calls for this Court to go out of its way to ensure that the requirements of Section 3006A are met for the appointment of counsel. See Hamdi v. Rumsfeld, 2002 WL 1483908, at *6 n.2 (July 12, 2002). Petitioners have not come close to explaining why the financial eligibility requirements are met in this case and, what is more, have pointedly declined to do so notwithstanding evidence that the detainee's father would not meet them. Accordingly, they have left this Court with no choice but to grant the relief requested by respondents.

CONCLUSION

For the foregoing reasons, and those stated in our opening memorandum, the Court should terminate the appointment of counsel in this case or, in the alternative, order the federal public defender or the detainee's father to show cause why the financial eligibility requirements of 18 U.S.C. 3006A are met.

Respectfully submitted,

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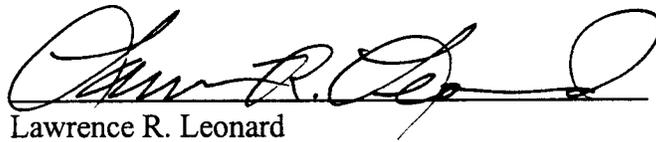
Dated: July 25, 2002

Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Reply in Support of Respondents' Motion to Terminate Appointment of Counsel Or, in the Alternative, for an Order to Show Cause Why the Financial Eligibility Requirements of 18 U.S.C. 3006A Are Met was served, this 26th day of July, 2002, by hand delivery addressed to:

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A handwritten signature in black ink, appearing to read "Lawrence R. Leonard", written over a horizontal line.

Lawrence R. Leonard
Managing Assistant United States Attorney