CASE NO. 15-1331

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RASMIEH YUSEF ODEH

Defendant-Appellant.

On Appeal from the United States District Court
For the Eastern District of Michigan
Southern Division

DEFENDANT-APPELLANT'S BRIEF ON APPEAL

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ORAL ARGUMENT REQUESTED

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

This case should not be submitted without oral argument. The appeal presents a case of first impression for this Circuit, as to whether or not the statute at issue, 18 U.S.C. §1425, charges a specific or general intent crime. In addition, the facts presented in this appeal are unique, and raise complex fundamental constitutional issues of the right to present a complete defense. Ms. Odeh believes the Court in reaching its decision will benefit by oral argument.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The one count indictment under which Rasmieh Odeh was charged stated an offense under 18 U.S.C. §1425. The defendant appeals from a final judgement and commitment order of the district court. A Notice of Appeal was timely filed and this Court is vested with appellate jurisdiction over this appeal pursuant to 28 U.S.C. §1291.

STATEMENT OF ISSUES FOR REVIEW

I. WHETHER THE TRIAL COURT ERRED IN DENYING MS. ODEH'S FUNDAMENTAL CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE?

A. WHETHER THE TRIAL COURT ERRED IN FINDING THAT 18 U.S.C § 1425 IS A GENERAL INTENT CRIME AND THUS BARRING APPELLANT'S EXPERT FROM TESTIFYING?

B. WHETHER THE COURT IMPROPERLY LIMITED THE MS. ODEH'S RIGHT TO TESTIFY IN HER OWN DEFENSE?

II. WHETHER THE COURT ERRED IN ADMITTING PREJUDICIAL AND IRRELEVANT, 45 YEAR OLD, ISRAELI MILITARY OCCUPATION DOCUMENTS?

A. WHETHER THE COURT ERRED IN ADMITTIING ISRAELI MILITARY OCCUPATION DOCUMENTS WHICH WERE THE PRODUCT OF TORTURE AND VIOLATIONS OF FUNDAMENTAL FAIRNESS AND DUE PROCESS?

B. WHETHER THE COURT ERRED IN REFUSING TO ACCEPT A STIPULATION IN LIEU OF ADMITTING HIGHLY PREJUDICIAL ISRAELI DOCUMENTS OR DECLINING TO REDACT THE MOST INFLAMMATORY PORTIONS OF THE DOCUMENTS?

III. WHETHER THE COURT ERRED IN FAILING TO FAIRLY APPLY THE §3553 FACTORS AND THE SENTENCING GUIDELINES IN SENTENCING THE APPELLANT TO 18 MONTHS IN PRISON?

STATEMENT OF THE CASE

Defendant-Appellant, Rasmieh Yousef Odeh, a 67 year-old Palestinian women, who was a naturalized in 2004, was convicted after a jury trial in a one-count indictment for a violation of 18 U.S.C. § 1425(a), procuring U.S. citizenship contrary to law. R.E. 3 pp.1-15, Pg. ID 5-19. The 2013 indictment, almost ten years after she became a U.S. citizen, charged her with providing false answers in her naturalization application "for the purpose of obtaining immigration benefits." R.E. 3, Pg. ID 18.

The evidence showed that Ms. Odeh marked "No" in boxes to a series of questions on her N-400 naturalization application, asking whether she had **"EVER"** been arrested, charged, convicted, or imprisoned for any offense, and failed to disclose any prior criminal history or imprisonment during her interview with an immigration officer. Govt. Ex. 1A, R.E. 186-1, Pg. ID 2615-2624; (Testimony of Jennifer Williams) R.E. 182, pp- 53-59, Pg. ID 2289-2307. The prosecution also claimed that her naturalization was obtained illegally because Ms. Odeh wrongfully obtained her permanent resident status ten years earlier, answering the same questions in the same way in her visa application, processed

by the U.S. embassy in Jordan. Govt. Ex. 2A, R.E. 186-5, Pg. ID 2628-2331; (Testimony of Raymond Clore) R. E. 181, pp. 129-158, Pg. ID 2194-2219.

At trial, the government introduced 45 year-old documents from the Israeli military occupation legal system to show that Ms. Odeh in fact had been arrested, charged, convicted and imprisoned, for life, for her alleged involvement in bombings that were part of nationalist resistance to the belligerent illegal occupation, which followed the Israeli invasion of Palestinian territory during the 1967 war, and their subsequent refusal to withdraw. Govt. Ex. 3, R.E. 186-6, Pg. ID 2632-2326; Ex. 4 R.E, 186-7, Pg. ID 2637-385; Ex 5, R.E, 186-8, Pg. ID 2639-2644; Ex.6, R.E. 186-8, Pg. ID 2645-2647; Ex. 7, R.E. 186-10, Pg. ID 2648-2649 and Ex. 8, R.E. 186-11, Pg. ID 2650-2654.

The defense opposed admission of these documents in a motion *in limine*, asserting that they were the product of torture and other violations of U.S. constitutional guarantees of due process and fundamental fairness. (Motion *in Limine* and Brief), R.E. 41 pp. 1-17, Pg. ID 260-274. In support, the defense submitted several exhibits: a report by Amnesty International R.E. 41 Ex. 2, Pg. ID 278-280; a confidential communication from the American consulate in Jerusalem to the U.S. Secretary of State concerning the systematic torture of detained Palestinians, R.E. 41, Ex. 1, Pg. ID 281-294; and an expert affidavit by a leading scholar on the Israeli military courts, Dr. Lisa Hajjar, who opined that the system

routinely used torture to obtain confessions, and operated in violation of American principles of Due Process and Fundamental Fairness. R.E. 65 Ex. 1, Pg. ID 584-590. Despite this evidence, and without an evidentiary hearing, the lower court admitted these documents, based on a 1998 Mutual Legal Assistance treaty (R.E. 67, Ex. 2, Pg. ID 632-651) between the United States and the Government of the State of Israel. (Opinion and Order), R.E. 117, Pg. ID 1229-1238

Although the defense offered to stipulate that the defendant had been arrested, charged, convicted and imprisoned for "serious" crimes, and argued that they were not contesting the statutory elements of materiality and procurement, the lower court refused to require any stipulations. (Opinion and Order), R.E. 117, pp 11-14, Pg. ID 1239-1242; (Opinion and Order), R.E. 123, Pg. ID 1267-1271.

The defense also moved *in limine* to redact highly prejudicial and minimally relevant language from the Israeli documents which included the specific charges by the Israeli military, accusing the Appellant of placing explosives "with the intention of causing death and injury" [and that] "[o]ne of the bombs exploded and caused the death of Leon Kannar and Edward Jaffe, May Their Memory Be a Blessing, as well as injuries to a multitude of people." (Govt. Ex. #3, R.E. 186-6, Pg. ID 2632-2326; (Motion and Supporting Brief *in Limine*), R.E. 41, pp.1-3, 14, Pg. ID 260-263, 275.

Ms. Odeh did not contest that she had been arrested, convicted and imprisoned by the Israeli military in 1969, at trial or otherwise. Rather she testified that she believed at the time that the naturalization questions, coming more than nine years after she began living in the U.S., referred only to her time in the in the United States -- where she had no criminal record -- and that she never thought about her time in Israel in providing her "No" answers on her form or in the interview. R.E, 182, pp. 116-120, Pg. ID 2364-2368. She also stated that a series of prior questions on the naturalization application which used the words **"Ever"** and referred to the United States, reinforced her understanding that the later questions, about prior arrests convictions and imprisonment, also referred to the United States, See Exhibit 1A, R.E. 186-1 pp. 6-7, Pg. ID 2620-21; (Testimony of Rasmieh Odeh), R.E. 183 pp. 53-54; Pg. ID 2426-27.

She explained that she would not have hesitated to disclose her Israeli conviction and imprisonment if specifically asked, since it was no secret. R.E. 182, p. 120, Pg. ID 2368; R.E. 183 p.21; Pg. ID 2394. The evidence also showed that she had told a Homeland Security Agent in 2013, that no one from Immigration ever asked her about her Israeli imprisonment at the time of her naturalization process. R.E. 183, pp. 18-21, Pg. ID 2391-2394; Testimony of Stephen Webber) R.E. 181 p.91, Pg. ID 2181.

The immigration officer who interviewed Ms. Odeh for her naturalization, testified that she had no recollection of Ms. Odeh specifically, or of her interview, but that she had been instructed to orally add to printed questions on criminal history, the phrase "anywhere in the world." (Testimony of Jennifer Williams), R.E. 182, pp- 53-59, Pg. ID 2301-2307. Ms. Odeh testified however, that she was never told by Ms. Williams or anyone else, that these questions pertained to the time before she came to the United States. R.E. 183 pp. 16-18, Pg. ID 2389-2391.

Ms. Odeh also testified that the answers in her 1994 visa application were copied from a sample form filled out by her brother, a U.S. citizen, who was fluent in English, which at the time Ms. Odeh barely spoke and could not read, who had prevailed upon her to come to the U.S. to take care of her father, who was suffering from cancer. R.E. 182 pp.110-117, Pg. ID. 2358-2365

As critical explanation and corroboration for her defense, Ms. Odeh intended to call Dr. Mary Fabri, an internationally recognized expert on the treatment of survivors of torture. R.E. 42 Ex.1 (Curriculum Vitae of Dr. Mary Fabri), Pg. ID 297-299; R.E. 113 pp. 7-9, Pg. ID 1167-1163. Ms. Odeh claimed that she had been brutally tortured with electro-shock, and instrument rape, during the first three weeks following her arrest by Israeli soldiers in 1969, at the infamous "Moscow Villa" interrogation center run by the Israeli *Shin Bet* secret police. (Affidavit of Dr. Mary Fabri), R.E. Exhibit 1, pp. 3-19; Pg. ID 329-336.

Dr. Fabri testified, in a Rule 104 hearing, that after extensive interviews and testing, she diagnosed Ms. Odeh as suffering from a chronic post-traumatic stress disorder (PTSD) resulting from torture. Dr. Fabri opined that the disorder could have operated to automatically "filter out" her terrible traumatic experiences in Israel, and cause her to interpret the naturalization questions as way to avoid any thought of her past trauma. (Testimony of Dr. Mary Fabri), R.E. 113, pp 11-16, 38-45, Pg. ID 1165-1170, 1192-1199.

Initially, the lower court ruled that the statute, 18 U. S. C. §1425, charged a specific intent crime, and ordered the 104 hearing to "ascertain whether Defendant's expert's anticipated testimony 'will support a legally acceptable theory of *mens rea*.'" (Order and Ruling of District Court). R.E. 98 pp; 7-15, Pg. ID 982-990. Prior to ruling on the admissibility of Dr. Fabri' testimony however, the court reversed his position in response to a government motion for reconsideration, and held that the statute charged a general intent crime, and consequently, as a matter of law, Dr. Fabri could not be permitted to testify. (Order and Ruling of District Court), R.E. 119, pp 1-7 Pg. ID 1252-1258.

The lower court ruled further that Ms. Odeh could not testify in her own behalf about the torture she endured, the symptoms she has chronically suffered as a result of her torture, or her recent diagnosis of post-traumatic stress disorder. (Order and Opinion of District Court) R.E. 125 pp. 1-4, Pg. ID 1280-1283.

Nor was she allowed to testify that she was innocent of the Israeli charges, or the complete lack of due process and fundamental fairness in her arrest, trial and imprisonment by the military occupation courts. (Order and Opinion of District Court), R.E. 117 pp. 17-19, Pg. ID 1245-1247.

Ms. Odeh was convicted and sentenced to 18 months in prison. Her citizenship was revoked, and she was ordered removed from the United States. The sentence, removal and denaturalization were stayed pending appeal.

Ms. Odeh now seeks reversal of her conviction and a new trial in which she is afforded her fundamental constitutional right to present her defense. In the alternative, Ms Odeh seeks a reduced sentence to the 5 weeks she served in the County Jail, or a new sentencing hearing in which her age, post-traumatic stress disorder and contributions to her community are properly considered.

SUMMARY OF ARGUMENT

The rulings of the trial court denied Ms. Odeh's Fifth and Sixth Amendments constitutional rights to present a complete defense, and to testify fully in her own defense. The lower court erred in deciding that 18 U.S.C. §1425(a) charged a general intent crime, and therefore precluded Ms. Odeh's expert psychological testimony. In addition, Ms. Odeh was improperly barred from testifying about her state of mind resulting from her prior torture and continuing symptoms.

The trial court also erred in admitting, without an evidentiary hearing, documents from an Israeli military occupation court, which operated in violation of Due Process and Fundamental Fairness. The lower court also erred in refusing to allow a stipulation or to order redaction, to shield or remove the inflammatory and highly prejudicial, irrelevant information contained in the Israeli military court documents.

In addition, the prison sentence imposed by the trial court, on top of her denaturalization and removal, was unduly harsh, and failed to fairly consider Ms. Odeh's arguments for a downward departure, and to properly apply the §3553 sentencing factors.

ARGUMENT

I. THE TRIAL COURT DENIED MS.ODEH'S FUNDAMENTAL CONSTITUTIONAL RIGHT TO PRESENT HER COMPLETE DEFENSE AND TESTIFY FULLY IN HER OWN BEHALF.

The Supreme Court has repeatedly recognized that "[w]hether rooted in the Due Process Clause of the Fifth Amendment or in the Compulsory Process or Confrontation Clause of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Holmes v. South Carolina*, 547 U.S. 319 (2006), quoting, *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). "The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. . . . This right is a fundamental element of due process of law." *Taylor v. Illinois*, 484 U.S. 400, 409 (1988), quoting from *Washington v. Texas*, 388 U.S. 14, 19 (1967) "[W]hile the Constitution leaves much in the hands of the trial judge, 'an essential component of procedural due process is an opportunity to be heard,'" *Gagne v. Booker*, 606 F.3d 278, 284 (6th Cir. 2010) quoting *Crane v. Kentucky*, 476 U.S. at 690.

The right is not absolute, but evidentiary rulings which are arbitrary, that infringe on a "weighty" interest of the accused, violate the constitutional guarantee

of a fair trial. See e.g., *United States v. Scheffer*, 523 U.S. 303, 308-09 (1998); *Ferensic v. Birkett*, 501 F.3d 461, 475-76 (6th Cir. 2007). A "weighty interest" is defined as one in which the barred evidence, evaluated in the context of the entire record, would have created a reasonable doubt that had not otherwise existed. *United States v. Blackwell*, 459 F.3d 739, 753 (6th Cir. 2006); *United States v. Reifsteck*, 841 F.2d 701, 705 (6th Cir. 1988).

Standard of Review

The applicable standard of review for evidentiary rulings claimed to violate the Sixth Amendment or other constitutional rights is *de novo*. *United States v. Robinson*, 389 F.3d 582, 591-92 (6th Cir. 2004); see also *United States v. Lloyd*, 10 F.3d 11197, 1216 (6th Cir. 1993).

In this case, the rulings of the lower court barred the heart and essence of the Ms. Odeh's defense: that PTSD had blocked her from understanding the time frame in the questions that were answered falsely. In precluding the entire testimony of Ms. Odeh's expert witness, Dr. Fabri, who had recognized and diagnosed her Post-Traumatic Stress Disorder symptoms resulting from her torture, the court deprived Ms. Odeh of solid, science-based, direct explanation and corroboration of her state of mind, as a matter of fact, which would have established that she did not knowingly lie on the application.

The trial court likewise prevented Ms. Odeh from testifying in her own behalf about being tortured by Israeli soldiers and secret police; the unbearable flashbacks that resulted, and persisted, and marked her condition; the other continuing symptoms of her chronic disorder; or the effect of her symptoms on her state of mind in relation to her alleged false answers. Without the testimony of the expert, and with Ms. Odeh constrained as to her own explanation, the jury was prevented from hearing critical evidence, which would have explained and corroborated her defense that she did not consciously, let alone deceitfully, provide false answers, 'contrary to law.' Rather, as a matter of fact, she was cognitively blocked from interpreting the **"EVER"** questions accurately.

That was her plausible, exonerating explanation of the cause of and reason for the false answers, and why they were given un-knowingly, without criminal intent. Surely she was entitled to put this factual defense before the Jury in the strongest possible terms. The "weighty interest," Ms. Odeh undoubtedly had in presenting that evidence was over-ridden, erroneously, in rulings by which the trial court suppressed 'the defendant's version of the facts', and thereby her 'opportunity to be heard' *Crane v Kentucky, supra; Taylor v. Illinois, supra; Washington v Texas, supra.*

A. The Court Erred in Ruling that the §1425 Charged a General Intent Crime, Requiring that it Bar the Testimony of Defendant's Expert.

Standard of Review

"A district court engages in statutory construction as a matter of law, and we review its conclusions *de novo*." *Waxman v. Luna*, 881 F.2d 237, 240 (6th Cir. 1989); see also, *In re Edward M. Johnson & Assocs., Inc.*, 845 F.2d 195, 1398 (6th Cir. 1988).

The United States Supreme Court specifically set out the elements of the civil denaturalization counterpart of §1425 -- 8 U.S.C §1451(a) -- in *United States v Kungys*, 485 U.S.759 (1988). As to *mens rea*, the Court held that "the naturalized citizen must have misrepresented or concealed some fact [and] the misrepresentation or concealment must have been *willful* . . ." *Id* at 776 (emphasis added). Then in *United States v. Lacthen*, 554 F.3d 709, (7th Cir. 2009), a criminal prosecution under §1425, the Court of Appeals for the Seventh Circuit held that the elements set out in *Kungys* also apply to a §1425 criminal prosecution,

> The *Kungys* majority held that there are 'four independent requirements' to the offense of procuring citizenship by misrepresentation: 'the naturalized citizen must have misrepresented or concealed some fact, the misrepresentation or concealment *must have been willful*, the fact must have been material , and the naturalized citizen must have procured citizenship as a result of the misrepresentation or concealment.

Id. at 713-714 (emphasis added). Similarly, in *United States v. Munyenyezi*, 781 F.3d 532, 536 (1st Cir 2015), the First Circuit stated that, "according to our judicial superiors –there are 'four independent requirements' for a section 1425(a) crime: the naturalized citizen must have misrepresented or concealed some fact, *the misrepresentation or concealment must have been willful . . .*" (emphasis added).

As to the identity of the civil denaturalization statute with its criminal counterpart, the court in *Lachten* stated, "[w]e acknowledge that *Kungys* dealt with a different statute, a civil statute, 8 U.S.C. § 1451(a). However, the parties suggest that distinction is trivial, and we agree; the civil and criminal statutes both require a material misrepresentation and procurement of citizenship." 554 at 713 f.n. 3.

The recognition that willfulness must be shown to establish a criminal as well as a civil violation under these companion enactments, as the First and Seventh Circuits acknowledged in *Lachten and Munyenyezi*,[1] is underscored by the provision that a criminal conviction under §1425 automatically requires denaturalization, under the civil section. 8 U.S.C. §1451(e).

[1] While several other Circuits have in some way addressed the elements of §1425, none have distinguished or even mentioned the Supreme Court opinion in *Kungys*. See, *United States v. Alameh*, 341 F.3d 167 (2d Cir. 2003); *United States v. Pasillas-Gaytan*, 192 F.3d 864 (9th Cir. 1999) (both cases rejecting a strict liability standard under the statute); see also, *United States v. Moses*, 94 F.3d 182, 184 (5th Cir. 1996) (stating that a violation of §1425(b) requires proof that the "defendant knows that he or she is not entitled to naturalization or citizenship." i.e., lying with an intent)

It would be an unreasonable to interpret a criminal statute which revokes one's citizenship to require a lesser state of mind than under a civil denaturalization standard. In *Kungys*, Justice Stevens opined that the consequences of denaturalization were so substantial under the civil statute that a standard of proof equivalent to the criminal statute -- beyond a reasonable doubt -- was required since "the factors that support the imposition of so heavy a burden are largely the same in both contexts.") 485 U.S. at 795, (Stevens, J., concurring)

The trial court initially found that §1425(a) requires a showing of specific intent, noting the indictment charged the defendant with knowingly providing false answers in her N-400 application "for the purpose" of obtaining immigration benefits, and citing *Lachten* and *Kungys*. "Here, the Government's case is based on the charge that she answered question related to her conviction and imprisonment falsely *for the purpose of procuring citizenship.*" (R.E. 98 p. 8, Pg. ID 983, 10/08) (Emphasis in original)

The district court went on to state:

> Other courts that have considered sufficiency of the evidence claims for convictions under §1425(a) have concluded that evidence of false statements made with the intent to unlawfully procure naturalization is sufficient to sustain a conviction under §1425 (a). See *United States v. Chala*, 752 F.3d 939, 947-48 (11th Cir. 2014) (rejecting the defendants' challenge to their convictions under Sec. 1425(a) because 'there was sufficient evidence here that the [defendant]s' fraudulent statements on their respective Lawful Permanent Resident applications were made with the intent to unlawfully procure

> naturalization[.]' *see also United States v. El Sayed,* 470 F. App'x 491, 494 (6th Cir. May 30, 2012) (rejecting the defendant's argument that there was insufficient evidence to support his conviction under §1425(a) because 'the jury rationally could have found beyond a reasonable doubt that [the defendant] knowingly made false information on his for N-455 to procure naturalization. . .) *Accordingly, the Court rejects the Government's that §1425(a) is a general intent crime. The Government will be required to establish at trial that Defendant made false statements on her naturalization application with the purpose of procuring naturalization unlawfully.*

R.E. 98 pp.10-11, Pg. ID 985-6 (emphasis added).

This ruling quickly brought on a heated demand by the prosecution for reconsideration, which was allowed by the court and caused the court to reverse itself. In doing so, the court observed that:

> As an initial matter, it has been noted that the statute's text is not a model of clarity, *specifically with the knowingly element of the crime*. One commentator has explained that the language is 'ambiguous' with respect to 'which of the operative terms of the provision the 'knowingly' requirement applies.' 2-33 Modern Federal Jury Instructions-Criminal P 3303.

(R.E.119 p. 2, Pg. ID 1253) (emphasis added),

Nonetheless, the Court changed its decision, stating that, "in the absence of any clear authority to the contrary, the Court must reconsider its earlier decision and now holds that §1425 is not a specific intent crime."R.E. p.6, Pg. ID 1257.

Abandoning its earlier view, the lower court now declined to recognize the *Kungys-Lachten* holding that the willfulness was a required element. [2]

Concretely, the trial court's decision barred the testimony of Ms. Odeh's expert Dr. Fabri, who had testified before him as to her 20 years' experience in the treatment of torture victims, her diagnosis that Ms. Odeh suffered from chronic PTSD, and the way the disorder could plausibly have impacted her responses to the **"EVER"** questions.

The lower court based its new ruling on the seemingly inflexible rule this Court set down in *United States v. Kimes,* 246 F.3d 800, 806 (6th Cir. 2001), that a psychologist may testify, as an expert, that a criminal defendant has or may have a so-called "diminished capacity," so long as the crime charged requires a showing of specific intent; but that where only general intent is required, a psychological expert will be prohibited from testifying.

Ms. Odeh asserts that the lower court's ruling was in error on two grounds: First, that §1425(a) does in fact require a showing of specific intent, and, Second, that, even if that is in doubt, such a rule should not be held to be absolute; and that,

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[2] Ironically, the Court later embraced the holding of the two cases that the elements of "materiality" and "procurement" must be established, as a basis for his refusal to redact highly prejudicial, inflammatory language from Israeli military court documents. See Below, Pt. II-B.

in the circumstances, and under the specific facts of this case, Ms. Odeh's expert still should have been allowed to testify.

1. 18 U.S.C. §1425 is A Specific Intent Crime

Ms. Odeh was charged under the statute with "procuring" naturalization ("immigration benefits") unlawfully, by knowingly giving false answers on her citizenship Application. The indictment specifically charges her with making false statements "for the purpose of obtaining immigration benefits." (Pg. ID 18)

Although the statute uses the term "knowingly," --- a term often associated with a general intent crime ---reading it as a whole, clearly shows that it requires the Government to prove the defendant had a specific purpose, i.e., to procure her naturalization, "contrary to law", by "knowingly" providing false answers in the naturalization process. As the Supreme Court teaches, "Purpose corresponds loosely with the common law concept of specific intent, while knowledge corresponds loosely with the concept of general intent." *United States v. Bailey*, 444 U.S. 394, 405 (1980).

As this honorable Court explained in *United States v. Kimes, supra*, a 'specific intent crime' is one that requires a defendant to do more than knowingly act in violation of the law. The defendant must also act with the purpose of violating the law . . . A specific intent crime requires an additional bad purpose." 246 F.3d at 806-7; see also, *United States v, Spears*, 49 F.3d 1136, 1141 (6th Cir.

1995) (to prove violation of 18 U.S.C. §1014, it must be shown that defendant "knowingly" made material representations to federally insured bank for the "purpose" of influencing bank's action.)

While §1425 uses the word "knowingly," the requirement that the false statements must be made for the purpose of procuring naturalization imports a requirement that specific intent be shown. The only reason one would make false statements in naturalization proceedings is 'for the purpose' of illegally procuring citizenship. To knowingly commit an act for a specific bad or illegal purpose is the quintessence of specific intent. This is why, in setting out the elements of the civil sister statute, the Supreme Court found in *Kungys* that the misrepresentation must be "willful," and why the Court in *Lachten* and *Munyenyezi* restated that a "willful" *mens rea* element was to be found in the criminal statute.

In *United States v. Chowdhury*, 169 F.3d 402 (6th Cir. 1999), this Court decided for the first time the intent requirement of the marriage fraud statute, 8 U.S.C. §1325 (c): that one "knowingly enters into a marriage for the purpose of evading any provision of the immigration laws." Although the statute only states that a defendant must act "knowingly", the Court nonetheless read a willfulness element into the law. It explained that, "We believe that the language 'knowingly enters a marriage for the purpose of evading any provision of the immigration laws' is best

understood as another way of saying that in knowingly entering a marriage the defendant *willfully* violated the immigration laws." *Id.* at 407-08. (emphasis added)

Relying on the Supreme Court opinion in *Bryan v. United States*, 524 U.S. 184, 189-190 (1998), the Court in held *Chowdhury,* that when used in the criminal context "a willful act is one undertaken for a bad purpose," and cited with approval a jury instruction in *Bryan* stating that:

> A person acts willfully if he acts intentionally and purposely and with the intent to do something the law forbids, that is, with the bad purpose to disobey or to disregard the law. Now, the person need not be aware of the specific law or rule that his conduct may be violating. But he must act with the intent to do something the law forbids. 169 F.3d at 406.

In the case at bar, Ms. Odeh was charged under §1425(a) with having "knowingly" lied to procure her naturalization, and thus, like the defendant in *Chowdbury*, with "willfully" violating the immigration laws. Ms. Odeh does not argue that the government was required to prove that she was aware of the specific law she violated, but that it did have to show, as charged in the indictment and in the entire theory of the prosecution, that she lied, with the intent or purpose of doing what the law forbids, i.e., to procure her naturalization illegally (by lying) when she provided the false answers. In this respect, she must have acted willfully; that is, with specific intent.

Other False Statement Statutes

§1425 is similar in scope and purpose to other statutes which this Court has held charged specific intent crimes. See *United States v. Brown,* 151 F 3d 476, 484 (6th Cir. 1988) and *United States v. Remilekun Olushoga*, 803 F.2d 722 (6th Cir. 1986) (18 U.S.C. §1001, making false statements to federal officials); *United States v. Smith*, 27 Fed. App'x. 292, 294 (6th Cir. 2001) (18 U.S.C. §1920, making false statements to obtain federal employee's compensation); *United States v. Spears*, 49 F.3d 1136, 1141 (6th Cir. 1995) (18 U.S.C. §1014, making false statements for the "purpose" of influencing actions of federally insured institutions).

There is no cognizable difference between making false or misleading statements to a federal government official with the intent to deceive or mislead, under §1001, and making false statements to an immigration official with the intent to deceive or mislead. "§1425(a) makes it a crime to 'knowingly procure[] or attempt[] to procure . . . citizenship' illegally. One way to do that is to make false statements in a naturalization application. See 18 U.S.C §1001(a)." *United States v. Munyenyezi*, 781 F.3d at 536.

"In determining the meaning of [a] statute, we look not only to the particular statutory language, but the design of the statute as a whole and to its object and policy" *United States v. Honaker*, 5 F.3d 160, 161 (6th Cir. 1993) (quoting

Crandon v. United States, 494 U.S. 152, 158 (1990). The purpose of both § 1001 and §1425 is to "protect the government against those who would cheat or mislead it in the administration of its programs" *United States v. Goodwin*, 566 F.2d 975, (5th Cir. 1978); See also, *United States v. Aarons*, 718 F.2d 188, 190 (6th Cir. 1984) ("It was the congressional intent to protect governmental departments and agencies from the perversion which might result from the deceptive practices described in this statute.")

This court has described the requisite intent necessary to secure a conviction under §1001 as follows:

> A false representation is one . . . made with an intent to deceive or mislead. The statute does not, however, require an intent to defraud -- that is, the intent to deprive someone of something by means of deceit. In this sense, the False Claims Act seeks to protect more than the simple proprietary interests of the federal government; it has for its object the protection and welfare of the government.

United States v. Turner, 22 Fed. App'x 404, 409 (6th Cir. 2001) (quoting, *United States v. Brown*, 151 F.3d 476, 484 (6th Cir. 1984). This is precisely what is made illegal under 18 U.S.C. §1425, and what the defendant was charged with: making false representations with the intent to deceive or mislead in procuring her citizenship. If §1001 requires specific intent, how does §1425 not require it?[3]

[3] See *United States v. Chula*, 752 F.3d 939, 947-48 (11th Cir. 2014 (Holding that fraudulent statements on permanent resident application violated §1425, as they were made "with the intent to unlawfully procure naturalization.")

Further insight into the scope and purpose of the § 1425 can be seen by comparing it to 18 U.S.C. §1015, which charges criminally "whoever knowingly makes any false statement under oath, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization." Under this language, simply the making of a false statement alone, relating to naturalization, for *any purpose*, or none, violates §1015. In contrast, under §1425, the false statement is made for the purpose of procuring naturalization and the lying is based on an intent to deceive in order to obtain naturalization. If §1425 only required that one knowingly made a false statement, with no intent to deceive it would be the same as §1015 and superfluous.

The law of *United States v. Kimes*, *supra*, prohibiting psychological expert testimony in defense of a general intent crime, simply does not apply here. The statute by specifying a particular purpose for the prohibited act, charges a specific intent crime, and the district court erred in precluding the testimony of Dr. Mary Fabri to explain and corroborate Ms. Odeh's defense.

The district court's erroneous ruling was clearly not harmless. Dr. Fabri's testimony would have been critically relevant to explain and give credibility to Ms. Odeh's assertion that she did not intentionally lie. Dr. Fabri would have explained that she suffered from chronic PTSD, which caused her to cognitively block out the memory of her traumatic treatment at the hands of the Israeli military and the

Shin Bet, along with present-time associations which relate to the memory and threaten dreaded flashbacks. In response to the question, "Can you explain to me how the PTSD would cause someone to read the word 'ever' to mean in the United States? Dr. Fabri said,

> So as to a trauma survivor, a torture survivor, you work very hard to cope, right, to develop strategies in your daily life so that you can live it without having to remember and those strategies help you develop that filter that I mentioned so you don't, you narrow your focus. Okay. *You narrow your focus so that you are not remembering the past. . . .*
>
> So you look at this with her filters, her defenses, but I like the word filters better, working. That she would look at this and it was narrowed [the] focus of the time frame, she could potentially, I mean, I don't know what went on in her mind, but in my understanding of PTSD and survivors, how they develop strategies to cope with daily life, that she would look as "ever in the U.S." It's a narrowing focus of time frame.
> R.E. pp. 43-44, Pg. ID 1197-98. (Emphasis added.)

Importantly, Dr. Fabri would have rejected the suggestion that, in leaving out her experiences in Israel, Ms. Odeh was acting under an "irresistible impulse" to lie, or that she lacked the capacity to form the requisite *mens rea*; -- defenses which have been rejected as improper. See e.g. *United States v. Pohlot*, 827 F. 2d 887, 890 (3rd Cir. 1987). Rather, Dr. Fabri's testimony would have provided expert psychological corroboration of Ms. Odeh's factual defense, that her disorder caused her to filter out the association with her traumatic past, by narrowing --- automatically, involuntarily, on a non-conscious level --- her interpretation of the questions about criminal history, and particularly the time frame referred to by the

words "EVER". As Dr. Fabri explained, this narrowed focus "would have them look at the questions in a narrow way so that it would be interpreted 'during my life in the U.S.', (and) not to include, my life back home where terrible things happened to me." R.E. 113 p. 16, Pg. ID 1170

For a jury to fairly evaluate Ms. Odeh's testimony that she believed the questions only referred to her history in the U.S., and that she blocked out any thought of her history under Israeli military occupation requires an explanation of how her chronic condition could have affected her thinking, so the Jury could fairly decide whether or not her defense was believable. The jury was denied this critical evidence, and Ms. Odeh's fundamental constitutional right to present her defense was thereby arbitrarily denied.

2. Even if the Statute Charges a General Intent Crime, Under the Circumstances of this Case, Ms. Odeh Should Have Been Allowed to Present Her Expert Witness.

Even if this Court were to conclude that §1425 is 'a general intent crime', under the specific circumstances of this case, Ms. Odeh's expert should still have been allowed to testify. As noted, the expert was not being called to provide a typical "diminished capacity" defense, in order to negate her intent completely, but rather to corroborate and explain how Ms. Odeh's disorder caused her to innocently mis-interpret the questions about her "criminal" history.

This testimony was clearly relevant, even under a general intent rubric to whether or not she "knowingly" lied in marking her "No" answers to the naturalization questions. Under these circumstances, the barring of Ms. Odeh's expert was an arbitrary denial of her right to present her defense. By precluding her expert witness, the lower court completely wiped out any chance of the jury understanding how she could have failed to mention such a stark "criminal history" without "knowingly" lying. Ms. Odeh's defense was thus gutted at its core. A blanket rule that prohibits a witness from calling a key corroborating witness, in all circumstances, and in the factual circumstances of this case, is arbitrary, and unacceptable in an ordered scheme.

In deciding whether or not a defendant knowingly lied to procure naturalization, it is of critical importance in particular to allow defendants who were victims of torture in the countries from which they have immigrated, to per to put forward a legitimate psychological claim. Precluding a torture victim from raising such a defense with expert testimony to a criminal charge of knowingly providing false answers to procure citizenship, in certain factual circumstances would violate their fundamental right to present a defense.

B. It was Compounded Error to Prohibit Ms. Odeh from Testifying Herself, About Her Condition, Its History, and the Torture and Abuse Which Gave Rise to it, in Order to Explain to the Jury Her State of Mind in Obtaining Her Naturalization.

Nothing can be more meaningful and critical to the Fifth and Sixth Amendment right of an accused to present her defense than the testimony of the defendant herself. Ms. Odeh was horrifically tortured following her arrest by Israeli occupation soldiers in 1969. Her confession, indictment, conviction and imprisonment were the direct result of that torture, and had continuing consequences which still deeply affected her state of mind, and thus her interpretation of the questions posed to her in during her naturalization process. The jury was tasked to decide if Ms. Odeh knowingly lied, and thus to determine her state of mind at the time she answered the questions. As we have seen, her past life experience was particularly relevant to the answers she would give; yet she was forbidden to speak of it, of her torture and of how it has affected her. Nor would the Court allow her to mention PTSD itself, or the symptoms she has continuously experienced which affected her cognitive recall processes.

Ms. Odeh's state of mind at the time she was accused of falsely answering her naturalization questions was clearly relevant to a rational determination of whether she knowingly lied, but the lower court erroneously held that what was done to her, and how it caused her to suffer a continuing chronic psychological disorder, was

irrelevant. The testimony of Ms. Odeh about her torture, her continuing physical and psychological symptoms, and her post-traumatic stress disorder was "highly relevant" and "indispensable" to the success of her defense, *Crain v. Kentucky*, 476 U.S. at 691; and barring it denied her a Fair Trial, in violation of her fundamental Fifth and Sixth Amendment rights.

II. THE COURT ERRED IN ADMITTING HIGHLY PREJUDICIAL DOCUMENTS CREATED BY AN ILLEGAL ISRAELI COURT OF MILITARY OCCUPATION, AND BY REFUSING TO ORDER REDACTION OF THE DOCUMENTS.

A. The Trial Court's Ruling That the Israeli Documents were Presumptively Admissible, Based on a Mutual Assistance Treaty, Without Consideration of How the Documents were Created, or of Whether the Treaty Applied to Military Courts, was Error.

The prosecution's case against Ms. Odeh was in based in substantial part upon 45 year-old documents created by a military occupation legal system imposed on the Palestinian people living in the West Bank region, after invasion, and conquest by Israel in 1967, as part of the system of pacification and illegal military rule over the Palestinian lands. The defense filed a motion *in limine* seeking to keep the military court documents out of evidence, alleging that the military judicial process imposed on the people of the West Bank was based on the systematic use of torture, forced confessions, and other procedures wholly inconsistent with Due

Process and U.S. principles of Fundamental Fairness. R.E. 41 pp 1-17; Pg. ID 260-274

In support of her motion, Ms. Odeh submitted a legal memorandum enumerating the fairness and due process violations in the military court procedures, and attached as exhibits a confidential communication from the Vice Counsel at the Jerusalem U.S. Consulate in Israel to the U.S. Secretary of State, under the subject heading "Torture of Arab prisoners in Jerusalem and the West Bank", R.E. 41 Ex. I, Pg. ID 281-294; and an Amnesty International report also raising the issue of systematic torture by interrogators in the military court system. R.E. 41, Ex.2, Pg. ID 278-280. She also submitted an affidavit from the leading expert on the Israeli military occupation courts, Dr. Lisa Hijjar, who also opined that the military court system used systematic torture to obtain confessions, and that the legal system imposed upon the Palestinian people violated international law and the U.S. protections of Due Process and Fundamental Fairness. R.E. 65 Ex. I, Pg. ID. 584-590

Finally, Ms. Odeh cited the 1987 Report of the Landau Commission, headed by a retired Israeli Supreme Court Justice, which found that the "Israeli military charged with interrogation of detainees suspected of security offenses were systematically lying in military courts about their uses of physical force in obtaining confessions." (Ruling of District Court) R.E. 117 p. 7, Pg. ID 1235.

The prosecution responded that the proffered Israeli documents were to be admitted pursuant to a 1998 mutual assistance treaty with the State of Israel, the "Treaty with Israel on Mutual Legal Assistance in Criminal Matters." R.E. 67-2 pp. 13-32, Pg. ID 632-651, and that further inquiry as to how they were obtained or the military court's operations was barred by the treaty.

In point of fact, while the treaty allowed for the admission of documents in U.S. courts -- if authenticated by an official in charge of "maintaining them in a manner specified by the Requesting State," R.E. 67- 2, pp. 21-22, Pg. ID 640-64 -- the treaty itself makes no mention of records generated by the military courts in the Occupied territories, which were condemned as illegal by the United Nations, and the majority of the countries of the world.

Despite Ms. Odeh's evidence that the proffered documents were the product of torture, and the denial of other fundamental guarantees of the U.S. constitution, the lower court ruled summarily, that the treaty allowed for the blanket admission of these military documents. R.E. 117 pp.5-11, Pg.ID 1233-1239. The lower court's ruling, without any evidentiary hearing as to whether or not the treaty applied to documents from the military occupation courts, or were produced by acts in violation of the Bill of Rights, was error.

Standard of Review

This Court reviews *de novo* a claim that a district court's ruling violates the Constitution. See, *United States v. Davis*, 577 F.3d 600, 666 (6th Cir. 2009) (Sixth Amendment); *United States v. Tarwater,* 308 F. 3d 494, 507 (6th Cir. 2002) (due process).

It is a bedrock principle of constitutional law that a treaty cannot change the constitution. See *Cherokee Tobacco Case*, 78 U.S. 616, 621(1871) ("It need hardly be said that a treaty cannot change the Constitution or be held valid if it's in violation of that instrument"); *Reid v. Covert*, 354 U.S. 1, 16-17 (1957) ("No agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution . . . This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty."); see also, *Sahagian v. United States*, 864 F.2d 509, 513 (7th Cir. 1988) ("It is well settled that the Bill of Rights limits both the federal government's treaty making powers as well as actions taken by federal officials pursuant to the federal government's treaties."); *Small v. United States*, 544 U.S. 385, 389 (2005) (Stating in *dicta* that foreign convictions should not be admissible in U.S. courts if they stem from "a legal system that is inconsistent with [the] American understanding of fairness.)

In *Colello v.U.S. S.E.C.,* 908 F. Supp. 738, (C.D. Cal.1995), the plaintiff challenged the constitutionality of an action freezing his assets pursuant to an "Mutual Assistance in Criminal Matters Treaty" with Switzerland. The Court ruled that the treaty's "reasonable suspicion" standard for seizure was unconstitutional. "The treaty at issue . . . must withstand essentially the same tests as would domestic legislation against a claim that it denies rights guaranteed by the Constitution," at 748.

Evidence obtained in violation of fundamental fairness and the prohibitions against torture, which is "shocking to the conscience," should not be admitted into evidence in a federal court, regardless of the provisions of any treaty. See *United States v. Mito*, 880 F.2d 1480-1483-84 (1st Cir.1989) ("Circumstances that will shock the conscience are limited to conduct that 'not only violates U.S. notions of due process, but also violates fundamental international norms of decency.' Saltzburg, *The Reach of the Bill of Rights Beyond the Terra Firma of the United States*, 20 Va. J. Int'l L. 741, 775 (1980)."); See also, *United States v. Maturo*, 982 F.2d 57, 60-61 (2d Cir. 1992); *United States v. Rosenthal*, 793 F.2d 1214, 130-31 (11th Cir. 1986);

In this case, Ms. Odeh and her entire family were brutally and illegally arrested by occupation soldiers without any legal authority. Ms. Odeh was tortured and sexually abused for weeks, denied access to a lawyer for 45 days, and the right to

remain silent. She was forced to confess, which directly led to her 'indictment', returned by soldiers acting as a grand jury, and trial by soldiers acting as judges. Her conviction and imprisonment were the direct result of torture, and coerced confessions by her and her co-defendants. The trial court's ruling admitting the documents, without any inquiry into the truth or validity of the documents, or the legality or fairness of the system that produced them, solely on the basis of a treaty with no specific provision for military occupation court documents, was improper, unfair and erroneous.

Certainly, a U.S. court would not have admitted documents created by a Nazi court operating in occupied France that convicted partisans resisting occupation. How then is it proper to allow, documents here which are similarly the product of torture and illegal occupation?

B. The Court Erred Further in Refusing to Allow a Stipulation, or to Order Redaction, to Shield or Remove Inflammatory, Highly Prejudicial, and Wholly Irrelevant Information and Wording Contained in the Israeli Military Court Documents.

Prior to trial, the defense moved to exclude certain highly inflammatory language contained in the military court documents from presentation to the jury. In lieu of these documents, the defense offered to stipulate that Ms. Odeh was charged with and convicted of "serious offenses" by a military tribunal, was arrested by the Israeli Defense Forces and was imprisoned for ten years. R.E. 178

pp. 30-34, 40-42; Pg. ID. 1817-1821, 1927-1829. The prosecution opposed any stipulations R.E. 178 p 34, Pg.ID 1821, and the trial court overruled the defense proposal. R.E. 117 pp.1314, PG. ID 1241-42.

The defense then moved alternatively that the court at least remove or "redact" from the military court "indictment,"[4] highly prejudicial and irrelevant, surplus language, which stated that Ms. Odeh was charged with placing explosives "with the intention of causing death and injury" [and that] "[o]ne of the bombs exploded and caused the death of Leon Kannar and Edward Jaffe, May Their Memory Be a Blessing, as well as injuries to a multitude of people." R.E. 186-6, Pg. ID 2632-2636. The trial court refused to make any redactions to the indictment or other documents from the military court. R.E. 123 pp. 1-5, Pg. ID 1267-1269.

Querulously, the court ruled that, that these words were necessary to specifically inform the jury that Ms. Odeh was not only charged with and convicted of placing explosives with the intent to cause death, but in fact that she supposedly caused the death of two civilians, by name, -- prayers that they be remembered -- and injuries to a multitude of other people, because the prosecution had to prove the 'materiality' of the false application answers resulting in the 'procurement' of immigration benefits.

[4] Unlike under U.S. law in which an indictment is the product of the determination of private citizens, the indictment of the military occupation courts was brought by soldiers.

The court made this ruling despite defense assertions that it was not challenging the fact that Ms. Odeh was so charged and convicted by the Israeli military, and indeed it was not contesting the issues of procurement and materiality. R.E. 178 pp. 34, 40-42; Pg. ID 1820, 1827-29.

The lower court also maintained that all the specific language in the indictment was also necessary to show that---because of such a conviction---Ms. Odeh would have been ineligible for admission as a lawful permanent resident. "An arrest for minor offenses such as jay-walking or loitering would not satisfy the materiality requirement because such crimes do not show lack of moral character." R.E. 117 pp. 12-13, Pg. ID 1240-1241.

In *Old Chief v. United States*, the Supreme Court recognized that, while the prosecution normally should be allowed to present its case as it wished, without agreeing to defense stipulations, in limited circumstances, where the fact of a prior conviction was necessary to satisfy a statutory element, where the particulars of the prior felony were so unnecessary--- beyond the simple fact of the conviction-- and so prejudicial, that a stipulation would be required instead. *Old Chief v. United States,* 519 U.S. 172, 189-192 (19970. While Ms. Odeh recognizes that under §1425, the prosecution must show more than a prior felony, the proposed stipulation that she had been charged and convicted of serious offenses was

perfectly adequate for its needs, and so the reasoning of *Old Chief* and the rule of weighing probative value against possible prejudice comes into play.

Even if the prosecution was not required to accept the offer to stipulate, and even if the court properly ignored the defense concession that it was not challenging the issue of procurement and materiality, there was literally no probative justification whatsoever for going beyond telling the Jury she was convicted of serious crimes, or, at most, of bombings "with the intent to kill or injure." Including the rest, that two named civilians were killed and many others injured, was fundamentally unfair and prejudicial.

Surely, the charge of placing bombs with the intent to kill followed by a conviction and a life sentence, establishes beyond doubt that the allegedly "knowing" lies were material, and showed lack of good moral character. To justify the refusal to redact this most prejudicial, irrelevant language about civilian deaths and injuries, because the jury might consider bombings with intent to kill, comparable with "minor offenses" insufficient to establish materiality and lack of good moral character, was altogether unreasonable and a clear abuse of discretion. (Ruling of District Court), R.E. 123; Pg. ID 1269. This Court reviews a district court's evidentiary rulings for abuse of discretion. *United States v. Anderson*, 76 F.3d 685, 692 (6th Cir. 1996).

The trial court's refusal to protect the defendant from this prejudice was cast in bold relief by the utterly token gesture of directing the Government not to use the terms "terrorist", or "terrorism", to show the Ms. Odeh would have been barred by statute from becoming a lawful permanent resident. R.E.117 pp.14-17, Pg.ID 1242-1245. The Court said,

> It goes without saying that the American public is particularly emotional when it comes to terrorism and the threat of terrorism, not only due to the attacks on the World Trade Center in 2001, but also due to the public's awareness and fears stemming from activities of a certain group, which in recent months has inflicted brutal violence upon Americans and others overseas.
>
> R.E. 117 p.15, Pg. ID 1243; [and that,]
>
> These terms are highly prejudicial and create a danger of improperly influencing the jury's verdict. The Government will still be able to establish the elements of materiality and procurement without using these terms. R.E. 117 p.17, Pg. ID 1245.

But there is hardly any difference between calling a defendant a terrorist and telling the jury that she placed bombs in public places in which two civilians died and many others were injured. It makes no sense, legally, to preclude accusations of "terrorism" by name, while at the same time refusing to bar the very accusation of deaths and injuries that are terrorism in essence. By admitting documents which showed that the defendant was charged and convicted of serious felonies, rather than placing bombs with the intent to kill, materiality, procurement and lack of

good moral character would have been readily established. Certainly, even if one could arguably claim that the jury needed to be told that the offenses in question were placing bombs with intent to kill, there is absolutely no justification to also interject the names of the two victims, and a prayer for their memory.

Predictably, the prosecution seized on the ruling admitting the whole statement, and opportunistically and prejudicially, brought up the bombings and two civilian deaths, and the many injured, repeatedly, throughout the trial. See, Pg. ID 2110 (Gov't Opening Statement); Pg. ID 2148, 2150 (Testimony of Stephen Webber); Pg. ID 2235, 2268-69 (Testimony of Douglas Pierce); Pg. ID 2463, 2465 (Gov't Closing Argument).

The law in this Circuit is well established that evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. See e.g. *United States v. Boyd*, 640 F.3d 657, 667-78 (6th Cir. 2011); *United States v. Stout*, 509 F.3d 796, 801, 803 (6th Cir. 2007). While the trial court is afforded broad discretion in determining whether the danger of undue prejudice outweighs the probative value of the evidence, See *United States v. Mack*, 258 F.3d 548, 555 (6th Cir 2001), there must be limits to the exercise of such discretion.

When "[t]he reverberating clang of those accusatory words would drown out all weaker sounds [and] the risk of confusion is so great as to upset the balance of advantage, the evidence goes out." *United States v. Stout*, 509 F.3d at 801, quoting

Shepard v. United States, 290 U.S. 96, 104 (1933). The claims of specific civilian deaths and injuries contained in the charges and conviction---which the defendant was precluded at trial from challenging, or even denying---were highly inflammatory and distracting.

The prosecution had absolutely no need to present these specific allegations to prove the elements of the offense, and the accusations of causing death and injuries---once the jury was informed that Ms. Odeh was charged and convicted with placing bombs with the intent to cause death and injuries---had no additional probative value at all. In *United States v. Merriweather*, 78 F.3d 1070, 1077 (6th Cir. 1995), this Court held that, "[one] factor in balancing unfair prejudice against probative value under Rule 403 is the availability of other means of proof (quoting, *Huddleston v. United States,* 485 U.S. 681, 688 (1988)). In this case, the prosecution had all the proof it needed without using the extremely prejudicial language in the Israeli charges.

Further, this Court in *United States v. Feagan,* 472 Fed. App'x 382, 395 (6th Cir, 2012), suggested that a way to reduce potential for risk of prejudicial evidence "drowning" out the permissible conclusions that a jury is permitted to make, is by a clear, concise limiting instruction indicating the specific purpose for which the evidence is admissible. In the case at bar, the failure to give a limiting instruction

was particularly prejudicial , since there was really no probative purpose in telling the jury that two civilians died and many others were injured.

Allowing the jury to hear such inflammatory accusations, which were not even relevant to the charges brought 45 years ago in the military court, since no one puts the names of the victims and a prayer for their memory in a proper legal indictment, let alone necessary to proving a §1425 violation, cannot be considered harmless and requires that the defendant be given a new trial

III. THE PRISON SENTENCE IMPOSED BY THE COURT, ON TOP OF DE-NATURALIZATION AND REMOVAL, IS UNDULY HARSH, UNNECESSARY AND UNJUSTFIED UNDER THE SENTENCING LAW.

The trial court's sentence of 18 months in prison given all the circumstances of the offense and the history and characteristics of Ms. Odeh was procedurally and substantively unreasonable and should be set aside.

In reviewing a sentence for procedural reasonableness,

> [a]n appellate court must determine whether the district court: "(1) properly calculated the applicable advisory Guidelines range; (2) considered the other§ 3553 factors as well as the parties' arguments for a sentence outside the Guidelines range; and (3) adequately articulated its reasoning for imposing the particular sentence chosen, including any rejection of the parties' arguments for an outside-Guidelines sentence and any decision to deviate from the advisory Guidelines range.

U.S. v. Young, 553 F.3d 1035, 1054 (6th Cir, 2009)

If the sentence is deemed procedurally reasonable, the substantive reasonableness must then be determined. *United States v. Brooks*, 628 F.3d 791, 796 (6th Cir. 2011). A sentence within the applicable Guidelines range carries a rebuttable presumption of reasonableness, and is reviewed for an abuse of discretion. *United States v. Carter,* 510 F.3d 593, 600 (6th Cir. 2007).

Rasmea Odeh was 67 years old at the time she was sentenced, and had suffered from a chronic post-traumatic stress syndrome and disorder for almost 45 years. This affliction, as noted, was the result of unspeakable torture and sexual abuse at the hands of Israeli soldiers and secret police. Despite the nightmares, flashbacks, inability to sleep and disruptions to any hope of a stable life, she came to America some 15 years after being amnestied and released from prison in Israel, and spent another ten years in service to her family, and her dying father. After becoming naturalized in 2004, Ms. Odeh became a master community organizer, with a talent and approach which proved to be profoundly open, and positive, in getting isolated people to work together and to help each other, and help strangers.

Ms. Odeh, with colleagues inspired by her positive outlook, created a working model of service and education for hundreds of immigrant Arab women, all struggling to adjust with their families to life in America. The Arab women's

program, as part of the Arab-American Action Network (AAAN) in Chicago, provided a wide range of services to immigrant women, which enabled them and their children to make great strides in adjusting to a new life in the U.S. The strategies and programs developed from her principles and her practice of reaching out, and helping out, have been studied, discussed and copied throughout the country. Ms. Odeh's leadership role in this project was widely admired, and affected so many people, and families, that scores of people from all social sectors were moved to write letters in support of a plea to the court below that she be allowed to continue her work, rather than going to prison. See e.g. Letters of support attached to sentencing memo R.E. 160, Ex. C4-72, Pg. Id 1564-1591, 1597-1694.

Of course the main consequence of Ms. Odeh's conviction was and will be the loss of citizenship and permanent, forced removal from her adopted country and the life she made here. Despite the devastating effect of this punishment, on a woman who has done so much, and given so much to her community -- thereby gained a measure of equanimity, if not peace, with the horrid memories and other effects of her torture and imprisonment so long ago -- the lower court sentenced her to 18 months in federal prison, before her removal.

The trial court failed to fairly consider the "history and characteristics" of Ms. Odeh, and to address Ms. Odeh's arguments for a downward departure under the

guidelines. The lower court made no reference in fixing her sentence to her age and PTSD condition,[5] and the horrific torture which was its cause, even though earlier in the proceedings it found those claims of torture credible. [6] By wholly ignoring these particularly pertinent characteristics of the Ms. Odeh the court abused its discretion to fashion a sentence which was "sufficient but not greater than necessary."

The trial court also failed to give fair consideration to the contributions Ms. Odeh has made to our country through her years of community service. The court did mention her good works in America, and that he had received letters from across the country from all walks of life, praising her work and pleading for mercy. However, he failed to actually take into account Ms. Odeh's extraordinary service and achievements in this country when finally determining the appropriate sentence. Nor did the Court give any consideration to the torture and suffering she had endured at the hands of the Israeli occupation army, while unfairly branding her a "terrorist, albeit, a reformed one.

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[5] Under the sentencing guidelines, the age and mental condition of a defendant "may be relevant in determining whether a departure [from the guidelines] is warranted." Guideline Policy Statements 5H1.1 (Age) and 5H1.3 (Mental and Emotional Conditions).

[6] "The Court of course agrees that the use of torture and rape are antithetical to the concepts of due process and basic human tights. Moreover, the Court accepts as credible Defendant's claims as torture and is not unaffected by the inhumane circumstances of her detention in the West Bank." R.E. 117 at 7, Pg. ID 1235.

In failing to consider these factors in fashioning an appropriate sentence, the court did not adequately articulate its reasoning for denying Ms. Odeh's request for a downward departure. Despite her unique history and characteristics, the court simply located Ms. Odeh's sentence in the center of the non-mandatory sentencing guidelines, as if she were a typical violator of immigration law. In doing so, the court also failed to fairly consider her characteristics under the statutory sentencing factors. The lower court based his sentence solely on his belief that her false answers were deliberate and deceitful. The sentencing factors require more than consideration of the offense itself as the basis for a proper sentence.

Wherefore, Ms. Odeh requests that this Court, if it does not order a new trial, direct the trial court to resentence her to 5 weeks, time-served or remand the case for a resentencing.

CONCLUSION

As argued above, Ms. Odeh has built an extraordinary life of service to her community over her 20 years of living in the United States. Since she was freed

from an Israeli prison and amnestied in a prisoner exchange in 1979, Ms. Odeh has not even had a minor arrest while leaving in the Middle East or in the U.S.

In fact, Ms. Odeh's life and work in Chicago would have continued uninterrupted, if not for an overzealous FBI "counter-terrorism" investigation into U.S. activists involved in public education about the plight of the Palestinian people. In 2010, with great fanfare, homes were raided; books and papers seized, and 23 people were subpoenaed to a federal grand jury in Chicago, including the executive director of Ms. Odeh's organization, the Arab American Action Network (AAAN).

Even though no charges were ever brought, and no criminal allegations were ever aired, this illicit investigation into the work and files of AAAN, led to the discovery of Ms. Odeh's naturalized citizenship, and prompted the Justice Department to contact the Israeli government seeking documents about Ms. Odeh. So Ms. Odeh became the one lone single victim of the FBI's phony "counter-terrorism" action.

Rather than compassionately exercise its broad discretion and choose not to prosecute Ms. Odeh, given her exemplary work and life here, and the decades old conviction by a military occupation court, the U.S. Attorney in Chicago passed this case to the Detroit office, who indicted her shortly before the statute of limitations

ran. Once it was discovered that Ms. Odeh had been convicted of being part of the Palestinian resistance to the Israeli occupation after the 1967 war, and of participation in bombings, a criminal prosecution was assured.

Unnecessarily indicted, Ms. Odeh was entitled, at the very least, to tell her story of torture, false charges, denial of access to counsel and impartial judges, and particularly of the PTSD she suffered as a result, and how it affected her naturalization answers. She was barred from presenting any of this evidence, while at the same time the allegations by the Israeli military in their inflammatory detail were allowed in evidence without any opportunity to challenge it.

To add extreme insult to injury, at the end of this faux trial, the trial court, who had denied her defense and allowed in evidence the most irrelevant and prejudicial details of her charges and conviction 45 years later, unjustly sentenced her to 18 months in prison as a warning to others who might be watching her well-publicized case, despite the fact that she will be removed from her home and community as punishment.

Under basic American principles of justice, Ms. Odeh's indictment, conviction, sentence and deportation are unfair and unnecessary. Her punishment does not fit her crime. Ms. Odeh, who should have never been charged in the first

place, must be allowed a new trial in which she can put forward her complete defense.

Respectfully submitted,

s/Michael E. Deutsch

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) (7) (C), Federal Rules of Appellate Procedure, the undersigned certifies that this brief complies with the type-volume limitations of Rule 32(a)(7)(B), Federal Rules of Appellate Procedure.

The brief contains a total of 11,084 words, exclusive of the Table of Contents, Table of Authorities, Statement in Support of Oral Argument, and Certificate of Compliance. It has been prepared using Microsoft Word 2013. The typeface is14pt Times Roman.

s/Michael E. Deutsch

CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2015, I electronically filed the foregoing brief with the Clerk of the United States Court of Appeals for the Sixth Circuit using the ECF system, which will send notification of such filing to the representatives of all parties.

s/ Michael E. Deutsch