UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Case No. 13-cr-20772
HON. GERSHWIN A. DRAIN

RASMIEH ODEH,

Defendant.

_____/

ORDER GRANTING GOVERNMENT'S MOTION FOR RECONSIDERATION [#105] AND DENYING DEFENDANT'S MOTION FOR OFFER OF PROOF [#111]

I.

Defendant is charged with unlawful procurement of naturalization in violation of 18 U.S.C. § 1425(a). Presently before the Court is the Government's Motion for Reconsideration of this Court's conclusion concerning the intent element under § 1425(a). *See* Dkt. No. 98. The Court ordered Defendant to file a response to the instant motion and Defendant filed a Response on October 23, 2014. Upon review of the parties' briefing, the Court finds that a palpable defect has occurred requiring a different disposition of this Court's conclusions concerning the intent element under § 1425(a). As such, in order to establish the intent element of the instant offense, the Government need only prove Defendant made a false statement knowing it to be false.

II.

Here, the Government is required to demonstrate "a palpable defect" by which the Court has been misled, as well as show that "a different disposition" will result in its correction. E.D. Mich.

L.R. 7.1(g)(3). Title 18 U.S.C. § 1425(a) punishes anyone "who[] knowingly procures or attempts to procure, contrary to law, the naturalization of any person . . . ." 18 U.S.C. §1425(a). 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 33.03.

Upon a careful review of the Seventh Circuit Court of Appeals' decision in *United States v. Latchin*, the case primarily relied on by this Court in reaching its original decision, the Court is compelled to agree with the Government that the *Latchin* court's decision cannot serve as precedent on the issue of the requisite intent that is required to prove unlawful procurement of naturalization in violation of § 1425(a). 554 F.3d 709 (7th Cir. 2009). It is of course true that the *Latchin* court, relying on the United States Supreme Court's decision in *Kungys v. United States*, 485 U.S. 759 (1988), stated "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 result of the misrepresentation or concealment.'" *Latchin*, 554 F.3d at 713. However, contrary to Defendant's argument, it is not clear that the *Latchin* court in fact concluded a heightened *mens rea* is a required element of proving a violation of § 1425(a).

As pointed out by the Government, if the *Latchin* court had actually found willfulness to be the required level of intent, then it is plainly curious that the court would "have little trouble approving the trial court's instructions" which did not require the Government to prove the defendant

willfully made a false statement in order to prove naturalization. *Id*. at 715. Specifically, *Latchin* approved the following jury charge on the elements of a § 1425(a) offense:

> First, that the defendant while under oath testified falsely before an officer of the Immigration and Naturalization Service as charged in the indictment.
>
> Second, that the defendant's testimony related to some material matter.
>
> And third, that the defendant *knew* the testimony was false.

Id. (emphasis supplied). Defendant suggests this is of no consequence, however Defendant's argument lacks merit. Specifically, Defendant argues that because the *Latchin* court noted that the trial courts should be more precise and "treat procurement as a separate element rather than a concept subsumed within the definition of materiality," this establishes the *Latchin* court did not "waver on the applicability of the elements as set out in *Kungys* . . . ." *See* Dkt. No. 115 at 8. However, this circular argument fails to remedy the fact that it is not clear that the *Latchin* court in fact held the intent element of § 1425(a) requires a finding of willfulness.

Defendant appears to argue that the *Latchin* court held the elements of the civil denaturalization statute at issue in *Kungys*, 8 U.S.C. § 1451(a), and § 1425(a), "the comparable criminal statue at issue here" are one in the same. *See* Dkt. No. 115 at 5; *Latchin*, 554 F.3d at 713 n.3 (noting that "*Kungys* dealt with a different statute, 8 U.S.C. § 1451(a)" and agreeing with the parties that the distinction was "trivial" because "the civil and criminal statutes both require a material misrepresentation and procurement of citizenship."). However, Defendant fails to acknowledge that the *Latchin* court was not analyzing the intent required under § 1425(a), rather the issue before the *Latchin* court was the meaning of the "materiality" requirement. The *Latchin* court was not tasked with determining whether § 1425(a) was a general or specific intent crime.

As such, the Court was misled by Defendant's argument that *Lachin* provides solid support

for concluding § 1425 is a specific intent crime resulting in a palpable defect concerning this Court's original findings as to what is required to establish the intent element of the crime for which Defendant has been charged. *United States v. Lockett*, 328 F. Supp. 2d 682, 684 (E.D. Mich. 2004) ("A palpable defect is a defect that is obvious, clear, unmistakable, manifest, or plain.") While the Government possibly could have articulated its position better, this does not alter the fact that *Latchin* is unreliable authority concerning the intent element of the subject offense.

It is clear from a review of *Kungys* and the decisions interpreting it that courts have been consistently willing to include a materiality element for the crime of unlawful procurement of naturalization under §1425(a), including the definition of materiality adopted by the *Kungys* majority. However, none of these courts have similarly extended the *Kungys* court's use of the term "willful" to the intent required for establishing violation of § 1425(a). *See United States v. Pasillas-Gaytan*, 192 F.3d 864, 869 (9th Cir. 1999) (concluding that the government was required to prove the defendant either "knew he was ineligible for naturalization due to his criminal record, or knowingly misrepresented his criminal record in his application or interview."); *United States v. Sadig*, 352 F. Supp.2d 634, 638 (W.D.N.C. 2005) (same); *United States v. Vaghari*, Nos. 08-69301, 08-69302, 2009 U.S. Dist. LEXIS 64793, *12 (E.D. Pa. Jul. 28, 2009)(same).

In fact, another district court out of the Sixth Circuit has specifically rejected Defendant's argument that willfulness is required for establishing the intent element for the crime of unlawful procurement of naturalization. In *United States v. Aquino*, No. 1:07cr428, 2008 U.S. Dist. LEXIS 7635, *7 (N.D. Ohio Feb. 1, 2008), the district court held that "because §1425 requires only 'knowing' conduct rather than imposing the stricter 'willful' requirement, the defendant did not have to know that procuring naturalization was a criminal act. Rather, the *mens rea* requirement for §

1425 is satisfied with proof that the defendant either knew he was not eligible for naturalization due to his prior conviction, or knowingly misstated his criminal record on his application or his interviews." *Id.* The reason behind the courts refusal to require"willfulness" under § 1425 is most likely due to the fact that § 1451(a), the statute at issue in *Kungys*, specifically authorizes denaturalization where naturalization is procured "by willful misrepresentation," whereas § 1425(a) only uses the term "knowingly." *See United States v. DeAndino*, 958 F.2d 146, 148 (6th Cir. 1992) ("[A] general rule of construction of criminal statutes provides that where a statute does not specify a heightened mental element such as specific intent, general intent is presumed to be the required element.")

Defendant cannot seriously dispute the lack of authority supporting her position that unlawful procurement of naturalization under § 1425 is a specific intent crime. In response, Defendant merely relies on cases cited by this Court in its original decision without addressing the Government's well reasoned arguments against the propriety of relying on these decisions. For example, while courts have rejected sufficiency of the evidence claims where the evidence at trial showed the defendants made fraudulent statements "with the intent to unlawfully procure naturalization" or that they "knowingly provided false information . . . with the intent to procure naturalization[,]" this merely shows the evidence at trial was sufficient to support the defendants' convictions under § 1425, not that this is evidence is required to prove a violation of the statute in all instances. *See United States v. Chala*, 752 F.3d 939, 947-48 (11th Cir. 2014); *see also United States v. El Sayed*, 470 F. App'x 491, 494 (6th Cir. May 30, 2012); *Pasillas-Gaytan*, 192 F.3d at 868 ("Because § 1425 requires only 'knowing' conduct rather than imposing the stricter 'willful' requirement, we hold that [the defendant] did not have to know that procuring naturalization was a criminal act, although such

knowledge would of course suffice to impose criminal liability.")

Lastly, to the extent Defendant argues that *United States v. Puerta*, 982 F.2d 1297 (9th Cir. 1990), also held that § 1425 is a specific intent crime, such a position is belied by the *Puerta* court's opinion. The *Puerta* court was similarly not faced with resolving the intent required for establishing the crime of unlawful procurement of naturalization, rather the *Puerta* court was addressing the proof needed to establish the "materiality" element under the statute. *Id.* at 1302 (concluding that providing "immaterial false testimony in naturalization proceedings is not a crime.").

As such, 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. The Government must therefore only establish that Defendant made a false statement on her Naturalization Application knowing it to be a false statement. In light of the Court's decision concerning the *mens rea* required for proving a violation of § 1425, the Court must deny Defendant's Motion for Offer of Proof, which seeks to admit the testimony of a clinical psychologist concerning her conclusions with respect to Defendant's defense related to post-traumatic stress disorder. It is well settled that this type of defense is inadmissible to negate the *mens rea* of a general intent crime, thus the expert's testimony is irrelevant to the issues herein and inadmissible at trial. *United States v. Kimes*, 246 F.3d 800, 806 (6th Cir. 2001); *United States v. Gonyea*, 140 F.3d 649, 651 (6th Cir. 1998).

III.

Accordingly, for the foregoing reasons, the Government's Motion for Reconsideration [#105] is GRANTED. The Defendant's Motion for Offer of Proof [#111] is DENIED.

SO ORDERED.

Dated: October 27, 2014

s/Gershwin A. Drain
GERSHWIN A. DRAIN
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on October 27, 2014.

s/Felicia M. Moses for Tanya Bankston
TANYA BANKSTON
Case Manager