No. 15-1331

In the
United States Court of Appeals
for the Sixth Circuit

United States of America,

Plaintiff-Appellee,

v.

Rasmieh Yousef Odeh,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Michigan
No. 2:13-cr-20772-1 (Honorable Gershwin A. Drain)

Brief for the United States

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Table of Contents

Table of Authorities

Cases

Statutes

Rules

Other Authorities

Request for Oral Argument

The government does not object to defendant's request for oral argument.

Issue Presented

1. Whether the district court erred in finding that § 1425(a) defines a general intent or knowing *mens rea*, rather than a heightened standard.

2. Whether the district court's rulings impermissibly impaired Odeh's ability to present a defense.

3. Whether the district court abused its discretion in admitting foreign documents received pursuant to a mutual legal assistance treaty.

4. Whether the district court abused its discretion by imposing an 18-month sentence, the middle of the applicable guideline range.

Statement of the Case

Defendant Rasmieh Odeh was charged in a single-count indictment filed in the Eastern District of Michigan on October 22, 2013. (R. 3: Indictment, 5). The indictment alleged that Odeh had obtained her naturalization as a United States citizen unlawfully, in violation of 18 U.S.C. § 1425(a), by having failed to disclose her overseas criminal history. Specifically, the indictment charged that Odeh had concealed from U.S. immigration officials her arrest, indictment, conviction, and sentence in Israel for having participated in a series of bombings by the Popular Front for the Liberation of Palestine in the 1960s. *Id*.

Beginning on November 4, 2014, Odeh stood trial before United States District Judge Gershwin A. Drain. On November 9, 2014, the jury found Odeh guilty. On March 12, 2015, the district court sentenced Odeh to 18 months' imprisonment, the middle of the applicable guideline range, and fined her $1,000. As required by law, the district court also ordered Odeh's United States citizenship revoked. (R. 169: Order Revoking United States Citizenship; *see* 8 U.S.C. § 1451(e)). The judgment was entered on March 13, 2015, and Odeh filed a timely

notice of appeal on March 17, 2015. (R. 172: Judgment, 1774; R. 173: Notice of Appeal, 1778). Various amici have moved, without objection from the government, to file a single brief supporting reversal. *See* Fed. R. App. P. 29.

In 1994, Odeh submitted an application for an immigrant visa to the U.S. State Department in her native Jordan. (R. 186: Government Exhibit 2A, 2628). Information defendant supplied on the application stated that she had lived continuously in Amman, Jordan, since 1948. (*Id.* at 2629, question 21). Odeh also checked the box marked "No" to a question which asked in part whether she had "ever been arrested, convicted, or ever been in a prison[.]" (*Id.* at 2631, question 34). The State Department issued Odeh an immigrant visa in 1995. (R. 186: Government Exhibit 2B, 2627). In fact, contrary to her answers, Odeh had been arrested in Israel in 1969 for the bombings, and was convicted in 1970. (R. 181: Tr., 2147–54). Odeh received two life sentences (*id.* at 2154), and she was continuously in prison from her arrest in 1969 until 1979. The prison was not in Amman, Jordan. (*Id.* at 2154, 2156–57). And Odeh herself testified that, following her release, she lived in Lebanon for four years, until 1983. (R. 182: Tr., 2357). Thus, Odeh had

answered falsely on her immigrant visa application not only as to her criminal history, but also as to her history of residences which, if known, would have led to discovery of her convictions and the non-issuance of her immigrant visa.

Thus, Raymond Clore, the State Department official who had supervised issuance of visas in Jordan at the time Odeh applied for hers, testified that if she had properly disclosed her criminal history, "[W]e would have asked the applicant for more details. What were the offenses? Where and when were they committed? We would try to get all the information from the prosecuting authority," so the State Department could make an eligibility determination. (R. 181: Tr., 2208). Mr. Clore testified that Odeh's untruthfulness about the places she had lived, even without more, likely prevented the State Department from learning of her ineligibility for a visa: "[I]f we knew that a person had lived in various locations, we would ask for, you know the certificate of no conviction." (*Id.* at 2211).

After having lived in the United States from 1995 until 2004, Odeh applied for United States citizenship. (R. 186: Government Exhibit 1A, 2615). The naturalization application asked more detailed

criminal history questions than had the application for immigrant visa. Each of the criminal history questions began "Have you **EVER**," with the word "ever" in capitals and bold in each instance. Collectively, the questions asked whether Odeh ever had been arrested; charged with a crime; convicted; or imprisoned. (*Id*. at 2622, questions 16, 17, 18, and 21). Odeh checked the box marked "No" for each question. In addition, even though in 1994 she had given false answers on her application for an immigrant visa, Odeh also checked "No" to questions which asked whether she ever had given "false or misleading information to any U.S. government official while applying for any immigration benefit" and whether she ever had "lied to any U.S. government official to gain entry or admission into the United States." (*Id*. at 2622, questions 23 and 24).

As part of the naturalization process, Odeh was interviewed by United States Citizenship and Immigration Services officer Jennifer Williams. (R. 182: Tr., 2290–91). The interview was conducted under oath. (*Id*. at 2292). At the interview, Officer Williams went through the entire application with Odeh, repeating each question. (*Id*. at 2293.) As she read each of the "Have you **EVER**" questions to Odeh, Officer Williams added the words "anywhere in the world" at the end, as she

had been trained. (*Id.* at 2294). Thus, for example, Officer Williams asked a question in the form of "Have you ever committed a crime or offense for which you were not arrested anywhere in the world." (*Id.*).

As Officer Williams received the answers she followed standard procedure of using a red pen to record them. If Odeh gave the same answer she had given on the written application, Officer Williams circled the answer in red; if Odeh gave a different answer, Officer Williams recorded the new answer in red. (*Id.* at 2293–94).[1] At the end of the interview, Officer Williams and Odeh again signed the application, certifying under oath that the answers and the 17 corrections which were made were correct. (*Id.* at 2294–95; *see also* R. 186: Government Exhibit 1A, 2624, Part 13; R. 182: Tr., 2264–65). Officer Williams was unaware of Odeh's criminal history of having been convicted of multiple bombings in Israel, which had resulted in two deaths. (R. 182: Tr., 2295–96). Those facts made Odeh ineligible for her immigrant visa or to naturalize. (R. 182: Tr., 2261; *see also* Argument IV.D, *infra.* (discussing statutory bar to immigration for anyone who

[1] The red circles and corrections are clearly visible throughout the Exhibit. *See generally* R. 186: Government Exhibit 1A, 2615 *et seq*.

had "engaged in terrorist activities")). The naturalization application "was approved because the applicant provided false information in response to the questions that were asked on the form." (R. 182: Tr., 2268).

At trial, to support a claim of diminished capacity, Odeh sought to introduce evidence that she suffered from Post-Traumatic Stress Disorder. (R. 111: Defendant's Motion for Offer of Proof, 1117.) The district court ruled such evidence inadmissible, because the crime charged has a general intent mens rea, requiring only that a defendant have made a false statement knowing it to be false—and this Court has repeatedly held that evidence of diminished capacity is admissible only to negate a heightened mens rea. (R. 119: Order Granting Government's Motion for Reconsideration [#105] and Denying Defendant's Motion for Offer of Proof [#111], 1257).

Summary of the Argument

The district court did not legally err in deciding that the charged offense, 18 U.S.C. § 1425(a), has as its mens rea a general intent or knowing standard, not a heightened standard. Thus, the district court properly excluded Odeh's proposed psychological testimony—which was intended to show that she had diminished capacity—because evidence of diminished capacity is only admissible to negate specific intent or heightened mens rea. For the same reasons, it was proper for the district court to limit Odeh's own testimony, preventing her from claiming diminished capacity. Moreover, Odeh was not prejudiced by the exclusion of the psychologist's testimony, because that testimony would have contradicted her own trial testimony in important ways.

The district court did not abuse its discretion in admitting foreign government documents obtained from Israel pursuant to a formal Mutual Legal Assistance Treaty request, nor did it abuse its discretion in not ordering further redaction of some of the documents beyond what it ordered.

And finally, the district court's sentence, at the middle of the advisory guideline range, was procedurally and substantively reasonable.

Argument

I. The district court properly ruled that § 1425(a) is a general intent crime, requiring only a knowing mens rea and not a heightened standard.

A. The standard of review

Odeh challenges the district court's ruling finding inadmissible her proffered testimony by a psychologist, to support a claim of diminished capacity, that Odeh had Post-Traumatic Stress Disorder. (Def. Br. 16; R. 111: Defendant's Motion for Offer of Proof). The district court found that the charged offense is a general intent crime, and it is well-established that psychological evidence of diminished capacity (as opposed to insanity) is admissible only to negate the mens rea of a specific intent crime. (R. 119: Order Granting Government's Motion for Reconsideration [#105] and Denying Defendant's Motion for Offer of Proof [#111], 1257).

This Court ordinarily reviews a district court's evidentiary rulings for an abuse of discretion. *See, e.g., United States v. Harris*, 192 F.3d

580, 588 (6th Cir. 1999) ("The question of admissibility of expert testimony is reviewed for an abuse of discretion."). But here Odeh challenges not the district court's evidentiary ruling as such, but rather its finding that § 1425(a) defines a general intent crime. So what is actually at issue is not an evidentiary ruling, but rather the district court's legal determination of the mens rea necessary to commit the crime. This Court reviews that legal conclusion de novo. *See, e.g.*, *United States v. Kimes*, 246 F.3d 800, 805–10 (6th Cir. 2001); *United States v. Gonyea*, 140 F.3d 649, 653–54 (6th Cir. 1999); *United States v. Willis*, 1999 WL 591440, *3 (6th Cir. July 29, 1999) (unpublished). Using all of the standard tools of statutory construction—statutory language, presumptions, rules of construction, precedent, and legislative history—it is clear that § 1425(a) is, as the district court found, a general intent statute.

B. General intent and specific intent defined

"[A] general intent crime requires the knowing commission of an act that the law makes a crime. A specific intent crime requires additional 'bad purpose.'" *Kimes*, 246 F.3d at 807. "'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).

Importantly, "where a statute does not specify a heightened mental element such as specific intent," then "a general rule of construction of criminal statutes provides that . . . *general intent is presumed* to be the required element." *United States v. DeAndino*, 958 F.2d 146, 148 (6th Cir. 1992) (emphasis added). Thus, in *Bailey*, the Supreme Court considered a prison break offense that contained no statutory language requiring that an act be done "willfully" or "with intent." The majority of circuits had "imposed the added burden on the prosecution to prove . . . that respondents acted 'with an intent to avoid confinement,'" but the Supreme Court rejected the addition of that element. It stated that "except in narrow classes of offenses, proof that the defendant acted knowingly is sufficient to support a conviction." *Bailey*, 444 U.S. at 408.

C. The plain language of the statute describes a general intent crime.

Section 1425(a) criminalizes: "[w]hoever knowingly procures or attempts to procure, contrary to law, the naturalization of any person, or documentary or other evidence of naturalization or of citizenship." 18

U.S.C. § 1425(a). Given the plain language of the statute, which expressly requires only that a defendant have acted "knowingly," Odeh cannot overcome the presumption that such a mens rea is all the statute requires. *DeAndino*, 958 F.2d at 148.

This Court has not addressed the issue of the required *mens rea*. But the Ninth, Second, and a panel of the Fourth Circuits have—and all of them have found § 1425(a) requires only the lesser "knowingly" mens rea. The Ninth Circuit concluded that "[b]ecause § 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." *United States v. Pasillas-Gaytan*, 192 F.3d 864, 868 (9th Cir. 1999). Accordingly, the government was required to prove that "either the defendant knew he was ineligible for citizenship due to his criminal record or knowingly misrepresented his criminal record in his application or interview." *Id.* The Second Circuit directly followed *Pasillas-Gaytan's* holding and quoted it, stating that "liability under § 1425 requires proof either that defendant knew he was not eligible for naturalization . . . or knowingly

[misrepresented the factor impugning his eligibility] on his application or in his interview." *United States v. Alameh*, 341 F.3d 167, 175 (2d Cir. 2003) (ellipses and brackets in original). And a panel of the Fourth Circuit found that "[t]he plain language of the statute does not require an intent to defraud." *United States v. Nicaragua-Rodriguez*, 1998 WL 738548, *2 (4th Cir. 1998).

As this Court has long noted, making a false statement knowing it to be false, such as what the Ninth, Second, and Fourth Circuits require for a violation of § 1425(a), is a general intent requirement, because it makes no difference why the person made a false statement so long as he or she knew it was false. *See United States v. S & Vee Cartage Co., Inc.*, 704 F.2d 914, 919 (6th Cir. 1983) (holding that 18 U.S.C. § 1027, which penalizes whoever "makes any false statement or representation of fact, knowing it to be false," is a general intent crime, requiring only that the act be undertaken "voluntarily and intentionally, and not because of mistake or accident" but "without the added element of a specific intent to do what the law forbids.").

When this Court for the first time addressed whether 18 U.S.C. § 111(a), assault on a federal officer, was a general or specific intent

crime, it looked first to the language of the statute and found that it "contains no language suggesting that specific intent must be shown." *United States v. Kimes*, 246 F.3d 800, 808 (6th Cir. 2001). This Court examined § 111(a) in light of nearby statutes and found it "plain," that "Congress is fully cognizant of the general intent/specific intent dichotomy. When it seeks to create a specific intent crime, Congress explicitly says so." *Id.* (noting that § 113(a)(1) punishes "assault with intent to commit murder," and § 113(a)(3), "[a]ssault with a dangerous weapon, with intent to do bodily harm").

Here, § 1425(a)'s plain language only requires the knowing act of making a false statement, knowing it to be false. Congress did not supply a specific intent requirement in § 1425(a) the way it did, for example in § 1426(c), which penalizes:

> [w]hoever, *with intent unlawfully to use the same*, possesses any false, forged, altered, antedated or counterfeited certificate of arrival, declaration of intention to become a citizen, certificate or documentary evidence of naturalization or citizenship purporting to have been issued under any law of the United States, or copy thereof, knowing the same to be false, forged, altered, antedated or counterfeited.

18 U.S.C. § 1426(c) (emphasis added). The omission of words requiring a specific intent demonstrates that § 1425(a) is a general intent offense.

D. *Kungys* and *Latchin* provide no basis for finding that § 1425(a) is a specific intent crime, because in the civil immigration context, "willfulness" equates to a general intent.

Defendant Odeh also cites *Kungys v. United States*, 485 U.S. 759 (1988), which held that in the civil denaturalization context, two elements are that "a naturalized citizen misrepresented or concealed some fact, [and] that the misrepresentation or concealment must have been willful." Def.'s Br. 16–17; *Kungys*, 485 U.S. at 767. "As a general matter, when used in the criminal context, a 'willful act is one undertaken with a 'bad purpose.' In other words, in order to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted with knowledge that his conduct was unlawful.'" *Bryan v. United States*, 524 U.S. 184, 191–92 (1998) (citations omitted). In the criminal context, therefore, "willful" clearly defines a specific intent standard, because it "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." *United States v. Gonyea*, 140 F.3d 649, 653 (6th Cir. 1998) (citations omitted).

However, the civil immigration context, as in *Kungys*, provides a vivid example of the fact that "the word 'willfully' is sometimes said to

be 'a word of many meanings' whose construction is often dependent on the context in which it appears." *Bryan*, 524 U.S. at 191 (citations omitted). In the civil immigration context, "The element of willfulness is satisfied by a finding that the misrepresentation was deliberate and voluntary. The INS does not need to show intent to deceive; rather, knowledge of the falsity of the representation will suffice." *Parlak v. Holder*, 578 F.3d 457, 463 (6th Cir. 2009). Thus, importing the *Kungys* mens rea for civil denaturalization to the criminal realm results in a general intent requirement, because "knowledge of the falsity of the representation will suffice." *Id.*; *see also United States v. S & Vee Cartage Co., Inc.*, 704 F.2d 914, 919 (6th Cir. 1983) (holding that an offense which prohibits making "any false statement or representation of fact, knowing it to be false," is a general intent crime, requiring only that the act be undertaken "voluntarily and intentionally, and not because of mistake or accident" but "without the added element of a specific intent to do what the law forbids").

In initially holding that § 1425(a) defined a specific intent crime, the district court "primarily relied" on *United States v. Latchin*, 554 F.3d 709 (7th Cir. 2009), for the proposition that § 1425(a) contains a

willfulness element. (*See* R. 119: Order Granting Government's Motion for Reconsideration [#105] and Denying Defendant's Motion for Offer of Proof [#111], 1253). Odeh also cites *Latchin* to support her position. Def. Br. 16. *Latchin*, in turn, had relied on *Kungys* for the origin of the "willful" requirement. *Latchin*, 554 F.3d at 713. As noted, *Kungys* is inapposite because willfulness in the civil immigration context does not have the same meaning as it does for criminal purposes, and thus it was error for *Latchin* to rely on it. But *Latchin* has a second significant flaw which further renders it unpersuasive authority on the mens requirement of § 1425(a). As the district court stated, in reversing its original ruling and instead finding that § 1425(a) requires only a knowing mens rea, "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" willfulness. (R. 119: Order Granting Government's Motion for Reconsideration [#105] and Denying Defendant's Motion for Offer of Proof [#111], 1253–54).

Thus, the district court noted that the jury instructions approved of in *Latchin* required the government to prove only: that the defendant while under oath testified falsely before an officer of the Immigration and Naturalization Service as charged in the indictment; that the defendant's testimony related to some material matter; and that the defendant knew the testimony was false. (*Id.* at 1254); *see also Latchin*, 554 F.3d at 715. On appeal, Defendant Odeh acknowledges neither of the infirmities of *Latchin,* nor that its muddled analysis of what constituted willfulness was the basis for the district court's rejection of *Latchin* as persuasive authority and of a heightened mens rea for § 1425(a). *See* Def's Br. 16–18; *see also* R. 119: Order Granting Government's Motion for Reconsideration [#105] and Denying Defendant's Motion for Offer of Proof [#111], 1256 ("Defendant cannot seriously dispute the lack of authority supporting her position that unlawful procurement of naturalization under § 1425 is a specific intent crime.").

E. The statutory language surrounding § 1425(a) further confirms that Congress intended it to be a general intent statute.

Defendant Odeh also cites *United States v. Munyenyezi*, 781 F.3d 532 (1st Cir. 2015), in support of her argument that § 1425(a) requires proof of specific intent. *Munyenyezi* relied on *Kungys* for the same two elements as did *Latchin*—a false statement and willfulness. *See Munyenyezi*, 781 F.3d at 536. As noted, however, in the civil context that simply means that a defendant was required to have made a false statement "with knowledge of the falsity." *Parlak v. Holder*, 578 F.3d at 463. *Munyenyezi* never discussed the *mens rea* requirement as such. Rather, in finding sufficient evidence to support the conviction, *Munyenyezi* stated that "Section 1425(a) makes it a crime for a person 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)." *Munyenyezi*, 781 F.3d at 536. Defendant Odeh apparently seizes upon the citation to § 1001, and asserts that because § 1001 is a specific intent statute, then so must be § 1425(a); "If § 1001 requires specific intent, how does § 1425 not require it?" she asks. Def's Br. 24-25.

The answer is quite simple. Section 1001 specifically provides that it is a crime to "knowingly and willfully" make a false statement regarding a matter in the jurisdiction of the federal government. Congress's choice of the word "willfully" sets § 1001 apart from § 1425(a), and rebuts the presumption that in the absence of other evidence, Congress is assumed to have required only the general intent necessary for a knowing violation. *DeAndino*, 958 F.2d at 148; *see also United States v. Bailey*, 444 U.S. 394, 406 (1980) ("[C]ourts obviously must follow Congress' intent as to the required level of mental culpability for any particular offense"). Odeh's reliance on 18 U.S.C. § 1920 has the same flaw—that statute also requires a "knowing and willful violation." *See* Def's Br. 24. And 18 U.S.C. § 1014, which Odeh also cites, requires that a defendant act "willfully" and "for the purpose" of influencing various government agencies.

The legislative history confirms that § 1425(a) is a general intent statute. Section 1425(a) is a consolidation of the pre-1948 statutes from various sections. *See* Historical and Statutory Notes to 18 U.S.C. § 1425 (West 2013). The original pre-1948 provisions were all general intent statutes, requiring that a defendant act "knowingly." *See* 62 Stat. 766 *et*

seq., 8 U.S.C. § 746 (1940). For example, former 8 U.S.C. § 746(2) (1940), from which current § 1425(a) derives, made it a crime "for any alien or other person . . . knowingly to procure or attempt to procure the naturalization of any such person, contrary to the provisions of any law[.]" *See* 8 U.S.C. § 746, ch. 876, title I, subch. III, § 346, 54 Stat. 1163 (1940). The 1948 consolidation did not purport to work any change in the substance of the law, and its substance thus remains unchanged today. Although there were later statutory changes, they merely changed the applicable fine, *see* P.L. 103-322, 108 Stat. 2146, § 330016(1)(K) (1994), and amended the incorrect words "to facility" into "to facilitate." *See* P.L 107-273, § 4002(3) (2002), 116 Stat. 1758. Thus, both the predecessor to § 1425(a) and its current incarnation were general intent statutes.

F. No other case Odeh cites supports a claim that § 1425(a) requires a showing of specific intent.

Odeh makes a reference to *United States v. Chahla*, 752 F.3d 939 (11th Cir. 2014), which superficially makes it sound as if that court found that § 1425(a) required a showing of specific intent, as the court stated "there was sufficient evidence here that the [defendants]' fraudulent statements on their respective Lawful Permanent Resident

applications were made with the intent to unlawfully procure naturalization[.]" *Id.* at 948; *see* Def's Br. 25 n.3.

Chahla, in fact, has nothing to do with *mens rea*. In that case, the defendants were charged not with having falsified the N-400, Application for Naturalization, as Odeh was, but rather with having provided false information on their applications to adjust status to lawful permanent residents (Form I-485). The defendants argued that any fraud in obtaining permanent resident status was insufficient as a matter of law to support a conviction under § 1425(a), because "they point out, and the government concedes, that a person could become a Lawful Permanent Resident and never seek to become a citizen," *id.* at 945–946, although the defendants in that case had in fact naturalized. Thus, the issue was not whether the defendants had any particular *mens rea*, but whether a false statement made in connection with becoming a permanent resident alien could, as a matter of law, constitute "procurement" of naturalization, as required to violate § 1425(a). Because permanent resident status was both a prerequisite to naturalization and had been granted based on false statements, the court "conclude[d] that a conviction under 18 U.S.C. § 1425(a) for

unlawful procurement of citizenship may be based on fraudulent statements made to obtain statutorily-required Lawful Permanent Resident status." *Id.* Thus, *Chahla* provides no support for the argument that § 1425(a) defines a heightened mens rea.

Consequently, no case other than *Latchin* has found that § 1425(a) contains a "willful" element. *Latchin* did so only by relying on *Kungys*'s civil standard and while approving jury instructions requiring a "knowingly" mens rea it called "willful." *Latchin* thus is too muddled to be persuasive authority, leaving no case in which a court has held that § 1425(a) requires a showing of specific intent; to the contrary, the courts of appeals which have considered the question have rejected a specific intent standard under § 1425(a), instead applying the knowing standard of "making a false statement knowing it to be false." Odeh has utterly failed to demonstrate that a heightened *mens rea* applies. The district court correctly concluded that § 1425(a) is a general intent statute requiring only a knowing *mens rea*.

II. The district court's rulings did not impermissibly impair Odeh's defense

A. In adhering to this Court's well-settled rule that evidence of diminished capacity is inadmissible to negate the mens rea of a general intent crime, the district court committed no error, let alone plain error.

At trial, Odeh sought to introduce evidence that she suffered from Post-Traumatic Stress Disorder, as a defense to the charge. (*See* R. 42: Notice of Expert Evidence of Mental Condition, 295). However, "[i]n the federal courts, diminished capacity may be used only to negate the *mens rea* of a specific intent crime." *United States v. Gonyea*, 140 F.3d 649, 650 (6th Cir. 1998). The district court initially ruled that § 1425(a) was a specific intent crime (R. 98: Order, 986), and thus began an evidentiary hearing to determine whether the proposed testimony did not run afoul of the Insanity Defense Reform Act, 18 U.S.C. § 17 (hereinafter, "the IDRA"). (*Id.*; *see also* R. 178: Tr., 1851–97). By the time of the evidentiary hearing, the government had filed a motion for rehearing as to the district court's finding that § 1425(a) was a specific intent offense (*see* R. 178: Tr., 1897), which the district court granted prior to ruling on whether the psychologist's testimony was otherwise admissible under the IDRA. (*See* R. 119: Order Granting Government's

Motion for Reconsideration [#105] and Denying Defendant's Motion for Offer of Proof [#111], 1252–57). Having determined that § 1425(a) was a general intent crime, the district court ruled:

> In light of the Court's decision concerning the *mens rea* required for proving a violation of § 1425(a), 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).

Id. at 1257. On appeal, Odeh argues for the first time that even if § 1425(a) is a general intent crime, this Court should nevertheless reverse the conviction and order a new trial in which she would be allowed to present her claim of PTSD. Without citing a single case or authority, Odeh asserts that "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." Def's Br. 29; *see also* Amicus Br., Section III, at 20 *et seq*. (arguing that non-insanity psychological evidence should have been admitted to negate general intent). Amici assert that evidence of

diminished capacity also is admissible to negate *mens rea* of a "knowing" commission of a crime, and that Odeh sought to offer the testimony on that basis at trial. Amicus Br. 24.

First, Odeh and amici ask the panel for relief that it is without authority to order. As this Court has repeatedly held, such evidence is admissible only to negate specific intent. *See, e.g., United States v. Kimes*, 246 F.3d 800, 806 (6th Cir. 2001); *United States v. Gonyea*, 140 F.3d 649, 651 (6th Cir. 1998). "As the rules of this circuit require, a panel of this court is bound by the prior published opinions of this circuit 'unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.'" *United States v. Willis,* 257 F.3d 636, 643 (6th Cir. 2001) (citation omitted). *Accord, Nat'l Union Fire Ins. Co. v. VP Bldgs., Inc.*, 606 F.3d 835, 839–40 (6th Cir. 2010).

Second, it is factually untrue that Odeh sought to offer the evidence at trial to negate general intent. Rather, Odeh's offer of proof seeking admission of the evidence was predicated solely on the argument that evidence of PTSD is admissible to negate specific intent and that § 1425(a) is a specific intent crime. (*See* R. 43: Opening Brief in

Support of Expert Testimony, 300–03). The brief's full conclusion was "Because unlawful procurement of citizenship is a specific intent crime, this Court should allow the testimony of the defendant's expert witness as part of a diminished capacity defense." (*Id.* at 303). Thus, Odeh did not preserve any argument that evidence of PTSD also would be admissible to negate a knowingly standard of mens rea, and thus any review would be for plain error.

A defendant can rely on the plain error doctrine "'only on appeal from a trial infected with error so 'plain' the trial judge and prosecutor were derelict in countenancing it.'" *United States v. Knowles*, 623 F.3d 381, 386 (6th Cir. 2010) (citations omitted). "For us to correct an error not raised at trial: (1) there must be error; (2) the error must be plain; and (3) the error must affect substantial rights. Assuming 'all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* at 385-386 (citations omitted). "The inquiry into whether the plain error review affected substantial rights usually requires a determination that

the error affected the outcome of the district court proceedings." *Id.* at 386 (citation omitted).

The failure to consider sua sponte an argument that PTSD evidence was admissible to negate a knowingly standard of *mens rea* was not plain error, as it is not error at all in light of *Gonyea* and *Kimes*, which hold that such evidence is admissible only to negate specific intent. *See United States v. Olano*, 507 U.S. 725, 732 (1996) (The first limitation on plain error review "is that there indeed be an 'error.'").

In addition, the unpublished case of *United States v. Willis*, 1999 WL 591440 (6th Cir. July 29, 1999), is procedurally similar to this case and demonstrates that even if such evidence were admissible to negate general intent, it nevertheless was not plain error for the district court here to exclude the evidence.

In *Willis*, the defendant gave notice that his expert's testimony would negate that he "voluntarily possessed the gun." *Id.* at *7. On appeal, the defendant changed his theory, and instead argued that the evidence would negate a knowing standard, in that it would "show that the Defendant did not even know that he possessed the gun." *Id.* This Court held that "This is a different theory from the one Defendant

advanced in his original motions and we decline to address it at this stage in the proceedings."

By refusing to address the new argument, this Court implicitly held that the exclusion of the evidence could not constitute prejudicial plain error. *See Olano*, 507 U.S. at 735 (Plain error review under Fed. R. Crim. P. "52(b) is permissive, not mandatory. If the forfeited error is 'plain' and 'affect[s] substantial rights,' the court of appeals has authority to order correction, but is not required to do so."). Defendant Odeh (and amici) are in the same position as was the defendant in *Willis*: even assuming plain error, this Court has held that such changes of theory on appeal regarding admissibility will not be found to satisfy the requirements for relief under the plain error standard, *i.e.*, that the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Olano,* 507 U.S. at 736.

B. Rather than bolstering Odeh's testimony, the expert testimony would have contradicted it.

Odeh argues that by excluding the psychologist's testimony, the district court undermined her right to present a defense. At trial, Odeh testified that she misunderstood the questions on the naturalization application, which asked if she "**EVER**" had been arrested, charged,

convicted, or imprisoned, and instead believed they inquired only about her time in the United States. (*See* R. 186: Gov. Exhibit 1, 2622, questions 16–18 and 21).[2] Odeh claims that testimony by the psychologist would have supported her own testimony, by providing a basis for believing that she could have so misunderstood the questions. Def. Br. 26–28. This is so, she says, because the psychological testimony would have shown that she automatically and subconsciously "filtered" her experiences to avoid reliving her claimed abuses. Thus, she says, the psychologist would have testified that defendant would have developed her "own coping strategies and those coping strategies help you narrow your focus and keep those bad memories at bay . . . [I]t's automatic. It's not this intentional, I'm not going to do that. It's an automatic. They've taught themselves to narrow their focus to keep the painful memories back." (R. 178: Tr.,1859–60).

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[2] If Odeh genuinely and in good faith had misunderstood the questions when filling out the written form, necessarily she also would have had to misunderstand them in the same way at a later date when they were repeated to her by a United States Citizenship and Immigration Services officer during her interview. However, the officer always added the words "anywhere in the world" to the end of each question; thus, for example, she would ask question 15 as "Have you ever committed a crime or offense for which you were not arrested anywhere in the world?" (R. 182: Tr., 2294).

The flaw in Odeh's argument is that as she posits it, the expert testimony would have contradicted, not supported her trial testimony. At trial, Odeh testified that she was fully aware of her criminal history, and that upon analyzing the form, concluded in good faith that it did not request information about events other than in the United States.

Thus, when asked on direct examination why she had answered "No" to the criminal history questions on the naturalization application, Odeh testified that after reading previous questions, such as "Have you ever claimed to be U.S. Citizen in writing or any other way," and "Have you ever registered to vote in any federal, state, or local election in the United States," she consciously and rationally concluded that all the questions must refer to the United States. (R. 182: Tr., 2365–66). "When I continue the other questions, my understanding was about United States. So I continue to say, no, no, no." (*Id.* at 2366).[3] Odeh continued her direct testimony by answering the question, "when you were filling

[3] Following the criminal history questions, the naturalization application provides blocks to disclose "City, State, Country" for any arrests and charges. Thus, the application itself makes clear that criminal history questions refer to places other than the United States. (*See* R. 186: Government Exhibit 1, 2622). Moreover, defendant was familiar with legal documents, as she had earned a law degree in Jordan prior to coming to the United States. (R. 183: Tr., 2395).

out that form and they asked you were you ever in prison or convicted or arrested, did you ever, did you think at all about what had happened to you in Israel in 1969 and 1970?" Odeh answered, "Never I thought about Israel. My understanding was about United States, and I believe if, if I knew that about Israel, I will say the truth." (*Id.* at 2367). When her attorney asked Odeh, "Is it your testimony that if you thought the questions referred to what happened to you in Israel, you would have answered those questions and given the information to the INS," she replied "Yes. I will give them. Yes." (*Id.*). To the question of "So is it your testimony that if you interpreted the question or understood the question to talk about what happened to you in Israel, you would have answered the question, yes, and given the information to the immigration [sic]," Odeh replied "Yes, if I understand that, of course." (*Id.* at 2368).

Understood in that context, Odeh could not possibly have been prejudiced by the exclusion of the psychologist's testimony. The psychologist would have undercut Odeh's claimed textual basis for her conscious understanding that the criminal history questions referred to time in the United States, by asserting that Odeh instead

subconsciously processed the information to arrive at her answers, never even thinking about her previous life and criminal history. But Odeh testified that she did think about her previous life and criminal history, and simply concluded that the naturalization application did not seek that information. Thus, if the psychologist had testified, the jury would have been squarely presented with Odeh's testimony that she consciously and in good faith analyzed and thought about the information and contradictory testimony from her own expert witness. It is a strange argument indeed which asserts that Odeh's defense was impaired because she not allowed to present an expert who would have contradicted Odeh's own testimony. Def's Br. 30–31.

Moreover, however interpreted, Odeh's claim to have misunderstood that the questions on the naturalization application referred only to events in the United States cannot possibly be true. If Odeh's explanation for her false answers were true, then her answers to the same questions necessarily would have been different before she came to the United States, as she clearly did have criminal history overseas, before she immigrated.

Thus, for example, if Odeh genuinely believed that "Have you **EVER** been convicted of an offense" really meant "Have you EVER been convicted of an offense in the United States," her answer of "No" on the naturalization application would not have been intentionally untrue, as she testified at trial. Yet Odeh gave precisely the same answers in Jordan in 1994 when she applied for her immigrant visa, before she ever had been to the United States, and thus she could not possibly have believed at that time that the questions referred only to events in the United States. (*See* R. 186: Government Exhibit 2A, 2630, question 33b (on immigrant visa application, defendant checking box marked "No" to question of whether she was in the category of an alien "convicted of 2 or more offenses for which the aggregate sentences were 5 years or more[.])"; *id*. at 2631, question 34 (on immigrant visa application, defendant checked box marked "No" to question "Have you ever been arrested, convicted or ever been in prison[.]")).

C. The psychological evidence which Odeh sought to introduce was in fact evidence of insanity, not diminished capacity, and could only have been offered pursuant to the Insanity Defense Reform Act.

Finally, Odeh cannot show that her defense was prejudiced by the district court's ruling excluding the evidence as irrelevant to *mens rea*.

The evidence she sought to offer would not have constituted diminished capacity, but rather could only have been introduced as part of a full-scale insanity defense. A claim of insanity would have been admissible only under the terms of the Insanity Defense Reform Act, 18 U.S.C. § 17, which Odeh did not seek to invoke.

Under the IDRA, a defendant is legally insane when "at the time of the commission of the acts constituting an offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of h[er] acts." 18 U.S.C. § 17(a).

Taking the evidence in the light most favorable to Odeh, her psychologist would have testified that due to Post Traumatic Stress Disorder, a mental disease,[4] Odeh subconsciously "filtered" her processing of information in such a way that she misunderstood questions so as not to think about her previous life overseas, instead focusing only on her time in the United States. (*See, e.g.,* R. 178: Tr., 1888 (psychologist testifying, "It's not, it's not this conscious process of

[4] PTSD is a mental disease or defect, included in the American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders, DSM-5. *See* Amicus Br. 9–10 and 10 n.17.

I'm going to use this now or I'm not going to use it now . . . It's automatic."); *id.* at 1889 ("It's not something that you control. It's like flipping a switch on and off. It's automatic[,]" and not "at the conscious level.")).

Thus, fully crediting Odeh's version of the proposed testimony, she would have been "unable to understand the nature and quality of her acts," because she did not interpret the questions at a conscious level. If Odeh was in fact subconsciously comprehending questions in a manner which prevented her from understanding their actual meaning, and thus providing untrue responses to the questions on that basis, then by definition she was "unable to understand the nature and quality of her acts" in falsely answering—the very definition of insanity. Thus, such testimony could only have been admissible to claim insanity, for which Odeh would have had to invoke the IDRA, thereby placing on her the obligation to provide notice, Fed. R. Crim. P. 12.2(a); the burden of proving by clear and convincing evidence the facts supporting the insanity defense, 18 U.S.C. § 17(b); and subjecting her to mandatory psychological examination by the government, Fed. R. Crim. P.

12.2(b)(1)(B).[5] But by failing to invoke the IDRA, Odeh waived the opportunity to invoke the insanity defense. Fed. R. Crim. P. 12.2(d).

D. Because § 1425(a) defines a general intent crime, claims of torture and PTSD were irrelevant, whether it was a psychologist or Odeh herself who sought to testify to the them.

Odeh's final argument with regard to psychological evidence is that it was "compounded error" for the district court to prevent the defendant herself from testifying to her claim of torture and diagnosis of PTSD. Def. Br. 30. "We review the district court's admission or exclusion of evidence for an abuse of discretion." *United States v. Ganier*, 468 F.3d 920, 925 (6th Cir. 2006) (citation omitted).

Odeh's argument is simply a repacking of her other arguments regarding psychological evidence, with no legal distinctions which compel a different result. As noted, *Kimes* and *Gonyea* hold that "diminished capacity may be used only to negate the *mens rea* of a specific intent crime." *Gonyea*, 140 F.3d at 650. That rule is categorical, and as noted, cannot be revisited by this panel. Odeh's argument essentially is that diminished capacity may be offered only to negate the

[5] Defendant never was examined by anyone except the expert who she sought to call at trial.

mens rea of a specific intent crime, unless it is the defendant testifying, in which case it can be used without limitation. However, it is not the identity of the witness but the substance of the proposed testimony which is at issue. *See* Fed. R. Evid. 401 (relevance turns on a "fact" which makes a matter of consequence to the case more or less likely, not the identity of a witness who seeks to testify to it). Odeh's claimed torture, which is a matter of great dispute (*see generally* R. 161: Government Sentencing Memo., 1721–26) could only have been relevant to establish a basis for her alleged PTSD; obviously, if evidence of her psychological condition was irrelevant, then the cause of her psychological condition also was irrelevant. The district court did not abuse its discretion in so limiting the Odeh's testimony. (*See* R. 182: Tr., 2340 (district court instructing defendant, prior to her testimony, to not mention claims of torture because they were not relevant)).

III. The district court properly admitted, under a mutual legal assistance treaty, documents created by Israeli governmental agencies.

A. The contents of the documents

Odeh next argues that the district court erred by admitting as exhibits certain documents created by Israeli governmental agencies,

and which were received and certified pursuant to an official request by the United States to Israel under a Mutual Legal Assistance Treaty. *See* Treaty with Israel on Mutual Legal Assistance in Criminal Matters, January 26, 1998, Senate Treaty Doc. No. 105-40 (hereinafter "the MLAT").[6]

At trial, seven documents received under the MLAT were admitted. The documents were highly redacted, and were offered to prove the falsity of specific questions on the Form-N400, Application for United States Naturalization. (*See* R. 183: Tr., 2507 (district court instructing jury that MLAT documents were redacted, and providing terms for proper consideration of them by jury)).

The first relevant question on the naturalization application asked whether Odeh ever had been arrested. (R. 186: Government Exhibit 1A, 2622, question 16). Three documents served to prove the falsity of

[6]*See* R. 36: Motion *in Limine* of the United States to Rule Admissible for Trial Foreign Evidence Produced Pursuant to Mutual Legal Assistance Treaty, 199. The Letter of Submittal from Secretary of State Madeline Albright to President Clinton, outlining the provisions of the treaty and providing a detailed analysis of it also is included, *id*. at 192; as is the Letter of Transmittal from President William J. Clinton to the United States Senate for ratification and providing a more general description of its terms, *id*. at 190.

Odeh's answer. Government Exhibit 4 was the translation of an exhibit that showed that an Israeli court had ordered Odeh detained pending her trial in Israel, and also was relevant to Question 21 which asked if Odeh ever had been imprisoned. (*Id.* at 2637*).* Government Exhibit 6 contained the translation of an arrest warrant. (*Id.* at 2645–47*).* And Government Exhibit 8 was a biographical record of Odeh, following a 1975 arrest for escape from prison. (*Id.* at 1650–54*).* It also contained her fingerprint, which was matched at trial to Odeh's fingerprints from her naturalization application in the United States, proving that she was in fact the person referred to in the various records. (R. 186: Government Exhibit 8, 2650; *id*. at 2652, 2655 (MLAT documents containing fingerprints); R. 183: Tr., 2311–21) (testimony of fingerprint examiner)).

The next relevant question on the naturalization application asked whether Odeh ever had been charged with a crime. (R. 186: Government Exhibit 1A, 2622, question 17). Government Exhibit 3 was a translation of the indictment of Odeh from Israel, showing that she in fact had been charged with a number of offenses. (*Id*. at 2632–34; R. 181: Tr., 2147–54).

The naturalization application also asked whether Odeh ever had been convicted of a crime or offense. (R. 186: Government Exhibit 1A, 2622, question 18). Government Exhibit 5 included the translation of a portion of the Israeli court's verdict and sentence, showing that she in fact had been convicted of several crimes. (*Id*. at 2639–44). Government Exhibit 7 was a document which affirmed Odeh's Israeli conviction. (*Id*. at 2648).

The naturalization application also asked if Odeh had "**EVER** given false or misleading information to any U.S. government official to obtain an immigration benefit," and whether she had "**EVER** lied to any U.S. government official to gain entry or admission into the United States." (R. 186: Government Exhibit 1A, 2622, questions 23–24) (bold and capitalization in originals). Those two questions incorporated by reference and thus made relevant Odeh's entire immigration history; in fact in 1994, "to obtain an immigration benefit," Odeh also had lied on her application for an immigrant visa, "to gain entry or admission into the United States." (*See* R. 186: Government Exhibit 2A, 2628).

For instance, on her immigrant visa application, Odeh had omitted that she spent ten years in prison in Israel and following her

release went to Lebanon, instead stating that she had lived only in Amman, Jordan from 1948 onward. (*Id.* at 2629, question 21; *see also* R. 182: Tr., 2357 (defendant testifying that she lived in Lebanon from 1979–1983). She also falsely answered "No" to a question on the immigrant visa application asking whether she ever had been "arrested, convicted, or in prison." (R. 186: Government Exhibit 2A, 2631, question 34). The Israeli documents demonstrating her criminal history were relevant and admissible to prove the falsity of her statements on her immigrant visa application for the same reasons previously discussed.

B. The documents were properly admissible under the terms of the treaty.

Odeh argues that the district court erred by admitting the MLAT documents, claiming that it should have inquired "into the truth or validity of the documents, or the legality or fairness of the system that produced them." Def. Br. 36. Odeh further argues that "the lower court's ruling, without any evidentiary hearing as to whether or not the treaty applied to documents from the military occupation courts," was error. Def. Br. 33.

As a threshold matter, it is difficult to discern how Odeh can claim prejudice, even if her argument had any merit as to legal error. As

noted, the Israeli documents were introduced in the government's case-in-chief to prove that she had falsely answered on the naturalization application about whether she ever had been arrested, charged with a crime, convicted, or imprisoned. However, Odeh freely admitted those facts in her testimony on her own behalf. (R. 182: Tr., 2353 (admitting her arrest in Israel); *id*. at 2355 (Odeh charged, tried and convicted in Israel); *id*. at 2356 (Odeh imprisoned in Israel)). And the documents and Odeh's testimony were not the only proof on that point. The government also introduced an excerpt from a video entitled "Women in Struggle," made in 2004, the same year in which Odeh naturalized, in which she appears and openly discusses her past. In the clip, introduced as Government Exhibit 11, Odeh admits that she had been in prison in Israel. (R. 185: Tr., 2165–67). Thus, regardless of the admissibility of the documents under the MLAT, any error necessarily was harmless, as the facts which they established were proven in multiple other ways. Given the totality of the evidence produced at trial showing that Odeh had been arrested, charged, and convicted in Israel, contrary to her answers on her naturalization application, any error in admitting the MLAT documents necessarily was harmless.

Odeh's argument also fails on the merits, because she completely misunderstands the scope of the treaty. Initially, she is incorrect in her assumption that the treaty's terms are limited to obtaining court records, and that there thus might be an issue as to whether the treaty was intended to cover military court documents. However, the treaty broadly covers "copies of any documents, records, or information which are in the possession of a government department or agency of [the Requested State] but which are not publicly available," which the Requested State, in this case Israel, chooses to provide. (*See* R. 36: Motion *in Limine* of the United States to Rule Admissible for Trial Foreign Evidence Produced Pursuant to Mutual Legal Assistance Treaty, 207, Article 9, ¶ 2). Thus, the MLAT covers much more than merely court records. Military court documents are records of the Israel Defense Forces, a department or agency of the Israeli government, and thus plainly within the terms of the MLAT. No evidentiary hearing was needed to establish that fact.

Odeh's next error is her assumption that her Israeli criminal history records could only be admissible if the government proved that she was appropriately convicted in Israel, according to due process

requirements of United States courts. Def. Br. 31–35. However, as the district court properly ruled, "the issue here is whether Defendant provided false answers on her Visa and Naturalization Applications. The validity of Defendant's conviction is not an issue for the jury's determination." (R. 117: Order, 1235). Thus, the MLAT records were offered not to prove Odeh's factual guilt of the underlying charges, but were merely records evidencing the historical events of her having been arrested, charged, convicted, and imprisoned. In that respect, the MLAT records were no different than any other business record which is offered to prove a historical fact. And the district court reinforced that ruling by instructing the jury, without objection from Odeh, that it was not to decide her factual guilt regarding the bombings in Israel: "Now, the defendant is not on trial for events which occurred in Israel in 1969 or for whether she was a member of the Popular Front for the Liberation of Palestine. Rather, she is on trial only for the charge of procuring her naturalization unlawfully in 2004 in the United States. You may consider evidence of whether the defendant was arrested, charged with, or convicted of an offense in Israel, as far as that evidence relates to the charge that she unlawfully procured her naturalization in

the United States. However, it is not your job to determine whether she was in fact guilty or innocent of any crime in Israel." (R. 183: Tr., 2515–16 (jury instruction); R. 182: Tr., 2371–72 (defendant having no objection to the jury instructions)). Because the district court did not abuse its discretion in admitting the MLAT evidence, Odeh's arguments on this point are without merit.

C. The district court did not abuse its discretion or commit plain error in declining to order further redaction of the documents.

Odeh argues that the district court erred in failing to order that the MLAT documents be redacted prior to admission, or in failing to require a stipulation in lieu of their admission. Def. Br. 36–42. As an initial matter, the MLAT documents were in fact highly redacted. (*See, e.g.*, R. 123: Order Regarding Defendant's Objections to the Government's Exhibits, 1267 *et seq.*; R. 183: Tr., 2507 (district court instructing jury that MLAT documents were redacted)).

At trial, Odeh objected to Exhibits 3, 4, and 2A part 2. (*Id.*). On appeal Odeh argues for redactions only as to Exhibit 3, the Israeli indictment. (*See* R. 186: Government Exhibit 3, 2632). Odeh argues that the district court erred in admitting that portion of Exhibit 3 noting

that the bomb which defendant placed killed two people, who are named in Exhibit 3, and which also states the traditional Jewish remembrance of "May Their Memory Be A Blessing." *Id.*[7]

"The propriety of the district court's admission of evidence is reviewed for abuse of discretion." *United States v. Henley*, 360 F.3d 509, 518 (6th Cir. 2004). As the district court noted, while the basis for Odeh's objections was not clear, "it appears that she objects to the admission of Government exhibit number 3 based on Rule 403." (R. 123: Order Regarding Defendant's Objections to the Government's Exhibits, 1268).

"'Unfair prejudice' as used in Rule 403 does not mean the damage to a [party's] case that results from the legitimate probative force of the evidence; rather, it refers to evidence which tends to suggest decision on an improper basis." *United States v. Schrock*, 855 F.2d 327, 335 (6th Cir. 1988) (citations omitted). "'Unfair prejudice' means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.'" *United States v. Whittington*, 455

[7] *See* Hebrew: Greetings & Congratulations, Entry 33, http://www.jewishvirtuallibrary.org/jsource/Judaism/hebrewgreeting.html.

F.3d 736, 739 (6th Cir. 2006). In reviewing a district court's ruling admitting evidence over an objection based on Rule 403, this Court "must look at the evidence in a light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect." *United States v. Newsom*, 452 F.3d 593, 603 (6th Cir. 2006) (citation omitted).

The district court declined to redact Exhibit 3 to remove references to the bomb having killed two people: "[T]he Court has further concluded that '[a] conviction for participating in a bombing that resulted in the death of two civilians would be material because it would be relevant to Defendant's good moral character. An arrest for minor offenses . . . would not satisfy the materiality requirement because such crimes do not show a lack of moral character.'" (R. 123: Order Regarding Defendant's Objections to the Government's Exhibits, 1269 (ellipses in original), citing R. 117: Order, 1241–42). The district court reaffirmed its earlier ruling admitting the MLAT evidence, which had noted that 8 U.S.C. § 1182(a)(3)(B)(i)(I) rendered an alien inadmissible to the United States based on any activity involving the use of any "explosive . . . or dangerous device . . . with intent to

endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property." (*Id.*). In its earlier ruling, the district court had relied on the fact that Odeh had been convicted of a charge almost identical to the statutorily-defined bar to admissibility in the United States, i.e., "plac[ing] explosives in the hall of the Supersol in Jerusalem, with the intention of causing death or injury . . .." (*Id.* at 1241–42). The reference to the two deaths was not unfairly prejudicial, because it helped establish that Odeh was ineligible for admission to the United States, based on the statutory bar.

Moreover, in light of Odeh's claim at trial that she believed the naturalization form did not seek information for the period prior to her arrival in the United States (R. 182: Tr., 2365–68), it was proper for the district court to admit evidence that people had died in the bombing, because the fact of their deaths made it unreasonable for Odeh to believe that the forms did not seek information about the bombings, given the seriousness of the crimes. The district court did not abuse its discretion in refusing to further redact Exhibit 3.

Similarly, the district court did not abuse its discretion in declining to redact the phrase, "May Their Memory Be a Blessing." That

phrase was simply a portion of the text of Exhibit 3 which demonstrated that two people had died in the bombing. For the reasons stated above, it was proper for the district to admit evidence that people had died in the bombing. The phrase added nothing more: there was no testimony about either of the individuals who had died, they were never referred to by name in the trial and no facts about them, other than the text of Exhibit 3 were introduced. Moreover, Odeh is certainly incorrect that "no one puts the names of the victims" in "a proper legal indictment[.]" Def. Br. 43. *See, e.g.*, R. 58: Indictment, in *United States v. Tsarnaev*, No. 13-cr-10200 (D. Mass. 2013), Count One, ¶ 13 (giving names of four victims whose deaths resulted from the conspiracy). The decision to not redact that portion of Exhibit 3 was within the district court's discretion.

D. The district court did not abuse its discretion in refusing to order a stipulation in lieu of Exhibit 3 to prove the elements of materiality and procurement.

Odeh further argues that the district court should have required the government to agree to a stipulation in lieu of the admission of Exhibit 3. Def. Br. 37–39. Odeh offered to stipulate to the fact she had been convicted of "serious" crimes in Israel. (*id.* at 39) (R. 117: Order,

1241). The district court rejected that argument, however, because "[t]he government is not required to accept the defendant's stipulation, and the defendant has no right to selectively stipulate to particular elements of the offense." (R. 117: Order,1241, *citing United States v. Boyd*, 640 F.3d 657, 668 (6th Cir. 2011)).

The district court's ruling was correct. This Court has long held that "The government is not required to accept the defendant's stipulation, and the defendant has no right to selectively stipulate to particular elements of the offense." *United States v. Hebeka*, 25 F.3d 287, 291 (6th Cir. 1994). The rule set forth in *Hebeka* survives *Old Chief v. United States*, 519 U.S. 172 (1997), because *Old Chief* set forth only a "narrow limitation" on the rule, which is limited to instances "involving proof of felon status." *See Boyd*, 640 F.3d at 668. "By contrast, 'when a defendant seeks to force the substitution of an admission for evidence creating a coherent narrative of his thoughts and actions in perpetrating the offense for which he is being tried,' the prosecution remains entitled to present its evidence. Indeed, 'the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away.'" *Id*. at 668–69 (*citing Old Chief*).

The rule barring a defendant from selectively stipulating to any element of the offense applies even to the introduction of "sensitive or gruesome evidence to prove elements of an offense." *Id*. at 669. Thus, the fact that the government sought to offer proof that Odeh had been charged and convicted of an offense which caused the deaths of two individuals does not change the calculus, as the government was required to prove that it was a fair inference that if the facts of Odeh's criminal history had been known that she would not have been granted citizenship. *See, e.g., United States v. Mensah*, 737 F.3d 789, 809 (5th Cir. 2013). The government met this burden through the testimony of Douglas Pierce, which demonstrated that defendant was categorically ineligible to receive an immigrant visa or to be admitted to the United States. *See* 8 U.S.C. §§ 1182(a)(3)(B)(iii)(V)(b), 1182(a)(3)(B)(iv)(I) (barring any individual who has "engaged in terrorist activity" and including in the definition of "terrorist activity" any use of an explosive under circumstances "indicating an intention to cause death."). (R. 182: Tr., 2261, 2268–69).[8] And finally, defendant states that the district

[8] The district court ruled that Mr. Pierce, a supervisor from U.S. Citizenship and Immigration Services, could not use the statutory (Continued)

court could have mitigated any unfair prejudice through a limiting instruction. Def. Br. 42–43. Odeh fails to acknowledge that the district court did precisely that, without objection from her, instructing the jury that it was not to determine defendant's factual guilt or innocence of the bombing in Israel, but only whether or not she was guilty of having unlawfully procured her naturalization in the United States. (R. 183: Tr., 2515–16 (jury instruction); R. 182: Tr., 2371–72 (defendant having no objection to the jury instructions)). The district court did not err with regard to Exhibit 3.

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terms "terrorist activity" and "engaged in terrorist activity" even though they are congressionally defined terms of art, because they would have been unfairly prejudicial (*see* R. 117: Order, 1242-1245), although he was allowed to rely on the statute as a basis for his opinion. (*Id.*) That ruling appears overly restrictive in light of Congress's use of those terms in the relevant statutes. *See Flores v. United States Citizenship and Immigration Services*, 718 F.3d 548, 551 n.1 (6th Cir. 2013) (criticizing term "alien" to refer to other human beings but nevertheless using it "to be consistent with the statutory language and to avoid any confusion in replacing a legal term of art with a more appropriate term.") *Id.* Nevertheless, defendant could not have been prejudiced by this restriction on Mr. Pierce's testimony at what she nevertheless refers to as "a faux trial." Def. Br. 49.

V. The district court did not abuse its discretion in sentencing Odeh within the guideline range.

A. The standard of review

Odeh's final argument is that the district court's sentence of 18 months' imprisonment was procedurally and substantively unreasonable. Def. Br. 43. Defendant particularly bases that argument on the fact that, as required by 8 U.S.C. § 1451(e), the district court revoked Odeh's fraudulently obtained United States citizenship. Def. Br. 45–46. (R. 169: Order Revoking United States Citizenship, 1764).

The sentence which the district court imposed was in the middle of the advisory guideline range of 15–21 months. (*See* R. 185: Sentencing Tr., 2559). Prior to imposing sentence, the district court made a factual finding that Odeh's background included engaging in terrorism. (*Id.* at 2599). The district court assessed two points pursuant to USSG § 3C1.1, based on Odeh's obstruction of justice. The district court found that Odeh committed perjury at trial, and that she further obstructed the proceedings by repeatedly interjecting testimony which the district court had ruled inadmissible. (*Id.* at 2558–59).

In reviewing the procedural and substantive reasonableness of a sentence, this Court uses a "deferential abuse-of-discretion standard."

United States v. Wright, 747 F.3d 399 (6th Cir. 2014). However, as here, where Odeh's "argument ultimately boils down to an assertion that the district court should have balanced the § 3553(a) factors differently, it is 'simply beyond the scope of our appellate review, which looks to whether the sentence is reasonable, as opposed to whether in the first instance we would have imposed the same sentence.'" *United States v. Sexton*, 512 F.3d 326, 332 (6th Cir. 2008) (citation omitted).

As permitted by *Rita v. United States*, 551 U.S. 338, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007), this Court accords a presumption of reasonableness to a within-guidelines sentence. *United States v. Thompson*, 515 F.3d 556 (6th Cir. 2008); *United States v. Crowell*, 493 F.3d 744 (6th Cir. 2007). Thus, when a district court sentences a defendant within a properly calculated guideline range, as here, a defendant must show that the district court's errors in applying (or failing to apply) any remaining sentencing factors rendered the sentence unreasonable. Under such circumstances, a review for reasonableness "involves looking for a plausible explanation and a defensible overall result." *United States v. Gale*, 468 F.3d 929 (6th Cir. 2006). Odeh, however, seems to have forgotten that this Court's role is

to review the sentence, not to fashion an appropriate one. Def. Br. 44-47; *see also id.* at 47 (asking this Court to order district court to impose five-week sentence).

B. The sentence was procedurally and substantively reasonable.

1. Deportation is an "impermissible fact" to consider for purposes of sentencing.

Odeh argues that the district court gave insufficient consideration to the fact that as a result of her conviction she would be deported. In fact, deportation is an "impermissible factor" under § 3553(a), which a district court may not consider at all for purposes of sentence.

Many things which happen to a defendant following a conviction and sentence are "impermissible facts" for purposes of determining a sentence. *See United States v. Musgrave*, 761 F.3d 602, 608 (6th Cir. 2014) (noting as examples that loss of a professional license, paying legal fees, or suffering embarrassment or a damaged reputation, are not part of the sentence). "None of these things are [the defendant's] sentence. Nor are they consequences of his sentence," and a district court should therefore sentence the defendant "without considering these factors." *Id.*

Deportation is similarly a collateral consequence to the sentence, and should be deemed an "impermissible fact." This Court has noted that "our sister circuits have frowned on the notion that deportation should be considered grounds for a downward variance." *United States v. Samayoa-Baltazar*, 436 F. App'x 620, 626 (6th Cir. 2011) (citing cases from the Seventh, Eighth and Tenth Circuits); *see also United States v. Telles-Milton*, 347 F. App'x 522, 525 (11th Cir. 2009); *United States v. Misquitta*, 568 F. App'x 154, 158 (3d Cir. 2014) ("multiple circuits have held" that a district court is "not permitted to consider" the "possibility of a defendant's deportation when fashioning his sentence").

Odeh is only subject to removal proceedings because her citizenship was revoked due to the fraud she had committed in obtaining naturalization. *See* 18 U.S.C. § 1451(e). That section is not a penalty provision—it authorizes no term of imprisonment, no fine, and no term of supervised release. Rather, it is solely a mechanism by which Congress mandated the disgorgement of the fruits of defendant's crime—her fraudulently obtained United States citizenship. The forfeiture of those illegally-obtained fruits is particularly apt here, as Odeh was unlawfully in the United States from her very first day here.

See 8 U.S.C. §§ 1182(a)(3)(B)(i)(I) (providing that any alien who has "engaged in terrorist activity" is inadmissible). Thus, as a matter of law, the district court could not have erred by failing to consider deportation consequences in fashioning a sentence.

2. The district court fully considered all of the § 3553 factors and imposed a reasonable sentence.

Odeh asserts that the sentence was procedurally unreasonable, but makes no attempt to develop any argument supporting that claim. Def. Br. 43. "Issues adverted to perfunctorily without developed argumentation are deemed waived." *United States v. Layne*, 192 F.3d 556 (6th Cir. 1999). Moreover, a sentence is only procedurally unreasonable if "the district court fails to properly calculate the Guidelines range, 'treats the Guidelines as mandatory, fails to consider the § 3553(a) factors, selects a sentence based on clearly erroneous facts, or fails to adequately explain the chosen sentence.'" *United States v. Jeter*, 721 F.3d 746, 756 (6th Cir. 2013), *citing Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007). The district court committed none of those errors.

The district court's sentence also was substantively reasonable, and well within its discretion. The district court extensively discussed

the nature of the offense, and Odeh's false statements on her immigration application. (R. 185: Tr. 2597–2599). The district court considered Odeh's history and characteristics (*id*. at 2599–2603), which "I think, does include some terrorist activities. She was a member, as I understand it, of the Popular Front for the Liberation of Palestine, and I believe she was involved in some terrorist activities, and was, in fact, convicted of that." (*Id*. at 2599). The district court found that in her trial testimony, "you lied when you talked about how you viewed the application. You said you thought that that only applied to or those questions only applied to conduct in the United States, and I don't believe that[.]" (*Id*. at 2601).

The district court extensively discussed the need for both general and specific deterrence, (*id*. at 2603–06), citing the high levels of immigration in the Eastern District of Michigan (with which the district judge was personally acquainted, *id*. at 2605–06), and the need to deter an applicant from calculating that the cost of lying to obtain citizenship might be low: "And so I don't want to give anybody who is thinking about becoming a citizen the impression that you can lie on your application, and if you get caught, you're just going to be deported." (*Id*.

at 2606). And finally, while acknowledging Odeh's background, the district court noted that "you're not a lot different from a lot of the people that I see in some ways." (*Id.* at 2608).

As to substantive reasonableness, Odeh makes two arguments: the district court gave insufficient weight to her social services work, Def. Br. 45–47, and failed to adequately consider that "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." *Id.* at 45. While deportation is an impermissible factor to consider, *see* Argument V.B.1, *supra*, even if the district court was required to weigh that factor, it was at most, together with Odeh's social services work, part of the "history and characteristics of the defendant." 18 U.S.C. § 3553(a). And despite being "disturb[ed]" at Odeh's attempt to "politicize[]" the case to "engender some sympathy," the district court reminded Odeh "this isn't a political case. This case is about honesty and being truthful and saying the right thing under oath. It's about someone coming into the country illegally and not being truthful about it." (R. 185: Sentencing Tr. 2601). The district court in fact weighed all of Odeh's history and characteristics. (*Id.* at

2602–03 (acknowledging Odeh's recitation of her work, and stating "And that's true. That's true. I acknowledge that and commend Ms. Odeh for that"); *id.* at 2605 (noting that a sentence which involved no incarceration but deportation only would not adequately deter)).

Despite her perjury at trial, attempts to politicize her case, and prior acts of terrorism, the district court gave Odeh a middle-of-the-guidelines sentence. Odeh's argument that her sentence was substantively unreasonable falls flat and her claim that the district court "should have balanced the § 3553(a) factors differently," is "'simply beyond the scope of our appellate review[.]'" *United States v. Sexton*, 512 F.3d at 332 (citation omitted).

Conclusion

For the reasons stated, the judgment of the district court should be affirmed.

Respectfully submitted,

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Certificate of Compliance with Rule 32(a)

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 12,420 words, excluding the parts of the brief exempting by Rule 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-pt. Century Schoolbook.

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Certificate of Service

I certify that on Wednesday, July 08, 2015, I electronically filed this brief for the United States with the Clerk of the United States Court of Appeals for the Sixth Circuit using the ECF system, which will send notification of that filing to the attorney for the defendant:

Michael E. Deutsch

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Relevant District Court Documents

Appellee, the United States of America, designates as relevant the following documents available electronically in the district court's record, case number 2:13-cr-20772-1, in the Eastern District of Michigan:

Record Entry No.	Document Description	PgID
R. 3	Indictment	5–20
R. 98	Order denying motion to dismiss	976–991
R. 111	Motion Offer of Proof	1117–1122
R. 117	Order denying motion to exclude evidence	1229–1248
R. 119	Order granting motion for reconsideration	1252–1258
R. 123	Order regarding defendant's objections to governments exhibits	1267–1271
R. 169	Order Revoking US Citizenship	1764–1765
R. 172	Judgment	1774–1777
R. 173	Notice of Appeal	1778–1779
R. 178	Motion Hearing Tr. 10/21/14	1902–1933
R. 181	Jury Trial Tr. 11/05/14	2091–2248
R. 182	Jury Trial Tr. 11/06/14	2249–2373
R. 183	Jury Trial Tr. 11/07/14	2374–2526
R. 185	Sentencing Tr. 03/12/15	2552–2612
R. 186	Notice of Filing Government's Trial Exhibits	2613–2657