

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

UNITED STATES OF AMERICA

CRIMINAL NO. 13-20772

Plaintiff,

HON. GERSHWIN DRAIN

RASMIEH ODEH

Defendant.

**REPLY TO GOVERNMENT'S RESPONSE TO DEFENDANT'S
MOTION FOR DISCLOSURE OF EXPERT.**

The defendant's motion is not based on a "falsehood," as the government's response cynically asserts. The Response deliberately misconstrues and trivializes the legitimate concerns for the defendant's welfare, and mental health, raised in the defense motion. The defense motion did not claim that Ms. Odeh has never talked about her torture by the Israelis during the past 45 years. It specifically acknowledged that Ms. Odeh spoke about her torture when she was first released, and the government identified two other occasions, including at her military trial and in a documentary about the treatment of Palestinian woman prisoners.

The essence of what the defense asserted in their motion for disclosure, was that Ms. Odeh never went through anything approaching the probing, detailed recall and re-living of her experiences of torture in Israel until the painstaking hours of examination by Dr, Fabri. It is one thing for Ms. Odeh to talk about her torture in a summary fashion when defending her life before a military tribunal or to a sympathetic audience (i.e., at the U.N., or to a writer or film-maker); it is quite another to submit, alone, to an unknown mode of mental-psychological examination over days and many hours, by a nameless government agent, tasked with finding her to be a liar and faker.

The government's pretense that the secrecy of their expert is necessary "to protect the integrity of the examination" is baseless and disingenuous . Secrecy here deprives the defendant of fundamental rights under the Fifth and Sixth Amendments, without providing any legitimate benefit to the prosecution. Certainly, Ms. Odeh's counsels have the right to know the identity and qualifications of the government "expert" to whom she will be required to submit herself to for up to 18 hours of adversarial examination.

Rule 35 of the Federal Rules of Civil Procedure, specifically requires that prior to a mental examination counsel be informed of the expert's identity and his

qualifications. The Rule, which applies to the “Physical and Mental Examination of Persons” requires that the examiner must be “*suitably licensed or certified*,”¹ and the Court’s Order itself, “must specify the time, place, manner, conditions, and scope of the examination, and *the person or persons who will perform it.*” R. 35(a)(1) and (2)(B), F.R.Civ. P. (Emphasis added)

There is no reason this rule does not apply simply because this is a criminal case; in fact, its importance is magnified by the potential for prejudice to Ms.Odeh’s defense as well as infringement of her basic constitutional rights. Clearly, as the Rule requires, Ms. Odeh is under the “legal control” of the Court, who is authorized under the law to compel a mental examination of the defendant. Reflecting the outlandish character of the demand for an anonymous examiner, defense counsel has found no case where the provision for disclosure was ever contested—let alone where an anonymity was sustained.

¹ The Advisory Committee on Rules states that 1991 Amendment to the Rule, “expressly authorized the Court to assess the credentials of the examiner to assure that no person is subjected to a court-ordered examination by an examiner whose testimony would be of such limited value that it would be unjust to require the person to undergo the invasion of privacy associated with the examination.” The Advisory Committee goes on to state that, “[i]f the proposed examination calls for an expertise that the proposed examiner does not have, it should not be ordered, even if the proposed examiner is a physician.” Notes of Advisory Committee on Rules ----1991 Amendment

Another falsehood put forth by the government here is that the defense somehow agreed, back in June when the scheduling order was formulated, that the identity of the examiner could be kept secret until after the exam. This issue was never discussed or raised by the government and certainly not agreed to by the defense.

Here again, the government asserts a threat to its interest in preserving the integrity of their expert's examination, by raising the specious claim of a threatened menace against the examiner based upon past First Amendment activities of the defendant's supporters. Such an argument is absurd in light of the simple expedient of providing this information under a protective order limiting the information to defense counsel only until the expert's report is filed. Further, such politically motivated speculation about possible responses of unnamed third parties has no place in the determination of the defendant's fundamental rights, nor should it influence the balance the Court must strike to protect the defendant, as best as possible, from being traumatized again, and further, by this exam.

Counsel is concerned that a cynical, bullying, antagonistic exam by an unqualified person—on a par and with the tone and approach of the government's unwarranted and prejudicial secrecy demand, —could prejudice the defendant's

ability to defend herself at trial. Defense counsel, at a minimum, must know the identity and C.V. of the government's expert to ensure he is suitably qualified and will not cause unnecessary harm to Ms. Odeh.

Considering what she's been through—and particularly the current level of her suffering, from the constant, hovering presence of the torture memories enforced by this indictment and ongoing proceedings against her, and a continuing inability to shut them out by any mechanism—the danger should be obvious, and the need for some modicum of transparency in the government's challenge to her defense equally so.

Of course, if one shares the government's cynical view that she is a liar, and a deceiver, no protection will seem needed, rights be damned; but the Court must remain free of such pre-judgment. There is absolutely no evidence of anyone supporting Ms. Odeh ever improperly contacting a juror or witness involved with this case. Certainly, the exercise of First Amendment rights by Ms. Odeh's supporters can not lawfully be made the basis to deny her the basic right to pertinent information about the qualifications of an expert, who by the very nature of such a proposed extensive examination, will result in a substantial invasion of Ms. Odeh's right of privacy.

Finally, the government's opposition to a neutral venue—where the Defense has suggested a room at the DePaul University School of Law—is premised on yet another falsehood, - an inaccurate, and yet another unwarranted and unprincipled attack on the First Amendment rights of Ms. Odeh's supporters. The event in support of Ms. Odeh cited in the government's response (G. Res at 17), was not held at the De Paul Law School, but at the undergraduate campus, several miles away. Moreover, the alleged "security issues" at that event was not brought about by the defendant's supporters at all, but, rather, by the threatened disruption of the event by pro-Israel protestors.

There is no basis to conclude that a room at the law school will in any way compromise or interfere with the examination. If the Court nevertheless feels that De Paul will not do, there are numerous other neutral sites where the exam can be held, by simple arrangement, and we strongly urge the Court to direct that a site other than the inherently intimidating confines of the government's own lair be provided.

CONCLUSION

In truth, both the government and the Court have a fundamental obligation to minimize any potential harm to the defendant from an examination ordered by the

Court. At the very least, the defense is entitled to know the identity, and qualifications of the government expert, to ensure that there is nothing which disqualifies the expert or is otherwise objectionable. The defendant's basic rights under the Fifth and Sixth Amendments entitle her to nothing less.

Moreover, we believe Rule 35 of the Civil Rules clearly applies here, and accordingly, that the Court itself must "specify" the identity—requiring that the person be appropriately qualified --- and should also provide specifically for the "time, place, manner, conditions, and scope" of such examination, along the lines we asked for in our motion. To be apprised of the tests the expert seeks to administer, to ensure to the Court and counsel that they are appropriate, will not in anyway improperly prepare the defendant or effect the legitimacy of her examination.

WHEREFORE, the defendant entreats this honorable Court to acquire the identity of the government's proposed expert and include it in a new Order for the examination, following the specifications of Rule 35 F.R.Civ P., along with, at a minimum, a provision that the exam take place at a neutral site; and with other provisions as specified in the Rule. Further, even if the Rule is not deemed applicable, we ask that the identity and C.V. of the expert be disclosed forthwith,

and that the Court grant such other and further relief as appears just and appropriate in the premises of this case.

Respectfully submitted,

Dated: September 26, 2016

/s/ Michael E. Deutsch

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CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2016, I electronically filed or caused to be filed the foregoing with the Clerk of the Court using the ECF system, which will send notification of such filing to all ECF filers.

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Dated: September 26, 2016