

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

**Criminal No. 13-20772
Hon. Gershwin Drain**

RASMEA ODEH,

Defendant.

_____ /

**MOTION OF THE NATIONAL LAWYERS GUILD FOR ADMISSION AS
AMICUS CURIAE TO SUPPORT DEFENDANT'S MOTION FOR
RECONSIDERATION OF ORDER DENYING BOND PENDING SENTENCING**

The National Lawyers Guild (“NLG”) respectfully moves the Court for permission to appear as *amicus curiae* for the purpose of supporting Ms. Rasmae Odeh’s motion for reconsideration of the Court’s order denying bond pending sentencing (DE#133).

Counsel for Ms. Odeh has consented to the filing of this motion. Counsel for the Government objects to the filing of this motion, on the ground that a United States District Court lacks authority to grant *amicus curiae* participation in a criminal case.

The reasons supporting the Guild’s motion to participate as an *amicus* for the limited purpose described above are set forth in the accompanying memorandum. The Guild’s proposed *amicus* brief is appended as Motion Exhibit “A.”

Respectfully submitted,

s/ Barbara Harvey
Barbara M. Harvey (P25478)
1394 East Jefferson Avenue
Detroit, Michigan 48207
(313) 538-1245
blmharvey@sbcglobal.net
Attorney for National Lawyers Guild

Dated: November 19, 2014

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**BRIEF IN SUPPORT OF
MOTION OF THE NATIONAL LAWYERS GUILD FOR ADMISSION AS
AMICUS CURIAE TO SUPPORT DEFENDANT'S MOTION FOR
RECONSIDERATION OF ORDER DENYING BOND PENDING SENTENCING**

I. INTRODUCTION

On November 10, 2014, the Court issued its order denying bond pending sentencing (DE #130). Defendant Rasmae Odeh filed her Motion for Reconsideration (DE #133) on November 13, 2014. The Court directed the Government to file any opposition on today's date, November 19, 2014 (DE #134). On November 18, 2014, undersigned counsel requested the consent of all counsel. Counsel for Ms. Odeh consented. Counsel for the Government objected, on the ground that this Court does not have the authority to admit an *amicus curiae* in a criminal case. Counsel for the Government informed undersigned counsel by email that he will seek sanctions if this motion is filed. The Guild responds, below, that this Court's authority to grant this motion is established as a matter of common law and common practice.

II. THIS COURT IS EMPOWERED TO ADMIT *AMICUS CURIAE* BRIEFS IN CRIMINAL CASES

Recognition of the discretion of courts to admit written and sometimes oral submissions by an *amicus curiae* is strongly rooted in English common law, which has been followed in this country from its inception:

Although the custom of allowing a person to serve as a friend of the court cannot be traced to its origin, it is immemorial in English law. 1 Bouvier's Law Dictionary 188 (Rawle's revision 1914)... The privilege of being heard *amicus* rests in the discretion of the court which may grant or refuse leave according as it deems the proffered information timely, useful, or otherwise, 3A C.J.S. *Amicus Curiae* § 3,

Leigh v. Engle, 535 F. Supp., 418, 419-20 (D. Ill. 1982).

Despite a lengthy late-night search, undersigned counsel has found no legal authority for the proposition that the long-established common law authority of the federal courts to exercise their discretion to allow participation by *amicus curiae* is restricted to civil cases. Counsel for the Government has cited no authority for his position.

While no rule of criminal procedure appears to address specifically the filing of a motion to appear in a criminal case as a friend of the court, this omission likely signifies only the absence of any perceived need for procedural requirements specific to this type of motion. This omission leaves the applicant for *amicus* status with the obligation to comply only with the general guidance applicable to all motions in criminal cases, as provided by F. R. Crim, P. rules 12, 47. The absence of a procedural rule does not extinguish the underlying common law governing the filing of such motions. By such reasoning, if this is indeed the Government's reasoning, the only motions allowed to be

filed in criminal cases would be those specifically addressed in the Rules – a plainly untenable position.

The statement of the common law rule applicable to such motions, civil and criminal, is that “[c]lassical participation as an amicus to brief and argue as a friend of the court was, and continues to be, a privilege within ‘the sound discretion of the courts.’” *Northern Sec. Co. v. United States*, 191 U.S. 555 (1903); *U.S. v. State of Michigan*, 940 F.2d 143, 165 (6th Cir. 1991). Factors that warrant the granting of a motion to appear as an *amicus* include findings that “the proffered information of amicus is timely, useful, or otherwise necessary to the administration of justice.” *U.S. v. State of Michigan, supra* (rejecting the concept of “litigating amicus” in the context of prisoner civil rights litigation managed by government amicus).¹

These general principles have been applied to participation as an *amicus* in a trial court criminal proceeding, as well as in civil cases. *See U.S. v. Yonkers Contracting Co., Inc.*, 697 F. Supp. 779, 781 (S.D.N.Y. 1988) (granting right to appear as an *amicus* in a district court criminal prosecution for a bid-rigging scheme, as a matter for the district court’s discretion). The court in *Yonkers Contracting Co., Inc.* considered a Government objection to *amicus* participation, but it was not made on the ground asserted here: that federal district courts have no authority to grant *amicus* participation in a criminal case.

In sum, the Government’s opposition to the participation of the Guild as an *amicus* on the ground that district courts lack the authority to authorize such participation

¹ Other courts have endorsed the concept of the “litigating amicus.” “No longer a mere friend of the court, the amicus has become a lobbyist, an advocate, and most recently, the vindicator of the politically powerless.” Comment, *The Litigating Amicus Curiae*, 1245 and nn. 10 – 13 (AMERICAN UNIV. L. REV. 1992) (collecting cases). The comment is published online: <http://www.americanuniversitylawreview.com/pdfs/41/41-4/lowman.pdf>

in criminal cases appears to lack foundation in law or precedent. As a matter of actual practice, on information and belief, the judges of this and other federal district courts consider *amicus* motions on their merits, without regard to whether the proceeding is a civil or criminal case.

CONCLUSION

For the foregoing reasons, the Guild requests that the Court grant its motion to participate as an *amicus* in support of Ms. Odeh's motion for reconsideration of the order denying bond pending sentencing. The Guild's proffered *amicus* brief is appended to its motion.

Respectfully submitted,

s/ Barbara Harvey
Barbara M. Harvey (P25478)
1394 East Jefferson Avenue
Detroit, Michigan 48207
(313) 538-1245
blmharvey@sbcglobal.net
Attorney for National Lawyers Guild

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**BRIEF OF *AMICUS CURIAE* NATIONAL LAWYERS GUILD
IN SUPPORT OF DEFENDANT'S MOTION FOR RECONSIDERATION OF
ORDER DENYING BOND PENDING SENTENCING**

The National Lawyers Guild, by undersigned counsel, supports Ms. Odeh's motion for reconsideration for the reasons set forth below.

I. INTERESTS OF THE NATIONAL LAWYERS GUILD AS *AMICUS CURIAE*

The Guild is a non-profit voluntary bar association. From its formation in 1937, it was the nation's first racially integrated bar association. Since then, the Guild has been at the forefront of efforts to develop and ensure respect for the rule of law and basic rights. Its mandate is to advocate for fundamental principles of social and economic fairness and for human and civil rights, including the protection of rights guaranteed under international law, the United States Constitution and laws, and the constitutions and laws of the various states. The Guild is the oldest and most extensive network of public interest and human rights lawyers and legal workers in the United States.

II. CONSIDERATION OF EVIDENCE SUCH AS HAS BEEN PROFFERED IN MS. ODEH'S MOTION WOULD LIKELY TIP THE COURT'S EXERCISE OF DISCRETION IN FAVOR OF REINSTATING HER TO BOND.

Ms. Odeh requested continuation of her release on bond pursuant to 18 U.S.C. § 3143(a)(1).

Motions for bail pending sentencing pursuant to 18 U.S.C. § 3143(a)(1) and for bail pending appeal pursuant to 18 U.S.C.A. § 3143(b) create a presumption in favor of detention and require proof by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of persons or the community, if released. Section 3143(a)(1) for bail pending sentencing requires a lesser showing than Section 3143(b)(1)(B) for bail pending appeal.¹ Section 3143(a)(2), involving convictions for specified crimes, mandates custody pending sentencing.

U.S. v. Christman, 596 F.3d 870 (6th Cir. 2010), was a case in which the defendant was subject to mandatory detention under 18 U.S.C. § 3143(a)(2) for serious drug offenses. Nevertheless, the Court of Appeals for the Sixth Circuit reversed the district court's denial of bond in the absence of factfinding under § 3145(c), holding that "the district court erred in not considering whether [defendant] established exceptional reasons to support his release pending sentencing." *Accord, U.S. v. Meister*, 744 F.3d 1236, 1238 (11th Cir. 2013) (collecting caselaw from the circuit courts unanimously agreeing with *Christman*).

¹ It has been said that "[a]mong the recent cases, a defendant who has been convicted may nevertheless be entitled to bail pending his appeal, *unless there is no amount of bond or conditions of bail which would assure the defendant's later presence when required.*" ORFIELD'S CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 46:63 (emphasis added). *See, e.g., U.S. v. Parrett*, 486 Fed. Appx. 544 (6th Cir. 2012).

This Court followed *Christman* in *U.S. v. Smiley*, 2014 WL 823401, at *3 (E.D. Mich. 2014). In *Smiley*, counsel sought release pending sentencing under § 3143(a)(1), which was inapplicable, and failed to seek relief under § 3143(a)(2). Nevertheless, this Court considered whether any “exceptional circumstances” were present in the record, warranting relief under § 3143(a)(2). The only circumstances relied upon by the defendant were that he sought to take care of some personal business and get some dental work. This Court found neither of these circumstances to be “exceptional,” especially with dental service available in prison, and denied relief under both §§ 3143(a)(1) and 3143(a)(2).

The circumstances submitted by Ms. Odeh’s in support of reconsideration are substantial and, we submit, would likely sustain her burden of proof, if reconsidered:

- This Court has already found that Ms. Odeh poses no risk of danger to persons or the community.
- While the Court found that Ms. Odeh failed to sustain her burden of proof that she presents no risk of flight because she has no family in Chicago, Ms. Odeh has shown, in her reconsideration papers, that she has close family in Chicago, including two nephews, with whom she has lived and helped to raise.
- Additionally, Ms. Odeh has shown exceptionally strong and credible non-family ties to her home community of Chicago – ties far stronger than most U.S.-born Americans are able to show:
 - She rejected a plea offer that would have guaranteed no term of imprisonment, because it would have required her to leave Chicago and the United States to avoid the risk of deportation. In other words, it was

more important to her to be able to stay in Chicago and continue her social work there than it was to risk imprisonment and deportation.

- Two hundred and sixty-one Arab and Arab American women immigrants to Chicago have signed a poignant plea to this Court to allow Ms. Odeh to return to her home community pending sentencing. These women are members of the Arab Women's Committee of Chicago, and they are calling themselves her family:

“She organizes visits to our homes when we are celebrating or mourning. She attends our children's weddings. She gives us advice about our families, our jobs, and our lives every time we call for it. The woman has and will do anything for us.” DE#133-3, at pages 1-24.

Ms. Odeh's attorneys have documented that her creation of the Arab Women's Committee has won awards and has been recognized nationally as a successful model for the assimilation of Arab women immigrants into large urban communities and a profoundly different cultural environment than they left behind in their countries of origin.

- Ms. Odeh would not be able to duplicate her success with the Women's Committee in Chicago elsewhere, because her effectiveness rests, in essential part, upon her familiarity with the Chicago area, its culture, and individuals in the community. Attempting such work elsewhere would likely take years, as she would first need to master the new environment and create the essential human ties and support networks required for such work to be effective. As a 67-year-old immigrant, Ms. Odeh would surely

be overwhelmed by attempting to repeat this lengthy process in a new place.

- Long-established Chicago attorney James Fennerty, who is one of Ms. Odeh's attorneys and has known her since 1984, has offered to vouch personally for her continuing presence in Chicago, pending sentencing.
- While the evidence was excluded at trial, it remains highly relevant to the issue of bond that Ms. Odeh's attempt to escape Israeli prison decades ago was an attempt to escape a continuing, sustained pattern of unspeakably brutal torture, including rape. Any person in her position who was capable of attempting escape would have done the same. She should not be faulted for an attempt to escape torture.

The organizational signatories to the letter appended to this motion as Exhibit A dedicate significant time and resources to educating the people of the United States about the brutality of the Israeli occupation. Israel's torture of Palestinian men, women, and even child prisoners is well-documented by human rights organizations, including the human rights NGOs, B'tselem, in Israel,² and Addameer, in the occupied West Bank.³

- Because she has lived in this country for the past 20 years, Ms. Odeh's ties to this country are far stronger than her ties to any other. She has made a deeply cathartic and rewarding life for herself and her community in Chicago, one that she has risked her personal liberty to maintain. She has shown by clear and convincing evidence that she has powerful personal motives to remain there, at any personal cost.

² See, e.g., http://www.btselem.org/torture/201308_etzion

³ See, e.g., <http://www.addameer.org/files/Reports/torture-eng.pdf>

- Unlike the defendant in *Smiley*, Ms. Odeh has an exemplary personal history in all respects, except for the nonviolent offense of making a false statement on her naturalization application. She has suffered extraordinarily, but succeeded in transforming her suffering into an unquenchable energy to help others. In Chicago, until last week, she lived an exemplary life of public service. By all accounts, including the statements of church-affiliated groups in Chicago and the 261 Arab women immigrants in Chicago who have informed the Court that they rely on Ms. Odeh heavily in trying to lead successful lives themselves, she is a great asset to the community of Chicago.
- She has offered to assume a variety of additional security measures, as well, as detailed in her motion, to secure her presence at sentencing.

III. EXCEPTIONAL CIRCUMSTANCES OF MS. ODEH'S CASE HAVE PROMPTED WIDELY RESPECTED AND PROMINENT NATIONAL ORGANIZATIONS TO ORGANIZE A COORDINATED REQUEST TO GRANT RECONSIDERATION AND RELEASE PENDING SENTENCING

Ms. Odeh's criminal prosecution for a false answer to a question so tightly entwined with a confession coerced from her by means that are unthinkable under any due process standards has shocked major U.S. human rights organizations that address Palestinian justice issues. The position stated in Motion Exhibit A is a coordinated appeal to this Court by the Guild; Jewish Voice for Peace, an organization whose grassroots activism has significantly increased understanding among U.S. Jews and non-Jews about the Israeli occupation; the Center for Constitutional Rights, a globally admired enforcer of the Constitution, international law and human rights; the American-Arab Anti-Discrimination Committee (ADC), which enforces the civil rights of Arab

Americans and combats widespread discrimination against this unfairly stereotyped community; Palestine Solidarity Legal Support, providing *pro bono* legal support to campus and community activists for justice for Palestinians; and the National Students for Justice in Palestine, with hundreds of chapters on campuses across the country, including Detroit, Dearborn, Ann Arbor, and Ypsilanti.

All of these organizations respectfully ask the Court, in their appended joint statement, to treat with compassion a woman who, under our own legal standards, cannot fairly be accused of ever harming anyone, whose life in this country has been dedicated to public service, and whose only legal wrongdoing arises from a false answer given in an effort to *remain* in her voluntarily adopted community in her voluntarily adopted home country. There is *no* evidence that Ms. Odeh wants to be anywhere in the world more than she wants to be in Chicago while awaiting her sentencing.

IV. CONCLUSION

For all of these reasons, we respectfully request that the Court reconsider its decision to deny bond pending sentencing and grant Ms. Odeh's request to remain in her home community of Chicago pending sentencing, subject to such additional guarantees that she will appear at her sentencing hearing as she has volunteered to undertake in her motion.

Respectfully submitted,

s/ Barbara Harvey
Barbara M. Harvey (P25478)
1394 East Jefferson Avenue
Detroit, Michigan 48207
(313) 538-1245
blmharvey@sbcglobal.net
Attorney for National Lawyers Guild

CERTIFICATE OF SERVICE

Barbara Harvey hereby certifies that she has filed the foregoing Motion for Admission as *Amicus Curiae*, Brief in Support of Motion for Admission, Brief of *Amicus Curiae* National Lawyers Guild, and Exhibit to Brief in Support of *Amicus Curiae*, etc., through the Court's ECF system on November 19, 2014.

s/ Barbara Harvey

November 19, 2014

Honorable Gershwin Drain
United States District Judge
U.S. District Court for the Eastern District of Michigan
231 West Lafayette Street
Detroit, Michigan 48226

Re: *United States v. Rasmae Odeh*, Cr. 2:13-cr-20772

Dear Judge Drain:

On behalf of the National Lawyers Guild, Jewish Voice for Peace, the Center for Constitutional Rights, Palestine Solidarity Legal Support, National Students for Justice in Palestine, and the American-Arab Anti-Discrimination Committee, we write respectfully to request that the Court reconsider its denial of bond pending sentencing, which Ms. Rasmae Odeh requested pursuant to 18 U.S.C. § 3143(a)(1).

Ms. Odeh's submissions in support of reconsideration are substantial and, we submit, would surely sustain her burden of proof, if reconsidered:

- This Court has already found that Ms. Odeh poses no risk of danger to persons or the community.
- While the Court found that Ms. Odeh failed to sustain her burden of proof that she presents no risk of flight because she has no family in Chicago, Ms. Odeh has shown, in her reconsideration papers, that she has close family in Chicago, including two nephews, with whom she has lived and helped to raise.
- Additionally, Ms. Odeh has shown exceptionally strong and credible non-family ties to her home community of Chicago – ties far stronger than most U.S.-born Americans are able to show:
 - She rejected a plea offer that would have guaranteed no term of imprisonment, because it would have required her to leave Chicago and the United States to avoid the risk of deportation. In other words, it was more important to her to be able to stay in Chicago and continue her social work there than it was to risk imprisonment and deportation.
 - Two hundred and sixty-one Arab and Arab American women immigrants to Chicago have signed a poignant plea to this Court to allow Ms. Odeh to return to her home community pending sentencing. These women are members of the Arab Women's Committee of Chicago, and they are calling themselves her family:

“She organizes visits to our homes when we are celebrating or mourning. She attends our children’s weddings. She gives us advice about our families, our jobs, and our lives every time we call for it. The woman has and will do anything for us.” DE#133-3, at pages 1-24.

Ms. Odeh’s attorneys have documented that her creation of the Arab Women’s Committee has won awards and has been recognized nationally as a successful model for the assimilation of Arab women immigrants into large urban communities and a profoundly different cultural environment than they left behind in their countries of origin.

- Ms. Odeh would not be able to duplicate her success with the Women’s Committee in Chicago elsewhere, because her effectiveness rests, in essential part, upon her familiarity with the Chicago area, its culture, and individuals in the community. Attempting such work elsewhere would likely take years, as she would first need to master the new environment and create the essential human ties and support networks required for such work to be effective. As a 67-year-old immigrant, Ms. Odeh would surely be overwhelmed by attempting to repeat this lengthy process in a new place.
- Long-established Chicago attorney James Fennerty, who is one of Ms. Odeh’s attorneys and has known her since 1984, has offered to vouch personally for her continuing presence in Chicago, pending sentencing.
- Ms. Odeh’s attempt to escape Israeli prison decades ago was an attempt to escape a continuing, sustained pattern of unspeakably brutal torture, including rape. Any person in her position who was capable of attempting escape would have done the same. She should not be faulted for an attempt to escape torture.

The organizational signatories to this letter dedicate much of their time and resources to educating the people of the United States about the brutality of the Israeli occupation. Israel’s torture of Palestinian men, women, and even child prisoners is well-documented by human rights organizations, including the human rights NGOs, B’tselem, in Israel,¹ and Addameer, in the occupied West Bank.²

- Because she has lived in this country for the past 20 years, Ms. Odeh’s ties to this country are far stronger than her ties to any other. She has made a deeply cathartic and rewarding life for herself and her community in Chicago, one that she has risked her personal liberty to maintain. She has shown by clear and convincing evidence that she has powerful personal motives to remain there, at any personal cost.
- Ms. Odeh has an exemplary personal history in all respects, except for the nonviolent offense of making a false statement on her naturalization application. She has suffered extraordinarily, but succeeded in transforming her suffering into an unquenchable energy to help others. In Chicago, she has steadfastly lived an exemplary life of public service.

¹ See, e.g., http://www.btselem.org/torture/201308_etzion

² See, e.g., <http://www.addameer.org/files/Reports/torture-eng.pdf>

By all accounts, including the statements of church-affiliated groups in Chicago and the 261 Arab women immigrants in Chicago who have informed the Court that they rely on Ms. Odeh heavily in trying to lead successful lives themselves, she is a great asset to the community of Chicago.

- Ms. Odeh has offered to undertake a variety of additional security measures, as well, as detailed in her motion, to secure her presence at sentencing.

For all of these reasons, we respectfully ask that you reconsider your decision to deny bond pending sentencing.

Respectfully submitted,

s/ Azadeh Shahshahani, Esq., President
National Lawyers Guild

s/ Rebecca Vilkomerson, Executive Director
Jewish Voice for Peace

s/ Maria LaHood, Esq., Senior Staff Attorney
Center for Constitutional Rights

s/ Samer Khalaf, Esq., National President
American-Arab Anti-Discrimination Committee (ADC)

s/ Dima Khalidi, Esq., Executive Director
Palestine Solidarity Legal Support

s/ Andrew Dalack, Esq. [not yet admitted to practice]
Ad Hoc Steering Committee, National Students for Justice in Palestine