APPENDIX A

Opinions of the United States Court of Appeals for the Second Circuit, *In re United States*, No. 18-3430 (Dec. 18, 2019)

18-3430
In re: United States of America

United States Court of Appeals
for the Second Circuit

AUGUST TERM 2018

Docket No. 18-3430

IN RE: UNITED STATES OF AMERICA,

UNITED STATES OF AMERICA,

Petitioner,

v.

YEHUDI MANZANO,

Respondent.

ARGUED: FEBRUARY 13, 2019

DECIDED: DECEMBER 18, 2019

Before: PARKER, CHIN, AND SULLIVAN, *Circuit Judges.*

On the eve of trial, the United States District Court for the District of Connecticut (Underhill, *Chief Judge*) ruled that Respondent – who is charged with,

inter alia, production of child pornography, an offense punishable by a mandatory minimum term of fifteen years' imprisonment – could argue jury nullification at trial. The district court also reserved decision on whether evidence of sentencing consequences would be admissible. The government now petitions for a writ of mandamus directing the district court to preclude defense counsel from arguing nullification and to exclude any evidence of sentencing consequences. We hold that the conditions for mandamus relief are satisfied with respect to the district court's nullification ruling, but not with respect to the admissibility of evidence of sentencing consequences. Thus, we grant in part and deny in part the petition.

Judge Parker concurs in part and dissents in part in a separate opinion.

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NORMAN A. PATTIS, Pattis & Smith, LLC, New Haven, CT, *for Respondent*.

JOHN GLEESON (Pooja A. Boisture, Nathan S. Richards, *on the brief*), Debevoise & Plimpton LLP, New York, NY, *for Amicus Curiae* The Honorable Stefan R. Underhill.

Clark M. Neily III, Jay R. Schweikert, Cato Institute, Washington, D.C., *counsel of record*, Mary Price, FAMM Foundation, Washington, D.C., Peter Goldberger, Ardmore, PA, Joel B. Rudin, National Association of Criminal Defense Lawyers, New York, NY, *for Amici Curiae* Cato Institute, FAMM Foundation, and National Association of Criminal Defense Lawyers.

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RICHARD J. SULLIVAN, *Circuit Judge*:

Respondent Yehudi Manzano stands charged with production of child pornography, an offense punishable by a mandatory minimum term of fifteen years' imprisonment, and transportation of child pornography, which is punishable by a mandatory minimum term of five years' imprisonment. Shortly before trial, he filed motions requesting permission to argue for jury nullification – in essence, that the jury should render a verdict not in accordance with the law – and to present evidence regarding the sentencing consequences of a conviction in this case. On the eve of trial, the district court (Underhill, *Chief Judge*) granted Manzano's request to argue jury nullification, but reserved decision on the admissibility of evidence regarding the sentencing consequences of a conviction.

The government now seeks a writ of mandamus directing the district court to (1) preclude defense counsel from arguing jury nullification, and (2) exclude any evidence of sentencing consequences at trial. Applying settled law in this circuit, we hold that the government has a clear and indisputable right to a writ directing the district court to deny defense counsel's motion for leave to argue jury

nullification, and that the other conditions for mandamus relief are satisfied. We further hold that, at this time, the government does not possess a clear and indisputable right to a writ directing the district court to exclude any evidence of sentencing consequences.

Accordingly, we grant in part and deny in part the government's petition.

I. BACKGROUND

A. Facts[1]

In October 2016, law enforcement officers in Connecticut received information that a 15-year-old girl, M.M., had been in a sexual relationship with Yehudi Manzano, the 31-one-year-old landlord of the building where she lived. During the ensuing state investigation, officers searched Manzano's cell phone pursuant to a warrant and discovered a video of M.M. and Manzano engaged in sexually explicit conduct.

M.M. knew that Manzano was recording the video at the time, and Manzano did not threaten her or force her to engage in the sexual conduct. Nonetheless, M.M. was 15 years old when the video was recorded and therefore was incapable

[1] The following facts have not yet been admitted into evidence in the district court, but the parties do not dispute them for the limited purpose of our review of the government's petition.

of consenting to sexual conduct as a matter of law. *See* Conn. Gen. Stat. § 53a-71(a)(1). Although Manzano did not distribute the video, he uploaded it, using internet servers located outside of Connecticut, to his personal Google Photos folder.

B. District Court Proceedings

In May 2018, a grand jury sitting in Connecticut returned an indictment charging Manzano with one count of production of child pornography, in violation of 18 U.S.C. § 2251(a), and one count of transportation of child pornography, in violation of 18 U.S.C. § 2252A(a)(1). The production count is punishable by a mandatory minimum term of fifteen years' imprisonment, 18 U.S.C. § 2251(e), while the transportation count is punishable by a mandatory minimum term of five years' imprisonment, *id.* § 2252A(b)(1). The district court set a trial date of October 29, 2018.

On October 1, 2018, Manzano filed a pretrial "Motion to Permit Counsel to Argue Jury Nullification" in which he sought "permission to make the jury aware of the penalty, and to argue that the [g]overnment's application of the law to the particular facts of this case is an obscene miscarriage of justice." *United States v. Manzano*, No. 18-cr-95 (SRU) (D. Conn. Oct. 1, 2018), ECF No. ("Doc. No.") 30. In

support of these requests, Manzano argued that "[b]ut for [M.M.'s] age, the contact was consensual," and "[b]ut for the fact that his telephone was seized pursuant to a warrant, no one would ever have had access to the film." *Id.* Manzano acknowledged that the government "may well be able to prove the elements of the [production] offense," but he insisted that "the conduct at issue here, while perhaps not innocent, [was] in no way so sinister as to warrant" the fifteen-year mandatory minimum penalty. *Id.*

On October 11, 2018, the government filed its opposition to Manzano's motion and requested that defense counsel "be precluded, through a jury address, witness examination, or offer of evidence, from informing the jury about the sentencing consequences or suggesting to the jury that they may acquit if they find the [g]overnment's prosecution or the sentencing consequences are unjust." Doc. No. 36 at 7. The government renewed that request in its motions *in limine*, filed October 23, 2018, which sought "to preclude evidence and/or argument of the propriety of the [g]overnment's prosecution." Doc. No. 45 at 9–10.

On October 25, 2018, with trial set to begin in four days, the district court held a pretrial conference at which it reserved decision on the government's motion. The next day, Manzano requested that the court rule on his still pending

"request to argue jury nullification and to present evidence of the sentencing consequences of a conviction to the jury." Doc. No. 48 at 10.

On October 29, 2018, the day the trial was scheduled to begin, the district court held another pretrial conference at which it granted Manzano's motion to permit counsel to argue jury nullification, while reserving decision on the admissibility of evidence related to sentencing consequences. In explaining its ruling, the district court began by observing that "[t]his is a shocking case . . . that calls for jury nullification."[2] Doc. No. 60 at 34. The court then ruled:

> [T]he law precludes me from charging the jury, the law precludes me from encouraging the jury, and I don't intend to do that. But if evidence comes in about the length of sentence, or if [defense counsel] chooses to argue, I do not feel that I can preclude that. I don't feel I'm required to preclude that. And I think justice requires that I permit that. So it's not going to come from me, but I think justice cannot be done here if the jury is not informed, perhaps by [defense counsel], that that's the consequence here.

[2] More fully, the district court explained:

> This is a shocking case. This is a case that calls for jury nullification. . . . I am absolutely stunned that this case, with a 15-year mandatory minimum, has been brought by the government. . . . I am going to be allowed no discretion at sentencing to consider the seriousness of this conduct or the lack or seriousness of this conduct, and it is extremely unfortunate that the power of the government has been used in this way, to what end I'm not sure.

Doc. No. 60 at 34.

Id. at 34–35. The district court memorialized its ruling in a minute entry stating that "[Manzano's] motion is granted to the extent it seeks permission to argue for jury nullification." Doc. No. 58.

The government immediately filed an emergency motion to adjourn the trial while it sought permission from the Solicitor General's Office to file a petition for writ of mandamus in this court. At an emergency motion hearing held the same day, the district court granted the government's motion, dismissed the jury, and adjourned the trial pending our resolution of the government's petition. With respect to its jury nullification ruling, the district court also reiterated: "I simply am allowing [defense counsel] to argue as he chooses to argue. There is no doubt that juries have the power to nullify, and [defense counsel] intends to argue that they should." Doc. No. 62 at 4–5.

This petition for a writ of mandamus followed.

II. DISCUSSION

The common-law writ of mandamus is codified in the All Writs Act, which provides that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a); *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004). "The

traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine [the court against which mandamus is sought] to a lawful exercise of its prescribed jurisdiction." *Cheney*, 542 U.S. at 380 (alteration in original) (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943)). Although courts have not subscribed to a "technical definition of 'jurisdiction,'" it is common ground that mandamus may lie only in "exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion." *Id.* (internal quotation marks and citations omitted).

"The writ is, of course, to be used sparingly." *Stein v. KPMG, LLP*, 486 F.3d 753, 760 (2d Cir. 2007). Thus, three demanding conditions must be satisfied before the writ may issue: (1) the petitioner must "have no other adequate means to attain the relief [it] desires;" (2) the petitioner must satisfy "the burden of showing that [its] right to issuance of the writ is clear and indisputable;" and (3) the issuing court "must be satisfied that the writ is appropriate under the circumstances." *Cheney*, 542 U.S. at 380–81 (internal quotation marks and citations omitted).

Here, the government petitions for a writ of mandamus directing the district court to (1) preclude defense counsel from arguing jury nullification at trial, and

(2) exclude any evidence regarding the applicable mandatory minimum sentences. Applying the framework set forth in *Cheney*, we consider each claim in turn.

A. Jury Nullification

1. Other Adequate Means to Obtain the Relief Sought

To satisfy the first *Cheney* condition, a petitioner must show that it "ha[s] no other adequate means to attain the relief [it] desires." *Id.* at 380. This requirement is generally unsatisfied where (1) the district court has not yet foreclosed the relief sought in the petition, *see Kerr v. U.S. Dist. Court*, 426 U.S. 394, 404–06 (1976); *see also, e.g.*, *Philip Morris Inc. v. Nat'l Asbestos Workers Med. Fund*, 214 F.3d 132, 135 (2d Cir. 2000) (per curiam), or (2) the petitioner can obtain relief through the regular appeals process, *see Cheney*, 542 U.S. at 380–81.

Appearing as *amicus*, Judge Underhill contends that his ruling permitting defense counsel to argue jury nullification did "'not foreclose' the relief the [g]overnment seeks" because it was contingent on later rulings of the court. Brief of the Honorable Stefan R. Underhill as *Amicus Curiae* at 14 (quoting *Kerr*, 426 U.S. at 404); *see also, e.g.*, *In re Cohn*, 416 F.2d 440, 441 (2d Cir. 1969) (per curiam) (denying a petition for writ of mandamus where it was "clear that the district judge, in denying the application for adjournment [of trial], d[id] not view his

action as being final"). In particular, Judge Underhill argues that his ruling was contingent on whether evidence of the applicable mandatory minimums would later be ruled admissible at trial. We are not persuaded.

As an initial matter, Manzano did not seek permission to argue jury nullification only in the event he could introduce evidence of the mandatory minimums at trial. Rather, he filed a pretrial "Motion to Permit Counsel to Argue Jury Nullification," which sought the court's permission "both to inform the jury of the consequences of a conviction, and to argue to the jury that the law as applied [to] the particular facts of this case is . . . fundamentally unfair." Doc. No. 30 at 2. Likewise, the government's request to preclude defense counsel from arguing jury nullification was not predicated on the admissibility of evidence. In its opposition to Manzano's motion, the government requested that counsel be precluded from arguing jury nullification "through a jury address, witness examination, or offer of evidence." Doc. No. 36 at 7. The government's motions *in limine* similarly sought "to preclude evidence *and/or argument* of the propriety of the [g]overnment's prosecution." Doc. No. 45 at 9–10 (emphasis added).

The district court granted Manzano's motion and denied the government's corresponding request and motion *in limine* without any relevant qualification.

Although the district court recognized that evidence of the mandatory minimums was *a* basis for defense counsel's jury nullification argument, the district court did not limit its ruling to that basis. Rather, the district court ruled: "If evidence comes in about the length of sentence, *or if [defense counsel] chooses to argue*, I do not feel that I can preclude that. . . . And I think justice requires that I permit that." Doc. No. 60 at 34–35 (emphasis added). Consistent with this unambiguous statement, the district court memorialized its ruling in a minute entry that stated clearly and without any qualification that "[Manzano's] motion is granted to the extent it seeks permission to argue for jury nullification."[3] Doc. No. 58. On this record, there can be no doubt that the district court granted defense counsel's request to argue jury

[3] Our dissenting colleague points to the district court's remark, made at a hearing held later the same day, that if "evidence of the mandatory minimum[s] . . . comes in as a matter of trial evidence, [defense counsel] is permitted to argue from that to the jury." Doc. No. 62 at 6–7. That statement, however, came only after the district court had already ruled, and in any event, it was consistent with the court's earlier observation that evidence of the mandatory minimums was one way in which defense counsel might attempt to argue nullification. Moreover, in the same hearing, the district court also stated that it was "simply allowing [defense counsel] to argue as he chooses to argue," while recognizing that "juries have the power to nullify, and [defense counsel] intends to argue that they should." *Id.* at 4–5.

The dissent also relies in part on arguments advanced by Judge Underhill as *amicus*. Dissenting Op. at 16. While we have given due consideration to these arguments, which Judge Underhill permissibly raised through counsel in this mandamus proceeding, *see Ligon v. City of New York*, 736 F.3d 166, 171 & n.11 (2d Cir. 2013), ultimately we must ground our assessment of the proceedings below in the record rather than the parties' briefs, *see, e.g.*, *Cross & Cross Properties, Ltd. v. Everett Allied Co.*, 886 F.2d 497, 505 (2d Cir. 1989).

nullification at trial, and that such a ruling was not contingent on later evidentiary rulings of the court.

We also conclude that the ordinary appeals process would not afford the government an adequate means of obtaining the relief it seeks. *See Cheney*, 542 U.S. at 380–81. The regular appeals process will be unavailable to the government if Manzano prevails at trial, because double jeopardy will have attached and the government will not be able to appeal the jury's verdict of acquittal. *See* U.S. Const. amend. V; 18 U.S.C. § 3731; *see also, e.g.*, *United States v. Amante*, 418 F.3d 220, 222 (2d Cir. 2005). Conversely, "if the government were to secure a conviction, any appeal would be moot and any alleged error would necessarily be harmless." *Amante*, 418 F.3d at 222. It is true, of course, that mandamus may not be invoked as a "substitute" for an interlocutory appeal – an uncontroversial rule that is made no "less compelling by the fact that the [g]overnment has no later right to appeal." *Will v. United States*, 389 U.S. 90, 97 (1967) (internal quotation marks, citation, and ellipses omitted). Our precedents make it abundantly clear, however, that the government's limited right of appeal in criminal cases is relevant to the mandamus inquiry. *See, e.g.*, *Amante*, 418 F.3d at 222; *In re United States*, 903 F.2d 88, 89 (2d Cir. 1990); *see also United States v. Sam Goody, Inc.*, 675 F.2d 17, 25 (2d Cir. 1982)

(discussing the rule stated in *Will* and recognizing that "[t]he writ thus is not to be granted *merely* because it is the only way in which the district court's new-trial order might be reviewed" (emphasis added)), *superseded by statute on other grounds as stated in United States v. Hundley*, 858 F.2d 58 (2d Cir. 1988); *United States v. Weinstein*, 511 F.2d 622, 627 (2d Cir. 1975) (granting a petition for writ of mandamus in part due to the "risk that the [g]overnment might be precluded on double jeopardy grounds from appealing"). Thus, the first *Cheney* condition is plainly satisfied. *See Amante*, 418 F.3d at 222; *In re United States*, 903 F.2d at 89.

2. "Clear and Indisputable" Right to the Writ

The second *Cheney* condition requires that a petitioner's "right to issuance of the writ [be] 'clear and indisputable.'" 542 U.S. at 381 (quoting *Kerr*, 426 U.S. at 403). This condition is satisfied where a district court commits "a clear and indisputable abuse of its discretion," that is, where the court clearly and indisputably "base[s] its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or . . . render[s] a decision that cannot be located within the range of permissible decisions." *Linde v. Arab Bank, PLC*, 706 F.3d 92, 107 (2d Cir. 2013) (quoting *SEC v. Rajaratnam*, 622 F.3d 159, 171 (2d Cir. 2010)).

We focus here on the first form of abuse of discretion – a ruling based on an erroneous view of the law. The government contends that the district court clearly and indisputably based its ruling on the erroneous legal view that a defendant may, in certain circumstances, argue jury nullification. Manzano responds that the government's right to a writ of mandamus is not clear and indisputable because no binding authority specifically prevents a district court from allowing counsel to argue jury nullification. The necessary implication of Manzano's argument is that district courts have the discretion to allow jury nullification arguments in certain cases, and that the district court's ruling in this case was not clearly outside the "range of permissible decisions." *Id.*

Manzano's argument misperceives our mandamus standard. We have never required petitioners to point to binding authority directly on point in order to establish their entitlement to the writ. *See, e.g.*, *Stein*, 486 F.3d at 760. Indeed, imposing such a requirement would mean casting aside one of the "touchstones" of mandamus review – the "presence of an issue of first impression." *Amante*, 418 F.3d at 222; *see also Schlagenhauf v. Holder*, 379 U.S. 104, 111 (1964) (concluding that the Court of Appeals should have exercised its mandamus power over "issues of first impression" in order "to settle new and important problems"); *infra* at 22.

Thus, in determining whether a district court has clearly and indisputably based its ruling on a legal error, we do not confine our review to the narrow (and often empty) universe of binding cases directly on point. *See, e.g.*, *In re City of New York*, 607 F.3d 923, 947 (2d Cir. 2010). Instead, as in any case, we may consider all relevant legal authorities. *See, e.g.*, *id.*; *see also, e.g.*, *San Jose Mercury News, Inc. v. U.S. Dist. Court*, 187 F.3d 1096, 1102 (9th Cir. 1999) ("While we have never squarely [answered the question presented in this mandamus petition], we conclude that the unbroken string of [analogous and out-of-circuit] authorities . . . leaves little doubt as to the answer."). The ultimate question is simply whether, bearing in mind the exceptional nature of mandamus, we are left with the "firm conviction" that the district court's view of the law was incorrect.[4] *In re Int'l Bus. Machines Corp.*, 687 F.2d 591, 600 (2d Cir. 1982); *see also In re Cement Antitrust Litig. (MDL No. 296)*, 688 F.2d 1297, 1305–07, 1306 n.6 (9th Cir. 1982) (adopting the "firm

[4] The dissent labels this formulation of the "clear and indisputable" requirement as "entirely ad hoc," "generat[ing] chaos," and amounting to no "justiciable standard." Dissenting Op. at 20–21. But courts routinely apply this formulation in the mandamus context, *see, e.g.*, *In re Int'l Bus. Machines Corp.*, 687 F.2d 591, 600 (2d Cir. 1982); *see also, e.g.*, *In re Bryant*, 745 F. App'x 215, 220 (5th Cir. 2018); *In re United States*, 884 F.3d 830, 836–37 (9th Cir. 2018); *Waymo LLC v. Uber Techs., Inc.*, 870 F.3d 1350, 1359 (Fed. Cir. 2017); *John B. v. Goetz*, 531 F.3d 448, 459 (6th Cir. 2008), and of course this formulation of the clear-error standard has been ubiquitous in the context of appellate review of factual findings since the Supreme Court first articulated it in *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *see also, e.g.*, *United States v. Simmons*, 661 F.3d 151, 155 (2d Cir. 2011) ("In order to [reverse for clear error], we must be left with the definite and firm conviction that a mistake has been committed." (internal quotation marks and citation omitted)).

conviction" standard for clear legal error in the mandamus context (citing *Int'l Bus. Machines*, 687 F.2d at 599–603)), *aff'd by an equally divided court sub nom. Arizona v. U.S. Dist. Court*, 459 U.S. 1191 (1983).

In this case, we are left with the firm conviction that the district court based its jury nullification ruling on an erroneous view of the law. Our case law is clear: "it is not the proper role of courts to encourage nullification." *United States v. Polouizzi*, 564 F.3d 142, 162–63 (2d Cir. 2009). Rather, "the power of juries to 'nullify' or exercise a power of lenity is just that – a power; it is by no means a right or something that a judge should encourage or permit if it is within his authority to prevent." *United States v. Thomas*, 116 F.3d 606, 615 (2d Cir. 1997).

Here, the district court in fact recognized that our case law "preclude[d] it from encouraging the jury" to nullify, Doc. No. 60 at 34, but then proceeded to draw an arbitrary distinction between encouraging the jury via jury instructions – which it properly deemed impermissible – and granting defense counsel's motion to argue nullification. This distinction is unsupported by our case law.

In *Thomas*, we concluded that "a presiding judge possesses both the responsibility and the authority to dismiss a juror whose refusal or unwillingness to follow the applicable law becomes known to the judge during the course of

trial." 116 F.3d at 617. In reaching that conclusion, we explained in no uncertain terms that "trial courts have the duty to forestall or prevent" jury nullification. *Id.* at 616. Our reasoning was thus not limited to the specific facts at issue. Instead, "tak[ing] th[e] occasion to restate some basic principles regarding the character of our jury system," we "categorically reject[ed] the idea that, in a society committed to the rule of law, jury nullification is desirable or that courts may permit it to occur when it is within their authority to prevent." *Id.* at 614. We have since applied the principles set forth in *Thomas* beyond the specific circumstances of that case, *see, e.g.*, *Polouizzi*, 564 F.3d at 162–63; *United States v. Carr*, 424 F.3d 213, 219–21 (2d Cir. 2005); *United States v. Pabon-Cruz*, 391 F.3d 86, 95 (2d Cir. 2004), and we have no hesitation doing so again here.

Applying the principles enunciated in *Thomas*, we emphatically reject the rule, advanced by Judge Underhill as *amicus*, that district courts are free to permit jury nullification arguments whenever they feel justice so requires – in other words, in any case in which the court strongly disagrees with the government's charging decisions and the attendant sentencing consequences. As a practical matter, there is no meaningful difference between a court's knowing failure to remove a juror intent on nullification, a court's instruction to the jury that

encourages nullification, and a court's ruling that affirmatively permits counsel to argue nullification. In each of these situations, the conduct in question subverts the jury's solemn duty to "take the law from the court, and apply that law to the facts of the case as they find them to be from the evidence." *Sparf v. United States*, 156 U.S. 51, 102 (1895); *see United States v. Trujillo*, 714 F.2d 102, 106 (11th Cir. 1983) ("We therefore join with those courts which hold that defense counsel may not argue jury nullification during closing argument."); *see also, e.g.*, *United States v. Gonzalez-Perez*, 778 F.3d 3, 18–19 (1st Cir. 2015); *United States v. Dougherty*, 473 F.2d 1113, 1130–37 (D.C. Cir. 1972). District courts have a duty to forestall or prevent such conduct, *see Thomas*, 116 F.3d at 616, and the district court in this case abdicated its duty by ruling that defense counsel could argue jury nullification.[5]

We have no doubt that in granting Manzano's motion to argue for jury nullification, Judge Underhill was acting under the sincere belief that his ruling was consistent with, and perhaps mandated by, the ends of justice. Nevertheless, individual judges, cloaked with the authority granted by Article III of the Constitution, are not at liberty to impose their personal view of a just result in the

[5] Indeed, Judge Underhill's statements that he thought this case "calls for jury nullification," and that "justice cannot be done here if the jury is not informed, perhaps by [defense counsel]," of the sentencing consequences, Doc. No. 60 at 34–35, suggest not simply a ruling that actively permits nullification, but literal encouragement of jury nullification.

face of a contrary rule of law. *See Hart v. Massanari*, 266 F.3d 1155, 1171, 1175 (9th Cir. 2001) ("Judges of the inferior courts may voice their criticisms [of a law], but follow it they must. . . . A district court bound by circuit authority, for example, has no choice but to follow it, even if convinced that such authority was wrongly decided."); *see also Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015) ("[O]nce a case or controversy properly comes before a court, judges are bound by federal law."). Nor are judges prosecutorial gatekeepers who may override the government's constitutional exercise of charging discretion in the name of justice. *See United States v. Batchelder*, 442 U.S. 114, 124 (1979); *United States v. Lovasco*, 431 U.S. 783, 790 (1977). Contrary to the dissent's suggestion, the fact that we might disagree with the government's charging decision, or lack a full understanding of that decision, provides no basis for holding this matter in abeyance and remanding so that the prosecutors can "revisit their charging decision" or "provide information as to why they believed their decision was appropriate." Dissenting Op. at 1. Subject to narrow exceptions not implicated here, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his

discretion." *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *see also, e.g.*, *United States v. Ng*, 699 F.2d 63, 68 (2d Cir. 1983) ("Although one may reasonably disagree with the [government's] judgment in the matter, the evaluation of charges clearly rested within [its] prosecutorial discretion.").

Finally, the district court's ruling may not be upheld on the basis of its supervisory power "to oversee the administration of criminal justice within federal courts." *United States v. Johnson*, 221 F.3d 83, 96 (2d Cir. 2000). As the Supreme Court has held, "the supervisory power does not extend so far" as to "confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing." *United States v. Payner*, 447 U.S. 727, 737 (1980); *see also United States v. Myers*, 692 F.2d 823, 847 (2d Cir. 1982) ("[Supervisory power] has not been used as a general corrective authority over the conduct of criminal investigations, and, in light of *Payner*, its scope is surely not to be expanded."). Clearly, then, the supervisory power does not authorize a court to grant a defendant's request to argue that the jury should disregard the law.

For these reasons, we are firmly convinced that the district court's jury nullification ruling was based on an erroneous view of the law.[6] Accordingly, the

[6] In so concluding, we have no occasion to pass on whether, or to what extent, a district court must *sua sponte* police a lawyer's arguments to the jury that sound in nullification.

government has a clear and indisputable right to a writ of mandamus directing the district court to deny defense counsel's request for leave to argue nullification.

3. Appropriateness of Mandamus under the Circumstances

The third and final *Cheney* condition requires us to determine whether "the writ is appropriate under the circumstances." *Cheney*, 542 U.S. at 381. "This requirement recognizes that 'issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed.'" *Linde*, 706 F.3d at 108 (quoting *Kerr*, 426 U.S. at 403). In exercising this discretion, we may "consider a range of factors, including whether the petition presents a 'novel and significant question of law' . . . [or] 'a legal issue whose resolution will aid in the administration of justice.'" *Id.* (quoting *In re City of New York*, 607 F.3d at 939).

We have little trouble concluding that mandamus is appropriate here. The specific question of whether a district court may actively permit a defendant to argue jury nullification is novel and significant in this circuit. Furthermore, resolving this issue will aid in the administration of justice. Obviously, our decision will serve to guide district courts in any criminal case in which a defendant requests leave to argue jury nullification or the government moves to preclude such argument. But more generally, today we reaffirm a principle of

fundamental importance in our jury system: namely, that the role of the court is to ensure, to the extent possible, that justice is done in accordance with the law – not in derogation of it. This principle is worthy of our mandamus jurisdiction.

Because the government has satisfied all three *Cheney* conditions, we grant the government's petition for a writ of mandamus directing the district court to vacate its prior order and to deny defense counsel's request for leave to argue jury nullification at trial.

B. Evidence of Mandatory Minimum Sentences

The government also seeks a writ of mandamus directing the district court to bar the admission of any evidence related to the sentencing consequences that would result from Manzano's convictions. With respect to this form of mandamus relief, we conclude that the *Cheney* conditions are not satisfied at this time.

1. Other Adequate Means to Obtain the Relief Sought

As for the first *Cheney* condition, the government arguably has other means short of mandamus to preclude the introduction of the statutory mandatory minimums, since the district court has yet to rule on the admissibility of such evidence. *See Kerr*, 426 U.S. at 404–06; *see also, e.g.*, *In re United States*, 884 F.3d 830, 838 (9th Cir. 2018); *Philip Morris Inc.*, 214 F.3d at 135. In contrast to the district

court's ruling that defense counsel would be permitted to argue for jury nullification at trial, the district court consistently manifested its intent to defer ruling on the admissibility of evidence related to sentencing consequences until after the commencement of trial. When ruling on Manzano's request to argue jury nullification, the district court observed that one way in which Manzano could argue nullification was through evidence related to sentencing consequences "*if* [such] evidence comes in." Doc. No. 60 at 34 (emphasis added). Similarly, at the October 29, 2018 emergency motion hearing, the district court again recognized that evidence of sentencing consequences could support Manzano's jury nullification arguments "if that evidence comes in as a matter of trial evidence." Doc. No. 62 at 6. Thus, the district court has not yet ruled out the possibility that evidence related to sentencing consequences will be precluded at trial.

Of course, insofar as the government's petition specifically seeks a *pretrial* evidentiary ruling precluding evidence of sentencing consequences, mandamus now would be the only means by which the government could obtain such relief, since the district court expressly deferred its ruling until after the commencement of trial. Nevertheless, even assuming that the government has preserved a specific

request for pretrial relief, we conclude that the government's right to the writ is not clear and indisputable for the reasons set forth below.

2. "Clear and Indisputable" Right to the Writ

In general, a mandamus petitioner challenging a district court's discretionary ruling faces a particularly daunting task. As we have explained, a petitioner may satisfy the second *Cheney* condition by demonstrating that the district court clearly and indisputably abused its discretion in rendering a decision that is well outside "the range of permissible decisions." *Linde*, 706 F.3d at 107 (quoting *Rajaratnam*, 622 F.3d at 171). However, the more discretion the district court enjoys in a given area, the greater the range of permissible decisions, and thus the less likely it will be that any abuse of discretion is "clear and indisputable." *See Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (per curiam) ("Where a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'"); *UAW v. Nat'l Caucus of Labor Comms.*, 525 F.2d 323, 326 (2d Cir. 1975) ("As to orders which lie within the discretion of the district judge[,] it is settled law in this Circuit that mandamus will not – indeed, may not – be issued except in the most extraordinary circumstances.").

In this case, by seeking a writ of a mandamus directing the district court to issue a pretrial ruling precluding any evidence of sentencing consequences at trial, the government necessarily challenges not one, but two discretionary decisions: (1) the district court's decision regarding *when* to rule on pretrial evidentiary motions, and (2) its decision regarding *how* to rule on the merits of those motions.

As for *when* an evidentiary ruling must be made, district courts enjoy broad discretion to defer ruling on a pretrial motion for "good cause." Fed. R. Crim. P. 12(d); *see also United States v. Barletta*, 644 F.2d 50, 57–59 (1st Cir. 1981). A district court may defer ruling where, for example, the resolution of a pretrial motion might depend in part upon evidence to be introduced at trial. *See United States v. Shortt Accountancy Corp.*, 785 F.2d 1448, 1453 (9th Cir. 1986); *Barletta*, 644 F.2d at 57–59; *see also, e.g.*, *United States v. Williams*, 644 F.2d 950, 952–53 (2d Cir. 1981). Similarly, with respect to the merits of an evidentiary ruling, district courts "enjoy considerable discretion to decide evidentiary issues" within the bounds of the Federal Rules of Evidence. *United States v. Gabinskaya*, 829 F.3d 127, 134 (2d Cir. 2016); *see also United States v. Coppola*, 671 F.3d 220, 244 (2d Cir. 2012) ("The standard of review applicable to [an appellant's] Rule 401/403 challenge is highly deferential in recognition of the district court's superior position to assess

relevancy and to weigh the probative value of evidence against its potential for unfair prejudice." (internal quotation marks and citation omitted)).

The government attempts to cut through these layers of discretion by arguing, in essence, that the district court committed clear legal error (and thus a clear abuse of discretion) by failing to preclude evidence of the mandatory minimum sentences, which will be offered solely for the improper purpose of encouraging nullification. If we were confident in the premise that evidence of sentencing consequences will be offered solely for that improper purpose, we would agree that the district court clearly erred in failing to preclude such evidence, even at the pretrial stage. As the government correctly argues, there is no difference between improperly permitting defense counsel to argue nullification and admitting evidence for the sole purpose of encouraging nullification. *See United States v. Funches*, 135 F.3d 1405, 1409 (11th Cir. 1998) ("Because the jury enjoys no right to nullify criminal laws, and the defendant enjoys a right to neither a nullification instruction nor a nullification argument to the jury, the potential for nullification is no basis for admitting otherwise irrelevant evidence."). Evidence admitted solely to encourage nullification is by definition irrelevant, and thus inadmissible, regardless of what other evidence might be

introduced at trial. *See* Fed. R. Evid. 401–02; *Shannon v. United States*, 512 U.S. 573, 579 (1994).

On the sparse pretrial record in this case, however, it is not clear whether Manzano will seek to introduce evidence of sentencing consequences solely for the purpose of encouraging nullification. Indeed, at oral argument, defense counsel proffered an additional purpose for such evidence. Specifically, counsel stated that he may offer as impeachment evidence M.M.'s purported Facebook post of the government's press release setting forth the mandatory minimums for the purpose of showing M.M.'s bias or improper motive. In that event, given that there is no "absolute prohibition" on exposing the jury to sentencing consequences, *Shannon*, 512 U.S. at 588; *see also Polouizzi*, 564 F.3d at 161, the district court would need to assess whether the alleged impeachment evidence is relevant based on how the trial unfolds (e.g., whether M.M. testifies and the nature of her testimony), and, if it is, whether it passes muster under Rule 403, *see, e.g.*, *United States v. DiMarzo*, 80 F.3d 656, 660 (1st Cir. 1996).

Thus, we cannot rule out the possibility that the admissibility of sentencing consequences will depend at least in part on events that will unfold at trial. In these circumstances, the district court's decision to defer ruling on the

admissibility of sentencing consequences until after the commencement of trial was not clearly and indisputably outside the range of permissible decisions. *See Barletta*, 644 F.2d at 57–59; *Shortt Accountancy Corp.*, 785 F.2d at 1453. Because the district court's decision therefore did not constitute a clear and indisputable abuse of discretion, the second *Cheney* condition is not satisfied.

Lest our decision be misunderstood, however, we must emphasize two important points. First, if the district court finds that Manzano is indeed seeking to introduce evidence of sentencing consequences solely for the purpose of encouraging nullification, the court must exclude that evidence as irrelevant. *See supra* at 27–28. Second, by concluding that the demanding mandamus standard has not been satisfied on the pretrial record here, we do not thereby endorse a rule that evidence of sentencing consequences is generally admissible under Rule 403. In this context, a district court's discretion should be guided by the special considerations referenced in *Shannon* – namely, that evidence of sentencing consequences "invites [jurors] to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion." 512 U.S. at 579; *see also, e.g.*, *DiMarzo*, 80 F.3d at 660 (concluding that even if evidence of a "guideline sentencing range had some

minimal probative value," the district court did not err in excluding it "given the considerations alluded to in *Shannon*" (citing Fed. R. Evid. 403)).

At this time, however, we do not undertake to define the rare circumstances in which evidence of sentencing consequences might pass muster under Rule 403. Nor do we offer any opinion on whether those circumstances might present themselves during the trial in this case. Rather, we simply hold that, on the pretrial record here, the government has failed to demonstrate its clear and indisputable right to the writ as required by the second *Cheney* condition.

Accordingly, we deny the government's petition for a writ of mandamus directing the district court to preclude the introduction at trial of any evidence related to sentencing consequences, without prejudice to renewal following the district court's ultimate ruling on the motion to preclude. Because our familiarity with the procedural history and issues in this case will allow us to respond expeditiously to any future petition during trial, this panel will retain jurisdiction over any future petition in this case related to the admissibility of the sentencing consequences of a conviction or, more generally, jury nullification. *See, e.g.*, *Philip Morris Inc.*, 214 F.3d at 135–36.

III. CONCLUSION

The jury remains today, as it has been for centuries, "a central foundation of our justice system and our democracy." *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 860 (2017). For our system to work, the court and the jury must work as partners to ensure that justice is done in accordance with the law. Of course, jurists and laypersons alike may disagree over whether justice and the law align in a given case. It is paramount, however, that in a society committed to the rule of law courts may not encourage or actively permit juries to ignore the law in the name of justice. *See Sparf*, 156 U.S. at 102; *Thomas*, 116 F.3d at 614; *Dougherty*, 473 F.2d at 1133–34; *United States v. Simpson*, 460 F.2d 515, 519–20 (9th Cir. 1972).

For the foregoing reasons, the petition for a writ of mandamus directing the district court to deny defense counsel's request for leave to argue jury nullification is GRANTED. The petition for a writ of mandamus directing the district court to exclude any evidence related to sentencing consequences is DENIED. The district court is hereby instructed to lift the stay of trial proceedings.

BARRINGTON D. PARKER, *Circuit Judge*, concurring in part and dissenting in part:

We are fortunate that the prosecutors in this Circuit nearly always bring a high degree of professionalism, good judgment, and common sense to bear in the exercise of their responsibilities. This case presents the unusual circumstance where a conscientious jurist is confronted with a charging decision that, in his considered judgment, reflects an abuse of prosecutorial power. Charging decisions are, of course, by and large the exclusive province of prosecutors.

There is a straightforward solution that could avoid the problems raised by the petition and discussed in this dissent. The petition should be held in abeyance and the case remanded to the District Court, at which time the prosecutors could revisit their charging decision. If they chose not to do so, they could provide information as to why they believed their decision was appropriate. If this approach did not resolve the problem, this Court could then revisit the petition.

Faced with the Government's charging decision, Judge Underhill could, I suppose, have acquiesced in whatever the prosecutors wanted. But he is not a piece of Steuben glass. Instead, witnessing what he perceived to be abuse, he pushed back. I believe that most conscientious jurists would have done the same. I have no difficulty concluding that Judge Underhill was right to do so. "[F]ederal

courts have authority under their supervisory powers to oversee the administration of criminal justice within federal courts." *United States v. Johnson*, 221 F.3d 83, 96 (2d Cir. 2000) (quoting *Daye v. Attorney Gen.*, 712 F.2d 1566, 1571 (2d Cir. 1983)). They should use these powers "to see that the waters of justice are not polluted" and "to protect the integrity of the federal courts." *United States v. Payner*, 447 U.S. 727, 744 (1980); *accord United States v. HSBC Bank USA, N.A.*, 863 F.3d 125, 135 (2d Cir. 2017). Their supervisory powers are not restricted to the protection of explicit constitutional rights. *McNabb v. United States*, 318 U.S. 332, 341 (1943). The powers exist "in order to maintain respect for law" and to "promote confidence in the administration of justice." *Olmstead v. United States*, 277 U.S. 438, 484 (1928) (Brandeis, J., dissenting); *accord Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974); *United States v. Getto*, 729 F.3d 221, 229 (2d Cir. 2013). The supervisory powers should be sparingly exercised. *HSBC*, 863 F.3d at 136. Judges are not, of course, free to disregard the limitations of the law they are charged with enforcing under the guise of exercising supervisory powers or at other times. *Payner*, 447 U.S. at 737. But since *Payner*, we have recognized that within their supervisory powers, courts should "not hesitate to scrutinize the Government's conduct to ensure that it comports with the highest standards of fairness." *Johnson*,

221 F.3d at 96 (quoting *United States v. Lawlor*, 168 F.3d 633, 637 (2d Cir. 1999)). This requirement applies with particular force in contexts such as charging and sentencing, especially those involving mandatory minimum sentences, where the Government plays an "often decisive role." *Id.*

Whether Judge Underhill went too far is debatable. But because this case does not come close to meeting the exacting standards for mandamus, I respectfully dissent from the majority's grant of a writ directing the District Court to allow no arguments for jury nullification. I concur to the extent that the majority denies a writ directing the District Court to exclude at trial evidence of sentencing consequences.

I

Our knowledge of the relevant facts, as the majority concedes, is incomplete: significant holes exist in the record and pretrial proceedings remain ongoing. What we know by way of background is that in the course of a state investigation of a statutory rape charge, Connecticut prosecutors discovered a video, which they referred for federal prosecution. The video depicted Manzano, who was thirty-one, and M.M, a fifteen-year old girl who was a tenant in the building where he was superintendent, engaging in explicit sexual conduct. M.M. knew that

Manzano was recording the video at the time, and there is no evidence that he had threatened her.

Eventually, Manzano attempted to delete the video, but he was unsuccessful. Unbeknownst to him, the video remained in the cloud storage associated with Manzano's Google account, where digital forensic examiners discovered it. There is no suggestion in the record that the video was ever shared with anyone else, a point the prosecutors concede. Indeed, there is no indication in the record that anyone aside from Manzano has ever seen the video (except, of course, the Government). Because the cellular phone that recorded the video had traveled in interstate commerce, and Google cloud storage is hosted on servers in several states, the prosecutors charged Manzano with interstate production and transportation of child pornography. These offenses carry mandatory minimum sentences of fifteen and five years, respectively.

In May 2018, a grand jury indicted Manzano on the two counts and the case was assigned to Judge Underhill. Early in the case, Judge Underhill told Assistant U.S. Attorneys Neeraj Patel and Sarah Karwan what he thought of the Government's charging decision. He called this a "shocking case" and said that he was "absolutely stunned" that the Government had brought a charge carrying a

fifteen-year mandatory minimum, a charge that gave him no sentencing discretion. *United States v. Manzano*, No. 18-cr-95 (SRU) (D. Conn. Oct. 29, 2018), ECF No. ("Doc. No.") 60, at 34. The record does not contain an explanation from the prosecutors.

During pretrial proceedings, Manzano sought permission to argue for jury nullification. His counsel contended that the prosecutors' "application of the law to the particular facts of this case is an obscene miscarriage of justice" and that the conduct in question "is in no way so sinister as to warrant such a penalty" because it "is not the sort of conduct Congress sought to proscribe." Doc. No. 30, at 1-2. The court did not rule on the motion at that point.

Manzano proposed raising jury nullification during voir dire. Specifically, he requested that Judge Underhill inform the jurors of their "right to determine whether the Government has justly prosecuted" Manzano and ask whether they were "comfortable sitting in judgment over the Government's decision to prosecute." Doc. No. 35, at 1. Manzano also requested that prospective jurors be asked whether they understood that one of their "functions as jurors in judging whether the Government has justly proceeded in this prosecution is to determine whether the sentencing consequences of a conviction are fair, just and reasonable."

Id. at 2. Ultimately, the District Court declined to ask these questions. Judge Underhill later explained:

> I screened out jurors at jury selection, and anybody who could not follow the law we struck for cause. So this jury has already been selected with jurors who can follow the rule of law. And at that time I rejected [Manzano's] efforts to raise the jury nullification issue; and there is no reason to believe, therefore, that this jury is prone to nullification. So I have done what I can to minimize the risk of nullification, as I am required to do.

Doc. No. 62, at 3.

A week before trial was scheduled to begin, Manzano submitted a proposed jury charge on nullification, which would have instructed the jury that it had "the power to determine whether the Government has justly prosecuted Mr. Manzano for the crimes charged in this case." Doc. No. 44, at 1. The District Court did not adopt this charge, and it instead stated its intention to instruct the jury as follows:

> Duties of the Jury
>
> It is your duty to find the facts from all evidence in the case. In reaching a verdict you must carefully and impartially consider all the evidence in the case and then apply the law as I have explained it to you. *Regardless of any opinion you may have about what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any understanding or interpretation of the law other than the one I give you. . . .*

> Closing Instructions on Charged Offenses
>
> If you, the jury, find beyond a reasonable doubt from the evidence in this case that the government has proved each of the foregoing elements for a particular count, then proof of the crime charged is complete, *and you should find Mr. Manzano guilty on that count*. . . .
>
> The Jury Is Not to Consider Punishment
>
> *The question of the possible punishment that Mr. Manzano will receive if convicted is of no concern to the jury and should not, in any way, enter into or influence your deliberations.* The duty of imposing a sentence rests exclusively upon the judge. Your function is to weigh the evidence in the case and to determine whether or not Mr. Manzano has been proven guilty beyond a reasonable doubt of the crimes charged, solely upon the basis of such evidence. *Under your oath as jurors, you cannot allow a consideration of the punishment that may be imposed upon Mr. Manzano, if convicted, to influence your verdict or enter into your deliberations.*

Doc No. 62, at 5-6 (emphasis added). We, of course, presume that the jury would follow these instructions.

At a pretrial conference on October 29, Manzano renewed his request to argue for jury nullification. Manzano stressed that the case involved a brief video, deleted before anyone had seen it. The Court responded:

> This is a shocking case. This is a case that calls for jury nullification. *I have been told by the Second Circuit that I cannot encourage jury nullification, and I do not intend to encourage jury nullification.* But I am absolutely stunned that this case, with a 15-year mandatory minimum, has been brought by the government.

> I am going to be allowed no discretion at sentencing to consider the seriousness of this conduct or the lack of seriousness of this conduct, and it is extremely unfortunate that the power of the government has been used in this way, to what end I'm not sure.
>
> *So the law precludes me from charging the jury, the law precludes me from encouraging the jury, and I don't intend to do that.* But if evidence comes in about the length of sentence, or if [defense counsel] chooses to argue, I do not feel that I can preclude that. I don't feel I'm required to preclude that. And I think justice requires that I permit that. *So it's not going to come from me*, but I think justice cannot be done here if the jury is not informed, perhaps by [defense counsel], that that's the consequence here.

Doc No. 60, at 34-35 (emphasis added). The District Court, after discussing in detail the relevant law, stated, "I have no intention as I said this morning, of instructing the jury on the mandatory minimums or their power to nullify. Instead, I am simply allowing [Manzano] to argue as he chooses to argue. . . . I also intend to, as I said this morning, instruct the jury specifically that they must follow the law." Doc. No. 62, at 4-5.

Later that day, the clerk made a minute entry stating that "[Manzano's] motion is granted to the extent it seeks permission to argue for jury nullification." Contrary to what the majority contends, what Judge Underhill actually decided is, as I read the record, not set forth simply in the minute entry. That entry must be read in conjunction with his remarks on the record. He made clear that he could

not and would not encourage jury nullification. Judge Underhill explained only that if evidence of the mandatory minimum properly came before the jury, he did not think he could preclude or would be required to preclude defense counsel from making arguments to the jury based on that evidence. Whether defense counsel could fashion permissible legal arguments is something we cannot know at this point. What we do know is that Judge Underhill made unmistakably clear that he intended to instruct the jury that punishment was of no concern to them and that jurors could not allow a consideration of punishment to influence their deliberations or their verdict.

The prosecutors moved to stay the trial to allow time to pursue a potential mandamus petition. After explaining why mandamus was not appropriate and warning that forbidding Manzano from making arguments grounded in properly admitted evidence could raise Sixth Amendment concerns, the District Court stayed the trial pending resolution of any mandamus petition filed by the prosecutors.

II

An especially unsettling aspect of this case is that the record the prosecution presented to the District Court and to this Court is barren of anything that would

explain, much less justify, the prosecutors' decision to file the most serious child pornography charges available to them against a man who made a single video which no one else ever saw and which he then attempted to erase. Based on what he had seen, Judge Underhill believed that a miscarriage of justice would occur if this man were required to spend fifteen years in prison for this conduct.

During proceedings below, Judge Underhill called on the prosecutors to explain their charging decision. They did not do so.[1] During oral argument, we asked Assistant U.S. Attorney Sandra Glover for help in understanding the Government's charging decision. Again, we got nothing of use. We were told only that the Government had additional information about Manzano that it expected to bring forth at sentencing. The incompleteness of the record before us underscores the inappropriateness of mandamus. I do not believe mandamus can be an appropriate remedy when essential information is unavailable.

If convicted, Manzano deserves substantial punishment, but the conduct charged in this case does not remotely resemble the conduct for which prosecutors have threatened fifteen-year mandatory sentences in any of the myriad child pornography cases decided in this Circuit. *See, e.g.*, *United States v. Brown*, 843 F.3d

[1] Instead, they stated that they might offer evidence in rebuttal or at sentencing that would speak to the appropriateness of a lengthy sentence. Doc. No. 60, at 35-36.

74, 78 (2d Cir. 2016) (25,000 still images, 365 videos, 4 images involving torture, 60 displaying bondage, 30 depicting bestiality, 18 involving infants, 294 victims); *United States v. Gilmore*, 599 F.3d 160, 162 (2d Cir. 2010) (70 photographs of eight-year-old daughter distributed online; physical sexual abuse facilitated by liquor and sleeping pills; collection of 662 images and 10 video clips); *United States v. Jimenez*, No. 16-cr-60-A, 2019 WL 2211458, at *1 (W.D.N.Y. May 22, 2019) (babysitter repeatedly raped and photographed three-year-old girl over the course of eight-and-a-half months); *United States v. Thomas*, No. 12-cr-37, 2018 WL 4146596, at *2 (D. Vt. Aug. 30, 2018) (hundreds of videos and misrepresentation of identity to solicit 12-year-old girl); *United States v. Rafferty*, 529 F. App'x 10, 12 (2d Cir. 2013) (summary order) (production of four videos of nine-year-old girl engaging in sexual conduct with mentally ill adult woman); *United States v. Spoor*, 904 F.3d 141, 146 (2d Cir. 2018) (numerous videos of seven- and eight-year-old boys, including defendant's son, filmed using hidden camera); *United States v. Archambault*, 740 F. App'x 195, 202 (2d Cir. 2018) (summary order) (recidivist offender with evidence of repeated acts of predation); *United States v. Broxmeyer*, 699 F.3d 265, 269-70 (2d Cir. 2012) (field hockey coach distributed explicit photos of himself to high school students, encouraged them to produce similar images,

and engaged them in intercourse and sodomy); *United States v. Puglisi*, 458 F. App'x 31, 35-36 (2d Cir. 2012) (summary order) (teacher offered repeated material inducements to teenage students and obstructed authorities' attempts to obtain evidence). *See generally United States v. Jenkins*, 854 F.3d 181, 188 (2d Cir. 2017) (discussing the severity of child pornography sentencing); *United States v. Dorvee*, 616 F.3d 174, 186 (2d Cir. 2010) (same).

It is highly unlikely—indeed inconceivable—that what Manzano did was what Congress had in mind when it provided for fifteen-year mandatory sentences. *Cf. United States v. Murphy*, 942 F.3d 73, 80 (2d Cir. 2019) (recognizing the relevance of "how the statute was intended to operate" in assessing the propriety of up to thirty years' imprisonment for a charged offense). Manzano's single video did not involve the commercial production or distribution or filesharing of child pornography. The video, made with the knowledge of both subjects, did not depict sadistic, masochistic, or violent conduct. The charged offense involved one video, not 600 or more images.[2] Moreover, whereas courts

[2] Manzano's conduct was less severe than the vast majority of cases where mandatory minimum sentences were imposed. Unlike 96.9% of transportation cases, the single video at issue did not depict a minor under the age of 12. *See* U.S. Sentencing Comm'n, *Federal Child Pornography Offenses* 209, 266 (2012). Unlike 82.1% of transportation cases, it did not involve sadistic, masochistic, or violent conduct. *See id.* at 209. It did not involve the commercial production, distribution, or sharing of child pornography, and it certainly did not involve 600 or more images. *See id.* at xi

have typically treated "personal" distribution of child pornography (e.g., individual email or direct communication between two offenders) to adult offenders as the most serious offense, this case involves unintentional transmission to a computer system, accessed only by law enforcement. *See* U.S. Sentencing Comm'n, *Federal Child Pornography Offenses* 151-52 (2012). Even those cases where only possession is charged and no mandatory minimum is threatened generally involve these features, but they are absent here. *See id.* at 209 tbl.8-1.

U.S. Attorney John H. Durham may not have been aware that the Sentencing Commission has emphasized in no uncertain terms that "the mandatory minimum penalties for certain child pornography offenses and the resulting guidelines sentencing ranges may be excessively severe and as a result are being applied inconsistently," U.S. Sentencing Comm'n, *Mandatory Minimum Penalties for Federal Sex Offenses* 56 (2019). Speaking to this inconsistency, the Commission has observed that "there is little difference in the underlying conduct of offenders charged with possession offenses," which do not carry a mandatory minimum penalty, "compared to the conduct of offenders charged with receipt offenses," which do carry a mandatory minimum. *Id.* at 48. As of 2012, 95.3% of offenders

n.57, 125, 209; U.S.S.G. § 2G2.2, Commentary ¶ 6(B)(ii) (2018) (treating a video as equivalent to seventy-five images).

sentenced only for possession had engaged in conduct that would have carried at least a five-year mandatory minimum if more severe charges had been brought. *Id.* at 14.

Recognizing the harshness of the statutory penalties, federal prosecutors in this Circuit have generally made reasonable charging decisions, reserving fifteen-year mandatory minimum sentences for the worst offenders. Yet in this case, faced with an offense that would not even have qualified for common sentencing enhancements if only possession had been charged, prosecutors have chosen to bring the most severe charges available to them, threatening—for a single video that was never shared and was later deleted—a mandatory minimum that many physical sexual abuse offenses do not carry. *See id.* (explaining that only 52.3% of physical sexual abuse offenders face a fifteen-year mandatory minimum sentence); *cf., e.g.*, *Flores v. Barr*, No. 17-3421 (2d Cir. Oct. 17, 2017), ECF No. 100, at 4 (describing a three-and-a-half year sentence for a man who repeatedly sexually assaulted his seven- and eleven-year-old step-grandchildren). Nothing in the record explains Durham's choice in this case. Perhaps the Government has good reasons for what it did. If so, knowledge of those reasons would certainly assist me in evaluating the prosecutor's application for mandamus.

III

In any event, the requirements for mandamus have not been met. A writ of mandamus is intended to confine the court against which mandamus is sought to the "lawful exercise of its prescribed jurisdiction." *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004). It is "a drastic and extraordinary remedy reserved for really extraordinary causes." *Id.* "Mere error, even gross error in a particular case . . . does not suffice to support issuance of a writ." *In re United States*, 733 F.2d 10, 13 (2d Cir. 1984). The Supreme Court has said that it "has never approved the use of the writ to review an interlocutory procedural order in a criminal case which did not have the effect of a dismissal." *Will v. United States*, 389 U.S. 90, 98 (1967). It has also said that mandamus "has been invoked successfully where the action of the trial court totally deprived the Government of its right to initiate a prosecution and where the court overreached its judicial power to deny the Government the rightful fruits of a valid conviction." *Id.* at 97-98 (citations omitted). Judge Underhill was unquestionably "within his jurisdiction." This case is an important one but is not, on any reasonable calculus, extraordinary. And the majority submerges itself in error correction. The use of mandamus to supervise

pretrial proceedings takes this Court on an ill-advised journey down the wrong road.

A petitioner seeking mandamus must establish that (1) there are "no other adequate means to attain the [desired] relief," (2) the "right to issuance of the writ is clear and indisputable," and (3) "the writ is appropriate under the circumstances." *Cheney*, 542 U.S. at 380-81. This test has not been satisfied.

Adequate Alternative for Relief

The majority and I interpret what Judge Underhill decided differently. The majority concludes that "there can be no doubt that the district court granted defense counsel's request to argue jury nullification at trial, and that such a ruling was not contingent on later evidentiary rulings of this court." Majority Op. at 12. That assertion is inconsistent with my reading of the record. What Judge Underhill said is that "[i]f I, under certain circumstances, can admit evidence of the mandatory minimum, *if that evidence comes in as a matter of trial evidence*, he is permitted to argue from that to the jury, period." Doc. No. 62, at 6-7 (emphasis added). Judge Underhill's amicus brief explains that "the District Court was clear that it will permit [jury nullification] argument[s] only if evidence of the mandatory minimums is found admissible at trial." Underhill Amicus Br. at 14.

Judge Underhill has not allowed Manzano to argue unqualifiedly for jury nullification.

What the District Court has done is decline to preclude Manzano from attempting to do so in the event that he is later able to lay the proper foundation for introducing evidence of the mandatory minimums. Mandamus is not available to review this ruling because it was a conditional ruling which does "not foreclose" the relief the Government seeks. *Kerr v. U.S. Dist. Court for N. Dist. of Cal.*, 426 U.S. 394, 404 (1976). Evidence of mandatory minimum sentences, if and when it is offered at trial, might not be admissible under the Federal Rules of Evidence. Defense counsel might fail to lay adequate foundation for this evidence, or the Government might prevail in its objection to the proffer. If the Government succeeds in keeping the evidence out, no argument from that evidence, whether for jury nullification or some other purpose, will be permitted. Even if the evidence is admitted, the Government might succeed in a later objection in cabining defense counsel's closing argument or in preventing nullification arguments altogether because of what actually happened at trial. At this point, no one knows what may happen. I do not believe that the minute entry can properly be read in isolation from Judge Underhill's explanation of what he intended. Judge Underhill viewed

his ruling as contingent, and mandamus is not available when "[i]t is clear that the district judge . . . does not view his action as being final," *In re Cohn*, 416 F.2d 440, 441 (2d Cir. 1969) (per curiam). Prosecutors have no right to appeal *potential* evidentiary errors.

But which side has the better of this argument does not matter. Assuming the majority is correct, the prosecutors are still not entitled to mandamus. The only reason the majority posits as to why the prosecutors have no adequate alternative for relief is that, if Manzano is acquitted, Judge Underhill's evidentiary decisions will not be appealable. This contention is a nonstarter. The point is not merely that the prosecutors have an adequate alternative for relief; the point is that they are not entitled to the relief they want in the first place. Our case law is unambiguous that the fact that the Government may be unable to appeal is insufficient to warrant mandamus review. *Will* is clear as can be on this point: "Nor is the case against permitting the writ to be used as a substitute for interlocutory appeal made less compelling by the fact that the Government has no later right to appeal." 389 U.S. at 97; *accord United States v. Sam Goody, Inc.*, 675 F.2d 17, 25 (2d Cir. 1982); *United States v. Margiotta*, 662 F.2d 131, 134 n.8 (2d Cir. 1981); *United States v. Weinstein*,

511 F.2d 622, 626 (2d Cir. 1975); *see also United States v. Coonan*, 839 F.2d 886, 896 (2d Cir. 1988) (Altimari, J., dissenting).

We are dealing with an evidentiary ruling in a context in which Congress has spoken. Mandamus should not be employed to amend statutes. 18 U.S.C. § 3731 limits appeals by the Government from evidentiary decisions in criminal cases to appeals "from a decision or order of a district court suppressing or excluding evidence . . . if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding." The statute does not allow appeals from orders admitting evidence, deferring ruling on motions, or setting bounds on closing arguments. "Congress clearly contemplated when it placed drastic limits upon the Government's right of review in criminal cases that it would be completely unable to secure review of some orders having a substantial effect on its ability to secure criminal convictions." *Will*, 389 U.S. at 97 n.5. Mandamus, the Supreme Court has cautioned, "may never be employed as a substitute for appeal in derogation of these clear policies." *Id.* at 97. Our Court has further emphasized that "[u]se of the writ as a substitute for appeal or as a means

of circumventing the Criminal Appeals Act [18 U.S.C. § 3731] is barred." *Weinstein*, 511 F.2d at 626.

The fact that some appellate judges might be firmly convinced that trial court decisions are wrong is of no moment. "Certainly, Congress knew that some interlocutory orders might be erroneous when it chose to make them nonreviewable." *Will*, 389 U.S. at 98 n.6. The majority's reasoning, with respect, contains no analytic limitation on the types of pretrial rulings on arguments or trial management issues that can or cannot be the subject of mandamus or that can or cannot reach this Court on interlocutory appeal. The majority's approach, in other words, is entirely ad hoc. And ad hoc jurisprudence generates chaos.

No Clear and Indisputable Right

Moreover, the Government is not entitled to mandamus because its right to the writ is not "clear and indisputable," something the Government concedes *twice. See* Pet. at 27 ("[T]his Court has not expressly held that a defendant may not argue for nullification . . . ."); Reply at 12 ("As the government acknowledged in its petition, there is no case from this Court expressly addressing the precise situation here."). No decision of this Court has even addressed, let alone clearly and indisputably decided, whether, given what the prosecutors below are doing,

a district court has the discretion to permit defense counsel to make arguments of some sort or another that raise nullification.

The majority attempts to sidestep this failure by arguing that this requirement can be dispensed with so long as "we are firmly convinced that the district court's view of the law was incorrect." Majority Op. at 15. There are significant problems with this approach. It reads the "clear and indisputable" requirement out of the test. That I am "firmly convinced" an error has occurred simply means that I believe I am correct. Someone's firm conviction, however strong or sincere, is not (and can never be) the same thing as a "clear and indisputable right." After all, a great many evidentiary or procedural rulings made during the course of a trial can leave an impression with one or another appellate judge that the ruling was incorrect. If a "firm belief' that error has occurred were sufficient, no justiciable standard for mandamus would, or could ever, exist.[3]

Our jurisdiction as prescribed in 28 U.S.C. § 1291 entitles litigants to appeal to this court from "final decisions." A limited number of exceptions are set forth

[3] The majority claims that the "firm conviction" standard is routinely applied, noting its similarity to the clear error standard used in reviewing district courts' findings of fact. However, although a "firm conviction" may be enough to show that an error was clear, it does not establish that the matter is indisputable or that a writ of mandamus should issue. I may be firmly convinced of a proposition while acknowledging that it is subject to dispute, and mandamus is an inappropriate remedy in such a situation.

in § 1292 and in 18 U.S.C. § 3731 for criminal appeals. On the one hand, these provisions cut off most interlocutory appeals. On the other, they ensure that courts of appeals function in the way Congress intended. The fact that the term "final decisions" is generally very well understood is an important source of fairness and predictability in appellate procedure. Only a narrow class of decisions can trigger interlocutory appeals. Litigants and jurists, therefore, know which matters can and cannot get before a court of appeals and how to get them there. The majority's ad hoc approach does violence to this understanding because it makes the availability of interlocutory appeals unknowable in advance and essentially dependent on random considerations such as the preferences of panel members.

In the absence of controlling precedent, the majority relies on *United States v. Thomas*, 116 F.3d 606 (2d Cir. 1997). The majority claims that *Thomas* addressed "a court's knowing failure to remove a juror who is intent on nullification." Majority Op. at 17. However, in *Thomas*, we vacated several convictions because, desirous of preventing nullification, the district court had removed a deliberating juror who simply found the Government's evidence insufficient. Far from sounding an alarm about the dangers of nullification, *Thomas* warned against too probing an inquiry into whether deliberating jurors intend to nullify, for fear that

this inquiry would "permit judicial interference with, if not usurpation of, the fact-finding role of the jury." *Id.* at 622.

More pointedly, the entire discussion of jury nullification upon which the majority now relies was unnecessary to the ultimate holding in *Thomas* and was, therefore, dicta that cannot support or justify mandamus relief. Only holdings create "established law"; language that is unnecessary to those holdings does not. *See* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1282 (2006) ("If a rule was declared only in dictum, the question remains undecided."). The holding of *Thomas* was that a district judge may properly remove for cause a juror who refuses to follow the law only if the record leaves no doubt that the juror would engage in nullification. 116 F.3d at 618, 622, 625. The question whether a district court has the discretion, in an appropriate case, to permit a defense lawyer to discuss jury nullification was not before the Court, was not decided by the Court, and, as noted, remains an open question in this Circuit.[4]

In addition to being an open question, it is a difficult and nuanced one. Closing arguments of defense counsel have long been recognized as a

[4] The majority also invokes *Shannon*, 512 U.S. 573 (1994), *Polouizzi*, 564 F.3d 142 (2d Cir. 2009), and *Pabon-Cruz*, 391 F.3d 86 (2d Cir. 2004). Nothing in the holding of any of these cases speaks to appropriate limitations on a defendant's summation. Each addresses whether a *judge* may inform the jury of sentencing consequences or encourage nullification in the *court's* charge.

fundamental aspect of a fair trial, and a judge presiding over trial "must be and is given great latitude" over the scope of summations. *Herring v. New York*, 422 U.S. 853, 862 (1975). Appellate courts are not well-suited, particularly on truncated records involving ongoing proceedings, to ensure that a trial is fair.

Writ Inappropriate Under the Circumstances

Finally, the writ is not appropriate under the circumstances of this case. Judge Underhill was confronted with a charging decision by the prosecutors that prima facie indicated serious overreach and foreshadowed a miscarriage of justice. At each step, he gave thoughtful consideration to the issues raised, the relevant precedent, and the magnitude of the stakes involved, not just as they impacted the prosecutors but also as they impacted a man about to be sentenced (by the prosecutors) to fifteen years of incarceration. Consistent with *Thomas*, he empaneled only jurors who could follow the law. Consistent with *Shannon*, *Polouizzi*, and *Pabon-Cruz*, he made unmistakably clear his intention to instruct the jury that they must not consider punishment in determining guilt. Given the gross uncertainty that exists at the intersection between prima facie prosecutorial overreach and arguments that might sound in nullification, Judge Underhill

walked a fine line. Jurists might agree or disagree with what he did, but there was no abuse of discretion and certainly none that was clear and indisputable.

I would deny the petition in its entirety.

APPENDIX B

Order of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing En Banc, *In re United States*, No. 18-3430 (Jan. 31, 2020)

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 31st day of January, two thousand twenty.

In Re: United States of America,
Petitioner.
****

United States of America,

Petitioner,

v.

Yehudi Manzano,

Respondent.

ORDER

Docket No: 18-3430

Respondent, Yehudi Manzano, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

APPENDIX C

Transcript Containing The Decision of the United District Court For The District of Connecticut, *United States of America v. Yehudi Manzano*, No. 3:18-cr-00095 (Oct. 29, 2018)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA, Government,	:	No. 3:18-cr-00095(SRU)
	:	915 Lafayette Boulevard
	:	Bridgeport, Connecticut
v.	:	
	:	October 29, 2018
YEHUDI MANZANO, Defendant.	:	

MOTION HEARING (CORRECTED VERSION)

B E F O R E:

THE HONORABLE STEFAN R. UNDERHILL, U. S. D. J.

A P P E A R A N C E S:

FOR THE GOVERNMENT:

UNITED STATES ATTORNEY'S OFFICE
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BY: NORMAN A. PATTIS, ESQ.

GUARDIAN AD LITEM FOR THE VICTIM/MINOR:

VICTIM RIGHTS CENTER OF CT, INC.
8 Research Parkway
Wallingford, Connecticut 06492
BY: MAURA CROSSIN, ESQ.

Sharon L. Masse, RMR, CRR
Official Court Reporter

(Proceedings commenced at 10:54 a.m.)

THE COURT: All right. What issues do we have to take up?

MR. PATTIS: I raised a series of motions on the 26th, which was last Friday, and it would be my hope that as many of them as possible could be resolved today.

The first issue I raised on page 1 -- or 2, rather, of my motion was some confusion on my part about how the jury was going to be charged as to the 2251 count. This is the conjunctive/disjunctive argument. I don't know if the Court has -- and I believe the Court was aware that there was some disagreement between the parties as to how this would be charged on Thursday evening. I feel that I need to know what I'm shooting at before we begin evidence. And so is the Court prepared to make a decision here?

THE COURT: I am. I forgot to bring out with me your pleading from Friday. So --

MR. PATTIS: May I approach?

THE COURT: Yes, sure.

MR. PATTIS: (Handing.)

THE COURT: Well, I've taken a look at this issue, and in my view the law is clear that there is a minimal interstate commerce requirement here. It seems surprising to me; but, apparently, the mere fact that the

recording equipment was manufactured outside of Connecticut is sufficient to meet the interstate commerce requirement of the statute.

MR. PATTIS: My question was, if you compare the language of 18 U.S.C. 2251 with the indictment, the indictment charges it in a way that's at variance with the statute, and it's my view that the government is bound by that. In other words, in the government's indictment it was "knew or had reason to know," colon, and then A, B and C. And the know or have reason to know should modify each of those three elements. The statute is not written that way, but that's how the government chose to charge this case, and that's how we're prepared to defend it on the basis that there is a scienter requirement as to each of the alternatives. If you look at the statute itself, it dispenses with colons and semicolons.

THE COURT: Well, I don't think you can change the requirements of the statute by the way in which the indictment is pled.

MR. PATTIS: You may not be able to. We didn't move to dismiss on that grounds. I'd make an oral motion to dismiss then. Because what we were provided with was notice that the government intended to proceed on a theory that my client knew or had reason to know that this item was transmitted in interstate commerce, not simply that it

had passed in interstate commerce. And that's a significant difference.

What the Court will learn and has probably gleaned from the pleadings is this was not an image which was distributed to the world at large; it was moved from a phone and apparently saved onto a Google account; never, you know, distributed in any meaningful way. So, you know, the government has two theories. It was produced by a phone that moved in interstate commerce. It was then distributed to the cloud or to some electronic thing by a thing that -- in a manner that affects interstate commerce.

As pled, Judge, this case gave us notice that the government was -- the government gave us notice that it was proceeding that Mr. Manzano had reason to -- knew or had reason to know these things, and we think they have to prove that. To suggest otherwise is to eliminate scienter from a specific intent crime, and I don't think that's the law, notwithstanding what the statute says.

MR. PATEL: Your Honor, I think that the motion defense -- Attorney Pattis filed raises two issues. One is whether we have to prove all three interstate elements, which I think the case law -- because the indictment is worded in the conjunctive, the statute is worded in the disjunctive, and I think the case law from all the

circuits pretty much states that indictments can be worded in the conjunctive even though the statute is worded in the disjunctive, and that conviction would be supported by proof of any one of those three interstate -- alternative interstate elements.

So to that argument, to the extent he's still raising that issue, we would argue that we only have to satisfy any one of those three interstate elements.

As to the knowing and have reason to know that, that first element was kind of wordy, and so the colon was there to explain that knowing and have reason to know applied to everything up to that first semicolon because there were so much verbs and interstate aspects to that first interstate element. I think the case law is -- which we've cited in our opposition to the motion to adjourn, talks about several circuits that have held that the knowing and having reason to know only applies to the first interstate alternative that's in the statute, not to all three.

And although the Second Circuit hasn't expressly ruled -- hasn't decided that issue, several other circuits have, and the Second Circuit has noted that the reason Congress enacted the other two alternative interstate elements was to allow the government to proceed when knowledge was absent. And that was *United States v.*

Holton, Second Circuit, 2003.

MR. PATTIS: Our position, Judge, is that in the absence of any controlling authority, the government is bound by its information -- or by its indictment, rather; and, you know, we're all competent, at least serviceable writers here. When you introduce a series by a colon and then separate what follows with semicolons, you're attributing the attributes of the thing to the left of the colon to everything in the series on the right. And the government attributed knowledge to the second and third elements, and it's our view that that's the manner in which this case should proceed.

THE COURT: I'm going to deny the motion to dismiss. I think this is not a significant deviation from the statute, and the statute does not impute a knowledge element to the last two options of the interstate commerce requirement. And in my view, this was easily discovered, comparing the statute to the language of the indictment. The government does not, in my view, take on a higher burden by misdescribing the requirements of the statute.

MR. PATTIS: Given that misdescription, Judge, I'd ask for an adjournment of trial, then, because it's one thing to make representations that I'm not going to oppose certain testimony when it served my interest to do so, but now I may seek to preclude the government's use of

certain evidence.

For example, Friday we received notice of an expert, who's apparently going to rely upon the testimonial equivalent of technology in rendering his opinion. And we may claim that that is a violation of *Melendez-Diaz.* I raised that issue most recently a month ago in a state court prosecution where a statistical tool was used to calculate the likelihood of a certain individual's DNA in a mixture. Candidly, the Court disagreed with me. But it's my position that when experts rely on a black box in forming their opinion and testify on that opinion, that black box is the functional equivalent of testimony, and I have a right to cross-examine the box. But I can't do so. So somebody who's qualified to talk about the box has to come in to offer that testimony. It's not clear to me that the government is prepared to do that, and I'm not prepared to waive that claim.

So I claim surprise by the manner in which this was drafted. The statute itself is less illuminating in the manner in which it's written than the indictment was. But now if I'm going to have to defend an offense that is a specific intent offense, without a mens rea, that's a different defense than the one I'm prepared to raise.

THE COURT: The statute is not a specific intent

statute, except with respect to the first interstate commerce element. So it doesn't become a specific intent statute through the --

MR. PATTIS: That's not at all clear from the statute itself. And it's not clear from the case law. I mean, it doesn't say, for example, knowing in one respect and ignorantly or otherwise, or that it's a strict liability defense with respect to a second alternative. The statute doesn't say that.

THE COURT: Well, I think a fair reading of it makes clear that it's not a specific intent with respect to parts 2 and 3 of the interstate commerce requirement. So I'm going to deny the motion for adjournment.

MR. PATTIS: Okay. The second issue is I've asked for an adjournment on the grounds that given the manner in which the government crafted this indictment and the manner in which it now is proceeding at trial, I don't know what the grand jury was told to get the indictment. Were they led to believe what the indictment says, that each of them had to be knowing? Did they know that they were being asked to consider what amounts to a strict liability offense; if the phone moved in interstate commerce, it didn't matter whether you know it or not? Given the manner in which the indictment is written and was signed by the foreperson, I don't know. So I'm asking

for an adjournment of the proceedings, and I'd like an opportunity to brief whether I'm entitled to the complete set of grand jury minutes to challenge what it is the government may or may not have told the grand jury to get this indictment.

MR. PATEL: Your Honor, we would oppose that request. I don't want to discuss, actually, what was told to the grand jury in an open courtroom, but the -- I would just say that his argument is without merit. It's hard for me to say without disclosing what was the instructions given to the grand jury. But it was in accordance with the law, as Your Honor set forth a few minutes ago.

MR. PATTIS: I have no reason to doubt that that's Mr. Patel's perspective, but I'm also the person who's claiming prejudice by the manner in which he amended -- attempted -- or in which he crafted the indictment. His view was it was intended to clarify a statute that was perhaps too wordy, or I'm maybe putting words in his mouth, that was prolix, and I don't know whether the jurors were invited to consider something other than the statutory requirement given the manner in which the indictment was written.

THE COURT: Well, I'm going to deny the motion for adjournment on that basis. I think it's unlikely to reveal any prejudicial misconduct by the prosecutor that

would justify throwing out the indictment.

MR. PATTIS: Judge, I would note that in the Court's preliminary instructions it substantially agreed with what the defense had written, and there was some discussion Thursday. If this Court was potentially, I don't want to say misled, but if this Court was inclined to reach a conclusion at variance with the government's theory of the case and the Court has experience with the law and understands the law, how am I to have any confidence that the grand jury was in a better position than you were? So I'm requesting the release of those grand jury minutes. If you're not going to adjourn the trial, I'd nonetheless like them to preserve whatever appellate remedies we have, including the Court abused its discretion in not giving us these.

THE COURT: Okay. We'll talk about that after the trial.

MR. PATTIS: It may be too late for me to seek relief at that point, Judge. The government, for example, sought an interlocutory appeal on a nullification case when it was clear that, in its view, something was going to proceed on an unlawful basis. Suppose I had those grand jury minutes and I was able to persuade a court that this trial should not go forward because the indictment was obtained in violation of the law. It would be too

late for my client, who might be serving time at that point.

THE COURT: Well, I don't think it will be too late.

MR. PATTIS: If you're not the one serving the time, respectfully, sir. My client is, and he's got a young family. I don't think he should be required to bear that risk when there are questions that this Court may not regard as serious -- I do -- as to why the indictment is at variance with the law on its face.

THE COURT: Well...

MR. PATEL: Your Honor, again, I don't want to divulge what was discussed to the grand jury when there's members of the public here, but suffice it to say they were instructed in accordance with the law that, as set forth in our jury instructions, which I think is what Your Honor noted, that the knowing and have reason to know only applies to the first interstate element and not the other two.

THE COURT: All right. Well, do you have a problem turning over the charge given to the jury?

MR. PATEL: Just one moment, Your Honor.

(Pause.)

Your Honor, perhaps what we should -- one suggestion is the Court could review the instructions or

the minutes in camera and see if it meets the burden -- whether there is anything in there that warrants disclosure to the defendant.

MR. PATTIS: Here's the problem. That's certainly the way it's done in New York State procedure, Judge, but if the grand jury -- if grand jury secrecy is intended to protect against disclosure of investigation for a person wrongfully accused, and there's potential Brady material in here that may or may not affect the integrity of the prosecution, what's the harm in letting the defendant see it? We're not asking that this go to the *New York Times*. It was his reputational interest that the grand jury was intended to protect in any case. They've indicted; they've charged.

Our view is that the indictment that was signed is materially different than the law they're requesting to be applied in this case on its face. And so we think we're entitled to see that.

THE COURT: All right. I think you should turn over the jury charge, the grand jury charge. It'll be --

MR. PATEL: It will have to be transcribed, Your Honor. The testimony of the witnesses or the witness has been turned over --

THE COURT: Right.

MR. PATEL: -- but the actual what happens

before and after the witness testifies, I don't think that's transcribed in the normal course.

THE COURT: Okay.

MR. PATTIS: So it would have to be transcribed. I don't know if that will be done by tomorrow.

THE COURT: Well, let's -- how were you going to show it to me if you weren't going to transcribe it?

MR. PATEL: I'll have to find out what -- I'll have to contact the court reporter and make arrangements for that to happen.

THE COURT: Okay, let's do that. It'll be provided to Mr. Pattis to be in confidence.

MR. PATTIS: Understood. Understood, sir.

THE COURT: Okay.

MR. PATTIS: There is an open question and the Court may want to consider this on a question-by-question basis at trial, and I think you may have indicated -- the Court may have indicated that that was what it was going to do, and that is as to the relevance of the underlying state court prosecution to this prosecution. I didn't bring my notes with me from Thursday evening.

THE COURT: Well, I don't really understand how that could be potentially relevant.

MR. PATTIS: Well, here's the problem. Let's go to -- look at Issue Number 6. I have two sovereigns

prosecuting my client at the same time and two different sets of charges. One depends almost entirely on the credibility of the complaining witness. The other can be tried, frankly, without her. And yours is the one that can be tried without her.

If my client testifies in this case that he was engaged in consensual activity with her, or he made a mistake of age and was involved with her, that would be admissible in the state court proceeding and will undo his defense in that case where he has to attack her credibility altogether because it doesn't rely on computer-generated evidence, and so forth. So clearly what happens in this courtroom is going to matter what happens in the other courtroom, from his -- from the standpoint of his interests. And every decision he makes on evidence here is going to have a bearing on what potentially happens in another trial, in another court.

Why should the government be treated any differently in this case? We had a prosecution pending in the state court with far fewer penalties where the testimony of the accuser is fundamental; and, Judge, we have videotapes filmed of her, ample social media communication where she's done nothing but torture this family, promised to see him ruined, boasted about the types of car she's going to drive with the proceeds of

this litigation. She sued him. She made law enforcement aware when she first gave a statement about -- or shortly thereafter, if not initially in the first statement, of the existence of this videotape, and yet for some great period of time no prosecution arose. Is it possible that this is a -- this prosecution is being used as a proxy for the state prosecution, where they don't want her to have to testify? If they get enough time here -- and you're aware of the mandatory minimum -- there may not be a state prosecution.

I agree it doesn't go, strictly speaking, to one of the elements, but my adversary here is the United States government, not the accuser, and the United States government comes in here under the same testimonial burdens, through its agent, I presume, that any other witness does, and its interest in the outcome of this case, its motive in bringing this case I think is fair game for the jury. And so I would contend that the relationship of the two prosecutions is important for this jury to know in evaluating whether this prosecution is warranted.

THE COURT: What prevents you from subpoenaing the minor to testify at trial?

MR. PATTIS: I don't want her to testify. I'm not sure I understand the import of that question.

THE COURT: You seem to be complaining that you're going to be able to attack her credibility, but in the federal prosecution they don't have to put her on, and therefore you'll be deprived of that opportunity.

MR. PATTIS: No. It's a little bit more nuanced than that, and I apologize for not being clear. The government, in my view, could arguably proceed in this case without the alleged victim. It would be difficult, but it could. It cannot proceed in the state court prosecution, which talks about a course of sexual conduct.

If my client -- my client may take inconsistent positions in this case and in the defense case. He may claim here -- he may not contest in this case that he was involved with her, but that he simply didn't know her age or have any reason to know that the items used as part of the crime were moving in interstate commerce. He may deny any conduct with her altogether in the state court proceeding.

You've not seen the videotape yet, and so the videotape does not show his face. At most it shows a ring on a hand, on a body, and the body is hers, and she'll testify that the hand and the ring was his. So the State of Connecticut cannot prove penetration, sexual conduct without her testimony in the state court trial.

It strikes me that this is one of those vagaries

of federalism cases where we had a state court prosecution that predates this one, and somehow this one arose when the sovereigns, at least as Connecticut sovereign, was well aware of this videotape for quite some time, and suddenly we are in a federal forum where my client is facing 15 years. Anything he says in this court is going to be used against him in another court if he makes an admission. Somehow I feel jerked around a little bit by the two sovereigns, hand in hand, playing -- playing, in effect, pocket pool with justice. I realize that it's not double jeopardy in the sense that they're different sovereigns, but try telling that to a client who existentially faces consequences in two fora and has to sort through how those two cases interact.

I think that because the United States government brought this charge, knowing full well that there was a pending state court charge, the government or its agent who testifies should be required to answer questions about that decision. What is their motive in bringing this case? What is their interest in the outcome of this case?

For example, many state prosecutors will not prosecute under the state possession of child pornography law of film because it is an affirmative and complete defense for possession of three or fewer images.

Connecticut prosecutors have thus far not adopted the practice of regarding each frame in the film as a separate image, so thus any one -- a one-second montage with 60 things could be 60 images. Could it be that we're here because the State wouldn't prosecute? And could it be that the State wouldn't prosecute because there was no violation of the law? You know, I think that's a factor the jury could consider. And I'll concede, Judge, that it's related to my nullification claim, which we'll address later.

But my view is the United States government is no different than any other party when it walks into this courtroom. Its motives, its bias, its interest in the outcome of the case can and should be probed, especially in a case where there's a pending and sister state prosecution arising from a common nucleus of operative effect.

MR. PATEL: Your Honor, we continue to move to preclude any evidence of the government's motive or reasons behind pursuing this prosecution. That is not a matter for the jury. The jury is only supposed to consider whether -- should only consider whether the evidence presented at trial, the government has met its burden of proof with respect to the elements. This type of argument and evidence is not relevant to whether the

government has met the elements of the offense. It would only invite jury confusion and jury nullification. And at the end of the day, jury nullification is something that the Court is required to prevent.

There's lots of cases, situations where federal government and state government pursue joint -- I don't want to use "joint," but parallel criminal prosecutions where the federal government -- in the child exploitation context it's often the case where we, the federal government, pursues charges based on the videotape or the manufacturing of child pornography, and the State prosecutes the underlying sexual assault, and that's what happened here. This case is no different than any other case that we routinely do. And the motives why the federal government decides to do that is not a matter for the jury.

MR. PATTIS: Judge -- I'm sorry, my apologies.

I'm flabbergasted by that argument. What rule says that we can't question the government's motives? I mean, this is a two-party case, the United States v. Yehudi Manzano. Whatever he says, whatever a witness on his behalf says, the government is going to be able to challenge them for motive and bias and interest in the outcome. I fail to see any -- I've never seen a case that suggested that the government, when it testifies through a

party, in this case the special agent, is exempt from ordinary strictures of cross-examination. And to suggest somehow the government's motives remain opaque, that goes well beyond -- well beyond a prohibition of jury nullification. That's basically saying the government is entitled to special status in a criminal prosecution. I'm unaware of any case that says that as well.

THE COURT: Well, okay. When a witness takes the stand, you can obviously cross him or her with any evidence of bias, interest in the outcome, or whatever. But what I understand you to be saying is that you're questioning the U.S. Attorney's Office's decision to prosecute this case, which I don't think is appropriate. So --

MR. PATTIS: Why wouldn't it be, Judge, in the same way if you sued me civilly, I could cross-examine you for your decision to bring the action against me and your reasons for it. Why is the defendant entitled to less when his liberty is on the line as to the United States government?

THE COURT: Well, when I sue you, I'm a party. Here the party is the United States. It's not --

MR. PATTIS: That's exactly right, and the United States is a legal fiction. I can't subpoena the United States. It frankly doesn't exist.

THE COURT: Right.

MR. PATTIS: It exists only through its agents. I can't disqualify Mr. Patel and call him as a witness, but he's got a government agent who's here, presumably with the Court's permission, notwithstanding the sequestration order. That is the face of the government for this case.

THE COURT: That's right. And when the government agent takes the stand, you'll be permitted to suggest that there's some bias, hostility, or whatever. But you can't impute it to the United States.

MR. PATTIS: She's here because she's a representative of the United States. She's the case agent representing the United States. I can't subpoena the United States. It doesn't exist.

THE COURT: No, no. And so you do it through her.

MR. PATTIS: Well, in my -- it may be that the argument has run its course, and you've made your decision. I'll simply say the following: I don't see why that should be limited as to the government's motives, to the degree she's aware of them, for bringing this prosecution, and I believe she has had conversations with the agents about that -- or with the prosecution about that. So my claim is that the government is not entitled

to special treatment here, much as any other party, and because I can't subpoena the government because it, strictly speaking, doesn't exist, I can only do so through its agents.

THE COURT: All right. What's next?

MR. PATTIS: I guess we'll take that on a question-by-question basis.

With respect to the claim that I cannot cross-examine the accuser in light of 18 U.S.C. 3509(k), it's our view that that statute violates the Sixth Amendment because it is never collateral to impeach a witness with their interest in the outcome and their motive. This is a young woman who threatened legal consequences if my client did not provide her with money. He didn't. Legal consequences arise. She continues to make statements about her financial income -- interest in the outcome of this case, including her filing a statutory claim that gives her a right, if she prevails in this case, presumably this might have some -- some effect on the civil litigation, a sum of $150,000.

So for Congress to say we're going to abandon the Sixth Amendment in this context, we simply disagree with that decision and ask you to so hold. Apparently there's no authority on this -- on this statute and this challenge, so we're asking you to make that decision for

the first time.

MR. PATEL: Your Honor, as I indicated the other evening, we have researched this issue, and there is no case law addressing this subsection of 3509, nor could we locate any legislative history. So all we have to rely on is the statute itself, and we'll just defer to the Court.

THE COURT: Well, I'm going to permit cross-examination with respect to the civil lawsuit. In my view, it does violate the Sixth Amendment to preclude a party from raising an obvious financial interest in the outcome of the case.

MR. PATEL: Just one concern, Your Honor, is that in the civil case, the minor is represented by counsel, and we would ask that defense counsel not be permitted to inquire as to any communications that are subject to the attorney-client privilege.

MR. PATTIS: That's understood.

THE COURT: Okay.

MR. PATTIS: Next issue, Judge, is Number 5 on whether the Court is going to consider giving a reasonable mistake as to age charge. Again, the Court heard some discussion of that Thursday night. I'm not sure more needs to be said on that.

THE COURT: Well, I would be willing to do that, but consistent with the Ninth Circuit pattern

instructions, it's an affirmative defense that has to be proven by clear and convincing evidence by the defendant.

MR. PATTIS: So we will take an exception to that portion of the charge because it's our view that the burden of proof never slides to the defense side; that consistent with how some states, at least, treat these issues, the burden should go to the United States government to disprove it beyond a reasonable doubt.

THE COURT: Okay. Well --

MR. PATTIS: Understood.

MS. KARWAN: Your Honor, along those lines, to the extent -- I was assigned to argue this part of the argument -- to the extent that Your Honor is concluding that the affirmative defense is available under *United States against District Court for Central District of California,* and joining Judge Kozinski in that regard, we'd note under the local rules I believe Attorney Pattis would have an obligation to present any evidence he intends to rely upon in such an affirmative defense. It should have been turned over within 14 days of discovery, but we would ask for that now.

MR. PATTIS: I'll provide the government with a copy before I leave.

THE COURT: All right.

MS. KARWAN: And will the jury be instructed

that at the onset, Your Honor?

THE COURT: In the preliminary instructions?

MS. KARWAN: Yes, when Your Honor goes over the charge and the three elements.

MR. PATTIS: I would object to that. It's possible, depending on how the government's case comes in, I may or may not pursue that if I'm persuaded that it's unavailing.

MS. KARWAN: Understood, Your Honor.

THE COURT: That's fine.

MS. KARWAN: We are taking exception, though, just to preserve our objection, Your Honor.

THE COURT: It's not necessary to do that, but that's fine.

MS. KARWAN: Just want to be clear for our appellate folks.

MR. PATTIS: If the Court is going to charge and tell the jury that it can consider bases of liability that do not depend on scienter, we will challenge the testimony of the FBI forensic examiner, who, according to the government's papers, quote, used, end quote, Cellebrite forensic software. I simply don't know -- I mean, I'm aware of what Cellebrite is and I've seen cases in which it's been used, but to permit the forensic examiner to testify as an expert that he relied on the conclusions of

the Cellebrite entity or thing in reaching his conclusions we believe violates my client's rights under *Melendez-Diaz*, that is, the right to confront witnesses against him.

The Cellebrite -- the product of the Cellebrite forensic software will be the functional equivalent of testimony, and although in a civil proceeding experts are permitted to rely upon hearsay in reaching their conclusions, this is a criminal proceeding in which Mr. Manzano retains the right to confront the witnesses against him. We simply can't confront the black box. There's no way to do that. He is not a manufacturer, not a manufacturer's representative. He doesn't know the algorithm or the software. He simply knows that if he behaves in a certain way with respect to the box, the box is supposed to give him results that are generally regarded or that he regards as valid. That's not cross-examination of the Cellebrite material or a person who's competent or capable of discussing the manner and means by which the Cellebrite operates.

So we would take the position that under *Melendez-Diaz*, our Sixth Amendment right to confront witnesses is abridged. We didn't raise this earlier, candidly, because we did not think the government was proceeding on a non-mens rea or nonscienter basis in this

case, but we're aware of it now, and we would object to any testimony in which he relies on functional equivalent of a black box.

MR. PATEL: Your Honor, all this Cellebrite technology does is you take a cellphone, you hook up a cord to the cellphone, and then the software copies the data from the phone to the computer examiner's drive, and then he can just review the data. It's no different than if I copy something from one computer and put it on a disk and look at it. I wouldn't need a forensic expert to just copy contents from one drive to another and look at the data.

And that's exactly what the Second Circuit said in unpublished opinion in 2014 where it held that FBI special agent, who was just testifying about how he used Cellebrite to copy the data from the phone to his computer and then look at it was not expert testimony. That's why we didn't notice him as an expert because he's just making observations of the data that he copied from the cellphone.

Now, on Thursday evening, based on the defendant's objection, we said, Okay, we will -- we will qualify him as an expert during trial. But we still maintain our position that his testimony is not expert testimony. He's just copying the contents from one

computer device to another. The lay witness on the stand, for example, someone who observes -- took photographs with his phone of a crime scene and then copied it from his phone to his computer drive, would we say that's an expert because he just copied images from one device to another? No. It happens every day. This person just used a software that does it for cellphones.

MR. PATTIS: Well, that's sort of like saying of a DNA -- a DNA expert that when they are involved in the copying of DNA, all they're doing is having the polymer reaction, so that they're copying the underlying product. But as the Court I'm sure is aware, that's actually a far more complicated procedure.

Mr. Patel wants to say that this is like authenticating a photograph. And the way you authenticate a photograph is you say that this photograph is a fair and accurate representation of what it portrays. Cellebrite does more than that or Cellebrite wouldn't be offered. Cellebrite aggregates and Cellebrite makes possible analyses that are not possible from just looking at a cellphone. That's why it's used. And the manner and means by which it does that we would claim resembles the multiplication of a strand of DNA. And it's not simply a question of saying, This is a fair and accurate representation of what I saw on the cellphone. If that's

all it were, they wouldn't use the Cellebrite. They'd just use the telephone.

THE COURT: All right. Well, I'm going to see what foundation is laid at trial.

MR. PATTIS: I think with respect to Issue 8, sir, we addressed that in the 412 hearing in chambers. The only issue that remains, Judge, is my request to be permitted to argue nullification and to make the jury aware of the sentencing consequences of a conviction.

THE COURT: Well, just to be clear, 8, I'm going to permit the history between the accuser and the defendant, but not any other evidence of past history.

MR. PATTIS: If I believe that the accuser opens the door to an inquiry as to some third party, I'll ask for permission to approach. I mean, I understand your ruling. I have no intent to go after that or to seek to manipulate her to produce it, Judge.

THE COURT: All right.

MR. PATTIS: As to 9, throughout the proceedings on the eve of voir dire, and at the time of voir dire, and at the time of the request to charge, and at our charge conference I've made clear my belief that jury nullification is the proper -- is the right -- that a jury has a right to nullify, has not just the power to nullify but the right to be shown how to use that power, and that

can come in a number of different forms. It can come by voir dire, and the Court rejected my voir dire request. It can come by way of a charge. It can come by way of argument. It can come by way of offering evidence as to the sentencing consequences of a plea.

I don't want to be tedious and give a lengthy recitation of at least my reading of American history, but we pride ourselves on the role of juries in this country, and indeed you'll recall that the Declaration of Independence talked in part about defending the right to a trial by jury, something that King George had abridged.

There is very little recent law on nullification. The government recites the *Thomas* decision, I believe it is, about the right of a defendant to seek a jury charge on nullification, and *Sparf* precludes that. The Supreme Court, however, has not ruled on this since 1895.

Candidly, Judge, this is a situation in which Mr. Manzano was involved in a consensual relationship, and I understand consent is not relevant, but a non-coerced relationship, which is I believe how the government intends to refer to it, with a young woman, and at one moment in time took a brief film, which he downloaded and then sought to erase. No one ever saw the film, other than the government agents investigating this. The film

was not distributed in interstate commerce. At most, a telephone that traveled through state lines was used.

This can't be justice. A 15-year mandatory minimum for this conduct, when a century ago that woman would have been -- could lawfully have consented to sexual intercourse in every jurisdiction in the United States? It was only in the 1880s when the Women's Christian Temperance Union began to wonder about the consequences of urbanization that these laws of consent went up because they were concerned about what was happening to factory girls far from home.

This young woman was no innocent. My client is no saint. But for the government to contend the jury ought not to know what it's asking it to do in the name of the people is to me obscene. And the jury needs to understand that this isolated act, if it believes that this is the sort of interstate commerce that Congress intended and it's comfortable with that, then go ahead and convict. If it thinks the government has misapplied a law intended to effect a far different and more culpable conduct, then I think they're entitled to know that. If they don't know the sentencing consequences, they can't if they're not told that they have the power to nullify, which even the government acknowledged they have in its argument to you during voir dire. If I'm not permitted to

let them know about that power in any form, then it's really a nullity, and the jury becomes emasculated.

Juries exist for a reason. They stand between the government and the accused, and they provide the accused with an opportunity to hold the government to its burden of proof. And in certain trials in our history, juries have done more than that. They've said the law is wrong, and we, the people, say it's wrong. A jury sits as the consciousness of a community almost as an ad hoc referendum on government conduct. I'm unaware of any case that said that cannot happen. The only case from the United States Supreme Court that I'm aware of said I'm not entitled to a charge. That case is a hundred thirty years old.

You have seen on the bench the grotesque misapplication of the commerce clause in our lifetime. Prior to the 1930s and '40s it was rarely used in the manner in which it's used now. The United States Supreme Court has twice had to roll back commerce clause applications in the *Morrison* case, as to the gun-free school zone -- or, excuse me, the Violence Against Women's Act, and in the *Lopez* case as to the gun-free school zone case. This may be the third case, where an isolated act, in a moment in time, is used to leverage the commerce clause into a 15-year sentence.

Judge, this is just wrong. I've been doing this -- defending people accused of crimes for 25 years. This is the first time I've walked into a court and felt soiled by the process. For me to stand by silently and permit this to happen to Mr. Manzano and not to alert the jury of what's really at stake in this case in my view is a miscarriage of justice. I'm asking you for permission to let this jury know what's going on in this courtroom, because if you don't, they won't.

And I'm reminded of a case years ago where I defended a young man of murder. He was convicted and sentenced to 45 years. When a juror read that sentence, they called me the next day. They read it in the newspaper and said, angrily, "Why didn't you tell us what could happen?" And I said, "I didn't because the law would not permit it."

I don't know if that would have changed that juror's vote. But I do know in this case, Judge, Mr. Manzano is not necessarily going to deny what happened, and that it was wrong, and that it hurt his family and his children and himself, but 15 years for this, Judge? Is this interstate commerce truly?

MR. PATEL: Your Honor, this has been briefed extensively in our opposition to his motion to argue jury nullification and the sentencing consequences and again in

our objection to the defense's proposed jury instructions to argue jury nullification. I don't want to rehash those arguments again. I think Your Honor is well aware of the case law that says that the jury -- you should take steps to prevent jury nullification and not inform the jury of the sentencing consequences. So we'll just rest on our prior submissions, but we would ask for a ruling so that we know that -- what's permitted and what's not permitted.

THE COURT: This is a shocking case. This is a case that calls for jury nullification. I have been told by the Second Circuit that I cannot encourage jury nullification, and I do not intend to encourage jury nullification. But I am absolutely stunned that this case, with a 15-year mandatory minimum, has been brought by the government.

I am going to be allowed no discretion at sentencing to consider the seriousness of this conduct or the lack of seriousness of this conduct, and it is extremely unfortunate that the power of the government has been used in this way, to what end I'm not sure.

So the law precludes me from charging the jury, the law precludes me from encouraging the jury, and I don't intend to do that. But if evidence comes in about the length of sentence, or if Mr. Pattis chooses to argue, I do not feel that I can preclude that. I don't feel I'm

required to preclude that. And I think justice requires that I permit that. So it's not going to come from me, but I think justice cannot be done here if the jury is not informed, perhaps by Mr. Pattis, that that's the consequence here.

MS. KARWAN: Your Honor, may I inquire?

THE COURT: Yes.

MS. KARWAN: Is the Court going to instruct the jury, though, that it cannot consider the arguments of counsel as relevant evidence, but only as arguments, because if Mr. Pattis is informing them of something, we're going to argue that there's no basis for them to credit that.

THE COURT: We'll have to see if it comes in into evidence.

MS. KARWAN: Meaning a question is asked, allowed, and answer is given?

THE COURT: Correct.

MS. KARWAN: And the government would then ask to seek the Court's permission to reopen its case to introduce other evidence of Mr. Manzano's conduct that would certainly come in as relevant sentencing -- relevant conduct at sentencing under the 3553(a) factors, including the length of the relationship, the fact of when it was started, who was present in the house over the year and a

half, as well as Mr. Manzano's possession of weapons.

MR. PATTIS: So there we go again, Judge. His motives are wide open, but the government gets to hide behind the legal fiction. It's just not right.

THE COURT: I'm not sure I understand the purpose of the offer.

MS. KARWAN: Your Honor expressed some concern about the sentence to be imposed, which would always be driven by the 3553(a) factors.

THE COURT: No, it's not. It's driven by the statute. The statute says 15 years. If he's done anything to violate the statute, he gets 15 years; and you, Judge, can't do anything about it. That's what the statute says. It's not 3553(a), because 3553(a) we wouldn't have a mandatory minimum. We would have true sentencing discretion, where you would present evidence and Mr. Pattis would present evidence, and I would make a decision based upon all of that evidence, all those factors. I don't get to do that in this case.

MS. KARWAN: I understand, Your Honor. At sentencing we would still present evidence related to the 3553(a) factors, and --

THE COURT: Why bother?

MS. KARWAN: -- I think the Court would have to consider.

THE COURT: Why bother?

MS. KARWAN: I understand Your Honor's frustration with the mandatory minimum, but I think 3553(a) is still applicable. Your Honor might conclude that 15 years, the mandatory minimum is insufficient based on relevant conduct.

THE COURT: I can't imagine, I can't imagine that's the case.

MS. KARWAN: Your Honor, I can. And I think a case where --

THE COURT: Well, it's a sentencing, it's a sentencing issue at that point.

MS. KARWAN: But Your Honor has indicated that that sentence is inappropriate without knowing all of those factors. But the point is, that's not what we involve the jury in.

If Your Honor thinks there's something wrong with the statute, then the Court will proceed as follows, but to argue about congressional intent and the propriety of the statute seems to me opens the door as to the propriety in this case, and that would call into question relevant conduct of Mr. Manzano, which the government is -- you know, so far indicated to Mr. Pattis that it's going to stay away from because we want the jury to focus on the elements of the offense. But if we're going to be

focusing on a whole host of things, including congressional intent behind this statutory mandatory minimum, it seems like we should be considering all the factors behind this particular offense.

THE COURT: We're not going to talk about congressional intent at this trial. Mr. Pattis is simply going to cross-examine somebody who's going to say what the penalty is, mandatory minimum of 15 years. That's what's going to happen. And then --

MS. KARWAN: And if that person has personal knowledge behind why that is the mandatory minimum, why wouldn't we be able to ask them on redirect?

THE COURT: It doesn't matter why. We're not going to get into legislative history here. If you want to say it's not really 15 years, it's really eight years, or really five years, or really two years, go ahead. That's fine.

MR. PATTIS: What I hear the government saying is one of them may want to testify about their charging decision, and I'll let them select either one of them. I'll be happy to cross-examine either prosecutor on their charging decision in this case.

MS. KARWAN: Your Honor, Mr. Pattis is offering the mandatory minimum evidence, at least as I understand it, to argue that it's inappropriate in this case.

THE COURT: Yes. He is.

MS. KARWAN: So as I understand it, if that question is asked and that evidence comes in, the government on redirect should be allowed to ask the witness in their view why it's appropriate in this case.

THE COURT: If you challenge -- he's going to simply bring out the consequence. The consequence is if you, ladies and gentlemen, return a verdict of guilty, this gentleman is going to go to prison for 15 years.

If that's not correct, then, yes, you can bring out on redirect how that isn't correct.

MS. KARWAN: And then he's going to argue that the jury should not follow the law as instructed by the Court because the penalties are so high.

THE COURT: Yes, he is.

MS. KARWAN: And I guess I'm back to where I started this question, if the Court is going to instruct the jury that it has to follow the law and that the arguments of counsel are not evidence.

THE COURT: I'm going to --

MR. PATTIS: That's a hybrid question, but I'll stop.

THE COURT: I intend to charge the jury that sentencing is not their -- not their concern.

MS. KARWAN: Okay. Understood. I mean, we

would still object, obviously, if the question is asked as to the statutory penalty at the appropriate time, but the Court is going to allow it. You've noted our objection.

THE COURT: I have. So technically I'm denying your motion, but --

MR. PATTIS: Understood.

THE COURT: What else?

MR. PATTIS: That's it from the defense, sir.

MR. PATEL: I don't believe there's any outstanding issues, Your Honor.

THE COURT: Okay. So we're here at 9:00 tomorrow. And did anybody have comments on the preliminary jury instructions?

MR. PATEL: Yes, Your Honor. In light of what the statute says, the preliminary instruction only notes the one of the three alternative interstate elements. It doesn't list all three.

THE COURT: It says "or otherwise affected interstate commerce." It's just --

MR. PATEL: Yes, sir.

THE COURT: -- I don't want to read that whole long statute.

MR. PATEL: That's fine, Your Honor.

MR. PATTIS: No further comments, Judge.

THE COURT: All right. Thank you. We'll stand

in recess.

(Proceedings adjourned at 11:51 a.m.)

C E R T I F I C A T E

No. 3:18-cr-00095(SRU)
United States of America v. Yehudi Manzano

I, Sharon L. Masse, RMR, CRR, Official Court Reporter for the United States District Court for the District of Connecticut, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

October 29, 2018

/S/ Sharon L. Masse
Sharon L. Masse, RMR, CRR
Official Court Reporter
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APPENDIX D

Docket Sheet Containing The Minute Order Memorializing The Decision of the United District Court For The District of Connecticut, *United States of America v. Yehudi Manzano*, No. 3:18-cr-00095

EFILE,STAYED

U.S. District Court
District of Connecticut (New Haven)
CRIMINAL DOCKET FOR CASE #: 3:18-cr-00095-SRU-1

Case title: USA v. Manzano

Date Filed: 05/03/2018

Assigned to: Judge Stefan R. Underhill

Defendant (1)

Yehudi Manzano

represented by **Norman A. Pattis**
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LEAD ATTORNEY
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Designation: Retained

Pending Counts	**Disposition**
SELLING OR BUYING OF CHILDREN - Production of Child Pornography (1)	
ACTIVITIES RE MATERIAL CONSTITUTING/CONTAINING CHILD PORNO - Transportation of Child Pornography (2)	

Highest Offense Level (Opening)

Felony

Terminated Counts	**Disposition**
None	

Highest Offense Level (Terminated)

None

Complaints **Disposition**

None

Plaintiff

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Date Filed	#	Docket Text
05/03/2018	1	SEALED INDICTMENT returned before Judge Charles S. Haight, Jr with the signature of the foreperson redacted. Grand jury number N-16-3 Warrant to issue as to Yehudi Manzano (1) count(s) 1, 2. (Fanelle, Nicholas) (Entered: 05/04/2018)
05/03/2018	2	Unredacted document with FOREPERSON'S SIGNATURE regarding Indictment (Sealed) 1 as to defendant(s)Yehudi Manzano. Access to the pdf document is restricted pursuant to Federal Rule of Criminal Procedure 49.1(e). (Fanelle, Nicholas) (Entered: 05/04/2018)
05/04/2018	4	*ENTERED IN ERROR* ELECTRONIC FILING ORDER as to Yehudi Manzano - PLEASE ENSURE COMPLIANCE WITH COURTESY COPY REQUIREMENTS IN THIS ORDER Signed by Judge Stefan R. Underhill on 5/4/2018. (Fanelle, Nicholas) Modified on 5/7/2018 (Fanelle, Nicholas). (Entered: 05/04/2018)
05/14/2018	5	ORAL MOTION to Unseal Case by USA as to Yehudi Manzano. (Gould, K.) (Entered: 05/15/2018)
05/14/2018		Arrest of Yehudi Manzano (Gould, K.) (Entered: 05/15/2018)
05/14/2018	6	Minute Entry for proceedings held before Judge William I. Garfinkel: granting 5 ORAL Motion

		to Unseal Case as to Yehudi Manzano (1); Arraignment as to Yehudi Manzano (1) Count 1,2 held on 5/14/2018; Detention Hearing as to Yehudi Manzano held on 5/14/2018; Initial Appearance as to Yehudi Manzano held on 5/14/2018; Motion Hearing as to Yehudi Manzano held on 5/14/2018 re 5 ORAL MOTION to Unseal Case filed by USA ; Plea entered by Yehudi Manzano Not Guilty on counts 1,2; (Jury Selection set for 7/6/2018 09:00 AM in Courtroom One, 915 Lafayette Blvd., Bridgeport, CT before Judge Stefan R. Underhill). and 43 minutes(Court Reporter FTR.) (Gould, K.) (Entered: 05/15/2018)
05/14/2018		CASE UNSEALED as to Yehudi Manzano (Gould, K.) (Entered: 05/15/2018)
05/14/2018	7	ELECTRONIC FILING ORDER as to Yehudi Manzano - PLEASE ENSURE COMPLIANCE WITH COURTESY COPY REQUIREMENTS IN THIS ORDER Signed by Judge Stefan R. Underhill on 5/14/2018. (Gould, K.) (Entered: 05/15/2018)
05/14/2018	8	Non-Surety Bond Entered as to Yehudi Manzano in amount of $ 300,000.00, (Gould, K.) (Entered: 05/15/2018)
05/14/2018	9	SEALED BAIL INFORMATION SHEET by Yehudi Manzano (Gould, K.) (Entered: 05/15/2018)
05/14/2018		INDICTMENT UNSEALED as to Yehudi Manzano (Gould, K.) (Entered: 05/15/2018)
05/14/2018	10	ORDER Setting Conditions of Release as to Yehudi Manzano Signed by Judge William I. Garfinkel on 5/14/2018. (Gould, K.) (Entered: 05/15/2018)
05/16/2018	11	NOTICE OF E-FILED CALENDAR as to Yehudi Manzano: THIS IS THE ONLY NOTICE COUNSEL/THE PARTIES WILL RECEIVE. ALL PERSONS ENTERING THE COURTHOUSE MUST PRESENT PHOTO IDENTIFICATION. Jury Selection set for 7/6/2018 09:00 AM in Courtroom One, 915 Lafayette Blvd., Bridgeport, CT before Judge Stefan R. Underhill (Jaiman, R.) (Entered: 05/16/2018)
05/16/2018	12	Arrest Warrant Returned Executed on 5/14/2018 in case as to Yehudi Manzano. (Fanelle, Nicholas) (Entered: 05/17/2018)
05/17/2018	13	ATTORNEY APPEARANCE: Norman A. Pattis appearing for Yehudi Manzano (Attachments: # 1 copy of envelope)(Oliver, T.) (Entered: 05/17/2018)
06/21/2018	14	NOTICE OF E-FILED CALENDAR as to Yehudi Manzano: THIS IS THE ONLY NOTICE COUNSEL/THE PARTIES WILL RECEIVE. ALL PERSONS ENTERING THE COURTHOUSE MUST PRESENT PHOTO IDENTIFICATION. *RESET FROM 7/6/2018* Jury Selection set for 7/9/2018 09:00 AM in Courtroom One, 915 Lafayette Blvd., Bridgeport, CT before Judge Stefan R. Underhill (Jaiman, R.) (Entered: 06/21/2018)
06/26/2018	15	WAIVER of Speedy Trial by Yehudi Manzano (Pattis, Norman) (Entered: 06/26/2018)
06/26/2018	16	MOTION to Continue *Jury Selection and Trial* by Yehudi Manzano. (Pattis, Norman) (Entered: 06/26/2018)
06/28/2018	17	Memorandum in Support by USA as to Yehudi Manzano re 16 MOTION to Continue *Jury Selection and Trial ; and Government's Request to Exclude Time Under the Speedy Trial Act* (Patel, Neeraj) (Entered: 06/28/2018)
06/29/2018	18	ORDER granting 16 Motion to Continue Jury Selection as to Yehudi Manzano (1). Signed by Judge Stefan R. Underhill on 6/29/2018. (Jaiman, R.) (Entered: 06/29/2018)
06/29/2018	19	ORDER TO CONTINUE - Ends of Justice as to Yehudi Manzano Time excluded from 7/9/2018 until 10/1/2018 Signed by Judge Stefan R. Underhill on 6/29/2018. (Jaiman, R.) Modified on 6/29/2018 (Jaiman, R.). (Entered: 06/29/2018)

06/29/2018	20	NOTICE OF E-FILED CALENDAR as to Yehudi Manzano: THIS IS THE ONLY NOTICE COUNSEL/THE PARTIES WILL RECEIVE. ALL PERSONS ENTERING THE COURTHOUSE MUST PRESENT PHOTO IDENTIFICATION. *RESET FROM 7/9/2018* Jury Selection set for 10/5/2018 09:00 AM in Courtroom One, 915 Lafayette Blvd., Bridgeport, CT before Judge Stefan R. Underhill (Jaiman, R.) (Entered: 06/29/2018)
07/26/2018	21	SCHEDULING ORDER as to Yehudi Manzano Jury Selection rescheduled to 10/12/2018 09:00 AM in Courtroom One, 915 Lafayette Blvd., Bridgeport, CT before Judge Stefan R. Underhill Signed by Judge Stefan R. Underhill on 7/26/2018. (Gould, K.) (Entered: 07/26/2018)
07/26/2018	22	NOTICE OF E-FILED CALENDAR as to Yehudi Manzano: THIS IS THE ONLY NOTICE COUNSEL/THE PARTIES WILL RECEIVE. ALL PERSONS ENTERING THE COURTHOUSE MUST PRESENT PHOTO IDENTIFICATION. *RESET FROM 10/05/2018* Jury Selection set for 10/12/2018 09:00 AM in Courtroom One, 915 Lafayette Blvd., Bridgeport, CT before Judge Stefan R. Underhill (Gould, K.) (Entered: 07/26/2018)
08/24/2018	23	Consent MOTION for Pre-Trial Conference by USA . (Patel, Neeraj) Modified on 8/27/2018 TO ADD FILER TO THE DOCKET ENTRY (Oliver, T.). (Entered: 08/24/2018)
08/24/2018	24	NOTICE OF E-FILED CALENDAR as to Yehudi Manzano: THIS IS THE ONLY NOTICE COUNSEL/THE PARTIES WILL RECEIVE. Telephone Status Conference set for 8/31/2018 01:00 PM before Judge Stefan R. Underhill. The call-in for the conference is 888.636.3807; when prompted for the access code, dial 650 8043 followed by #. (If asked whether to join the conference as the host, bypass that option by dialing #.) (Kaas, E.) (Entered: 08/24/2018)
08/24/2018	25	ORDER granting 23 Motion for Conference as to Yehudi Manzano (1). Signed by Judge Stefan R. Underhill on 8/24/18. (Kaas, E.) (Entered: 08/24/2018)
08/28/2018	26	ATTORNEY APPEARANCE Sarah P. Karwan appearing for USA (Karwan, Sarah) (Entered: 08/28/2018)
08/31/2018	27	Minute Entry for proceedings held before Judge Stefan R. Underhill: Status Conference as to Yehudi Manzano held on 8/31/2018. Total Time: 0 hours and 20 minutes. (Court Reporter S. Masse.) (Kaas, E.) (Entered: 08/31/2018)
08/31/2018	28	SCHEDULING ORDER as to Yehudi Manzano: - Jury questionnaire will be administered 9/24/2018; - Objections due 9/28/2018; - Telephone Conference to discuss objections set for 10/2/2018 11:00 AM before Judge Stefan R. Underhill. The call-in for the conference is 888.636.3807; when prompted for the access code, dial 650 8043 followed by #. (If asked whether to join the conference as the host, bypass that option by dialing #); - Proposed Voir Dire Questions due 10/9/2018; - Proposed Jury Instructions due 10/22/2018; - Motions in Limine due 10/23/2018; - Jury Trial set for 10/29/2018 09:00 AM in Courtroom One, 915 Lafayette Blvd., Bridgeport, CT before Judge Stefan R. Underhill. Signed by Judge Stefan R. Underhill on 8/31/18. (Kaas, E.) (Entered: 08/31/2018)
09/10/2018	29	NOTICE OF E-FILED CALENDAR as to Yehudi Manzano: THIS IS THE ONLY NOTICE COUNSEL/THE PARTIES WILL RECEIVE. ALL PERSONS ENTERING THE COURTHOUSE MUST PRESENT PHOTO IDENTIFICATION. Pretrial Conference set for 10/25/2018 05:00 PM in Chambers Room 411, 915 Lafayette Blvd., Bridgeport, CT before Judge Stefan R. Underhill (Smith, E). (Entered: 09/10/2018)
10/01/2018	30	MOTION for Disclosure *and Argue Jury Nullification* by Yehudi Manzano. (Pattis, Norman)

		(Entered: 10/01/2018)
10/01/2018	31	AMENDED SCHEDULING ORDER as to Yehudi Manzano:- Jury questionnaire will be administered 9/24/2018; - Objections due 9/28/2018; - Telephone Conference to discuss objections set for 10/4/2018 2:30 PM before Judge Stefan R. Underhill. The call-in for the conference is 888.636.3807; when prompted for the access code, dial 650 8043 followed by #. (If asked whether to join the conference as the host, bypass that option by dialing #); - Proposed Voir Dire Questions due 10/9/2018; - Proposed Jury Instructions due 10/22/2018; - Motions in Limine due 10/23/2018; - Jury Trial set for 10/29/2018 09:00 AM in Courtroom One, 915 Lafayette Blvd., Bridgeport, CT before Judge Stefan R. Underhill.Signed by Judge Stefan R Underhill on 10/1/18. (Caldero, M.) (Entered: 10/01/2018)
10/04/2018	32	Minute Entry for jury questionnaire proceedings held before Judge Stefan R Underhill: Pretrial Conference as to Yehudi Manzano held on 10/4/2018. Total Time: 1 hour and 1 minute (Court Reporter Sharon Masse.) (Smith, E) (Entered: 10/04/2018)
10/09/2018	33	NOTICE *Joint Statement of the Case to be Read at Jury Selection* by USA as to Yehudi Manzano (Patel, Neeraj) (Entered: 10/09/2018)
10/09/2018	34	Proposed Voir Dire by USA as to Yehudi Manzano (Patel, Neeraj) (Entered: 10/09/2018)
10/11/2018	35	Proposed Voir Dire by Yehudi Manzano (Pattis, Norman) (Entered: 10/11/2018)
10/11/2018	36	Memorandum in Opposition by USA as to Yehudi Manzano re 30 MOTION for Disclosure *and Argue Jury Nullification* (Patel, Neeraj) (Entered: 10/11/2018)
10/11/2018	37	Proposed Witness List (Pattis, Norman) (Entered: 10/11/2018)
10/12/2018	38	Minute Entry for proceedings held before Judge Stefan R Underhill:Jury Selection as to Yehudi Manzano held on 10/12/2018 Total Time: 6 hours and 56 minutes(Court Reporter Masse, S.) (Jaiman, R.) (Entered: 10/17/2018)
10/18/2018	39	NOTICE OF E-FILED CALENDAR as to Yehudi Manzano: THIS IS THE ONLY NOTICE COUNSEL/THE PARTIES WILL RECEIVE. ALL PERSONS ENTERING THE COURTHOUSE MUST PRESENT PHOTO IDENTIFICATION. Jury Trial set for 10/29/2018 09:00 AM in Courtroom One, 915 Lafayette Blvd., Bridgeport, CT before Judge Stefan R Underhill (Jaiman, R.) (Entered: 10/18/2018)
10/19/2018	40	Proposed Exhibit List by USA (Patel, Neeraj) (Entered: 10/19/2018)
10/19/2018	41	Proposed Witness List by USA (Patel, Neeraj) (Entered: 10/19/2018)
10/22/2018	42	Proposed Jury Instructions by USA as to Yehudi Manzano (Patel, Neeraj) (Entered: 10/22/2018)
10/22/2018	43	Proposed Verdict Form by USA (Patel, Neeraj) (Entered: 10/22/2018)
10/22/2018	44	Proposed Jury Instructions by Yehudi Manzano (Pattis, Norman) (Entered: 10/22/2018)
10/23/2018	45	MOTION in Limine *(Omnibus)* by USA as to Yehudi Manzano. (Patel, Neeraj) (Entered: 10/23/2018)
10/25/2018	46	RESPONSE/REPLY by USA as to Yehudi Manzano re 44 Proposed Jury Instructions/Request to Charge *(Government's Objections to Defendant's Proposed Jury Instructions)* (Patel, Neeraj) (Entered: 10/25/2018)
10/26/2018	47	Minute Entry for proceedings held before Judge Stefan R Underhill: Pretrial Conference as to Yehudi Manzano held on 10/25/2018 Total Time: 1 hours and 30 minutes (Court Reporter S. Masse.) (Smith, E) (Entered: 10/26/2018)
10/26/2018	48	MOTION for Leave to File *TO ADJOURN TRIAL AND FOR FURTHER PROCEEDINGS* by

		Yehudi Manzano. (Pattis, Norman) (Entered: 10/26/2018)
10/26/2018	49	Memorandum in Opposition by USA as to Yehudi Manzano re 48 MOTION for Leave to File *TO ADJOURN TRIAL AND FOR FURTHER PROCEEDINGS* (Patel, Neeraj) (Entered: 10/26/2018)
10/26/2018	50	NOTICE OF E-FILED CALENDAR as to Yehudi Manzano: THIS IS THE ONLY NOTICE COUNSEL/THE PARTIES WILL RECEIVE. ALL PERSONS ENTERING THE COURTHOUSE MUST PRESENT PHOTO IDENTIFICATION. *(Jury Trial RESET FROM 10/29/2018)* Evidentiary Hearing set for 10/29/2018 09:30 AM in Courtroom One, 915 Lafayette Blvd., Bridgeport, CT before Judge Stefan R Underhill; Jury Trial reset for 10/30/2018 09:00 AM in Courtroom One, 915 Lafayette Blvd., Bridgeport, CT before Judge Stefan R Underhill (Gould, K.) (Entered: 10/26/2018)
10/29/2018	51	NOTICE *DEFENDANT'S FRE 412* by Yehudi Manzano (Pattis, Norman) (Entered: 10/29/2018)
10/29/2018	52	Emergency MOTION Seeking a Two-Week Stay of Trial by USA as to Yehudi Manzano. (Patel, Neeraj) (Entered: 10/29/2018)
10/29/2018	53	ENTERED IN ERROR...TRANSCRIPT of Proceedings: as to Yehudi Manzano Type of Hearing: Motion Hearing. Held on 10/29/2018 before Judge Stefan R. Underhill. Court Reporter: S. Masse. **IMPORTANT NOTICE - REDACTION OF TRANSCRIPTS:** To remove personal identifier information from the transcript, a party must electronically file a Notice of Intent to Request Redaction with the Clerk's Office within seven (7) calendar days of this date. If no such Notice is filed, the court will assume redaction of personal identifiers is not necessary and the transcript will be made available through PACER without redaction 90 days from today's date. The transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. The policy governing the redaction of personal information is located on the court website at www.ctd.uscourts.gov. Redaction Request due 11/19/2018. Redacted Transcript Deadline set for 11/29/2018. Release of Transcript Restriction set for 1/27/2019. (Masse, S.) Modified on 10/30/2018 (Jaiman, R.). (Entered: 10/29/2018)
10/29/2018	54	Minute Entry for proceedings held before Judge Stefan R Underhill:In Camera Hearing re Federal Rule of Evidence 412 as to Yehudi Manzano held on 10/29/2018 18 minutes(Court Reporter Masse, S.)(Jaiman, R.) Modified on 10/30/2018 (Jaiman, R.). (Entered: 10/30/2018)
10/29/2018	55	ORAL MOTION to Dismiss by Yehudi Manzano.Responses due by 11/19/2018 (Jaiman, R.) (Entered: 10/30/2018)
10/29/2018	56	ENTERED IN ERROR...ORAL MOTION for adjournment re indictment by Yehudi Manzano. (Jaiman, R.) Modified on 10/30/2018 (Jaiman, R.). (Entered: 10/30/2018)
10/29/2018	57	ENTERED in ERROR...ORAL MOTION for adjournment re grand jury by Yehudi Manzano. (Jaiman, R.) Modified on 10/30/2018 (Jaiman, R.). (Entered: 10/30/2018)
10/29/2018	58	Minute Entry for proceedings held before Judge Stefan R Underhill: Motion Hearing as to Yehudi Manzano held on 10/29/2018 denying 30 Motion for Disclosure and argue Jury Nullification to Yehudi Manzano (1) The motion is denied to the extent Mr. Manzano seeks a jury charge informing the jury of the mandatory minimum or notifying the jury that they have the power to engage in jury nullification. The motion is granted to the extent it seeks permission to argue for jury nullification; granting in part and denying in part 45 Motion in Limine as to Yehudi Manzano (1); denying 48 Motion for Leave to File TO ADJOURN TRIAL AND FOR FURTHER PROCEEDINGS as to Yehudi Manzano (1); granting 52 Emergency MOTION Seeking a Two-Week Stay of Trial to Yehudi Manzano: Granted with alternative relief: the case is stayed pending the outcome of the Solicitor Generals review and if authorized, the decision of

		the Writ of Mandamus; denying 55 Oral Motion to Dismiss as to Yehudi Manzano (1); re 55 Oral MOTION to Dismiss filed by Yehudi Manzano, 30 MOTION for Disclosure *and Argue Jury Nullification* filed by Yehudi Manzano, 45 MOTION in Limine *(Omnibus)* filed by USA, 48 MOTION for Leave to File *TO ADJOURN TRIAL AND FOR FURTHER PROCEEDINGS* filed by Yehudi Okay Manzano, 52 Emergency MOTION Seeking a Two-Week Stay of Trial filed by USA. Total Time: 1 hours and 09 minutes(Court Reporter Masse, S.) (Jaiman, R.) (Entered: 10/30/2018)
10/29/2018	60	TRANSCRIPT of Proceedings: as to Yehudi Manzano Type of Hearing: Motion Hearing (Corrected Version). Held on 10/29/2018 before Judge Stefan R. Underhill. Court Reporter: S. Masse. **IMPORTANT NOTICE - REDACTION OF TRANSCRIPTS:** To remove personal identifier information from the transcript, a party must electronically file a Notice of Intent to Request Redaction with the Clerk's Office within seven (7) calendar days of this date. If no such Notice is filed, the court will assume redaction of personal identifiers is not necessary and the transcript will be made available through PACER without redaction 90 days from today's date. The transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. The policy governing the redaction of personal information is located on the court website at www.ctd.uscourts.gov. Redaction Request due 11/19/2018. Redacted Transcript Deadline set for 11/29/2018. Release of Transcript Restriction set for 1/27/2019. (Masse, S.) (Entered: 10/30/2018)
10/30/2018	59	Docket Entry Correction...Modified and ENTERED IN ERROR as to Yehudi Manzano re 56 Oral MOTION re indictment, 57 Oral MOTION adjournment re grand jury, 53 Transcript. (Jaiman, R.) (Entered: 10/30/2018)
10/30/2018	61	SEALED TRANSCRIPT of Proceedings as to Yehudi Manzano held on 10/29/2018 before Judge Stefan R. Underhill. Court Reporter: S. Masse. Type of Hearing: (Sealed) In Camera Hearing Pursuant to Federal Rule of Evidence 412. (Masse, S.) (Entered: 10/30/2018)
10/30/2018	62	TRANSCRIPT of Proceedings: as to Yehudi Manzano Type of Hearing: Emergency Motion Hearing. Held on 10-29-2018 before Judge Stefan R. Underhill. Court Reporter: S. Masse. **IMPORTANT NOTICE - REDACTION OF TRANSCRIPTS:** To remove personal identifier information from the transcript, a party must electronically file a Notice of Intent to Request Redaction with the Clerk's Office within seven (7) calendar days of this date. If no such Notice is filed, the court will assume redaction of personal identifiers is not necessary and the transcript will be made available through PACER without redaction 90 days from today's date. The transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. The policy governing the redaction of personal information is located on the court website at www.ctd.uscourts.gov. Redaction Request due 11/20/2018. Redacted Transcript Deadline set for 11/30/2018. Release of Transcript Restriction set for 1/28/2019. (Masse, S.) (Entered: 10/30/2018)
11/09/2018	63	TRANSCRIPT of Proceedings: as to Yehudi Manzano Type of Hearing: Pretrial Conference. Held on 10/25/18 before Judge Stefan R. Underhill. Court Reporter: S. Masse. **IMPORTANT NOTICE - REDACTION OF TRANSCRIPTS:** To remove personal identifier information from the transcript, a party must electronically file a Notice of Intent to Request Redaction with the Clerk's Office within seven (7) calendar days of this date. If no such Notice is filed, the court will assume redaction of personal identifiers is not necessary and the transcript will be made available through PACER without redaction 90 days from today's date. The transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. The policy governing the redaction of personal information is located on the court website at www.ctd.uscourts.gov. Redaction Request due 11/30/2018. Redacted Transcript Deadline set for 12/10/2018. Release of Transcript Restriction set for 2/7/2019.

		(Masse, S.) (Entered: 11/09/2018)
11/13/2018	64	TRANSCRIPT of Proceedings: as to Yehudi Manzano Type of Hearing: Excerpt of Jury Selection. Held on 10/12/2018 before Judge Stefan R. Underhill. Court Reporter: S. Masse. **IMPORTANT NOTICE - REDACTION OF TRANSCRIPTS:** To remove personal identifier information from the transcript, a party must electronically file a Notice of Intent to Request Redaction with the Clerk's Office within seven (7) calendar days of this date. If no such Notice is filed, the court will assume redaction of personal identifiers is not necessary and the transcript will be made available through PACER without redaction 90 days from today's date. The transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. The policy governing the redaction of personal information is located on the court website at www.ctd.uscourts.gov. Redaction Request due 12/4/2018. Redacted Transcript Deadline set for 12/14/2018. Release of Transcript Restriction set for 2/11/2019. (Masse, S.) (Entered: 11/13/2018)

APPENDIX E

Transcript Containing The Stay Order of the United District Court For The District of Connecticut, *United States of America v. Yehudi Manzano*, No. 3:18-cr-00095 (Oct. 29, 2018)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA, Government,	:	No. 3:18-cr-00095(SRU)
	:	915 Lafayette Boulevard
	:	Bridgeport, Connecticut
v.	:	
	:	October 29, 2018
YEHUDI MANZANO, Defendant.	:	

EMERGENCY MOTION HEARING

B E F O R E:

THE HONORABLE STEFAN R. UNDERHILL, U. S. D. J.

A P P E A R A N C E S:

FOR THE GOVERNMENT:

UNITED STATES ATTORNEY'S OFFICE
157 Church Street, 25th Floor
New Haven, Connecticut 06510
BY: NEERAJ N. PATEL, AUSA
SARAH P. KARWAN, AUSA

FOR THE DEFENDANT:

THE PATTIS LAW FIRM, LLC
383 Orange Street, First Floor
New Haven, Connecticut 06511
BY: NORMAN A. PATTIS, ESQ.

Sharon L. Masse, RMR, CRR
Official Court Reporter
915 Lafayette Boulevard
Bridgeport, Connecticut 06604
Tel: (860)937-4177

(Proceedings commenced at 3:53 p.m.)

THE COURT: All right. I have the government's emergency motion, seeking a two-week stay of trial.

MR. PATEL: Your Honor, for the reasons set forth in the motion, we are seeking a stay to seek approval from the Solicitor General's Office for writ of mandamus concerning certain rulings that are outlined in our motion. We're currently in discussions -- currently having conversations with the Solicitor General's Office and are awaiting further instructions from them.

THE COURT: So which rulings are you seeking mandamus on?

MR. PATEL: We haven't reviewed the entire transcript yet, we just got it, so we need to go through it, but just generally the decision to allow Attorney Pattis to elicit testimony and evidence and argue the sentencing consequences, the mandatory minimum penalties, and then to make argument about those penalties and jury nullification.

THE COURT: Okay. Well, let me be clear. I think it would be a shame to lose this jury. The jury has been selected. It's a short trial. I denied Mr. Pattis's motions for continuance this morning. But, more importantly, I think mandamus is inappropriate for the following reasons: I don't believe I've issued any order

that is inconsistent with established law. I screened out jurors at jury selection, and anybody who could not follow the law we struck for cause. So this jury has already been selected with jurors who can follow the rule of law. And at that time I rejected Mr. Pattis's efforts to raise the jury nullification issue; and there is no reason to believe, therefore, that this jury is prone to nullification. So I have done what I can to minimize the risk of jury nullification, as I'm required to do.

In *United States v. Polouizzi*, P-o-l-o-u-i-z-z-i, 564 F.3d 142, Chief Judge Katzman wrote that: "The government concedes that neither the Supreme Court nor this Court has 'expressly held that a court has no authority to inform the jury of the applicable sentence,' but it argues that the principles motivating various Supreme Court and Second Circuit decisions demand the conclusion that a district court may not inform the jury of a mandatory minimum sentence. Specifically, the government draws two principles from court rulings: (1) the Supreme Court's teaching in *Shannon* that the 'jury is to base its verdict on the evidence before it, without regard to the possible consequences of the verdict,' 512 U.S. at 576, and (2) our disapproval, expressed in *United States v. Thomas*, 116 F.3d 606, 616 (2d Cir. 1997), of any encouragement of jury nullification. The government

argues that these two principles are inconsistent with any recognition of district court discretion to instruct the jury as to the consequences of a verdict. In fact, the law does not support such an absolute prohibition.

"First, the government's position contradicts the Supreme Court's explicit statements in *Shannon.* Although the *Shannon* Court concluded that 'an instruction [on the consequences of a not-guilty-by-reason-of-insanity verdict] is not to be given as a matter of general practice' it also specifically 'recognized that an instruction of some form may be necessary under certain limited circumstances.' 512 U.S. at 587-88. And elsewhere in *Shannon*, the court observed: 'As a general matter, jurors are not informed of mandatory minimum or maximum sentences." The phrase "as a general matter" is hyphenated -- excuse me, is italicized. "Far from prohibiting all instructions to the jury regarding the consequences of its verdict, these statements make clear that in some, albeit limited, circumstances it may be appropriate to instruct the jury regarding those consequences."

I am doing far less here. I have no intention, as I said this morning, of instructing the jury on mandatory minimums or their power to nullify. Instead, I simply am allowing Mr. Pattis to argue as he chooses to

argue. There is no doubt that juries have the power to nullify, and Mr. Pattis intends to argue that they should.

I also intend to, as I said this morning, instruct the jury specifically that they must follow the law, and I'm going to quote from my boilerplate jury instructions that I've used in every case for the last 19 years:

"Duties of the jury.

"It is your duty to find the facts from all the evidence in the case. In reaching a verdict you must carefully and impartially consider all the evidence in the case and then apply the law as I have explained it to you. Regardless of any opinion you may have about what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any understanding or interpretation of the law other than the one I give you."

Later, "Closing Instructions on Charged Offenses:

"If you, the jury, find beyond a reasonable doubt from the evidence in this case that the government has proved each of the foregoing elements for a particular count, then proof of the charged crime is complete, and you should find Mr. Manzano guilty on that count. If, on the other hand, you have a reasonable doubt about any of the elements of a particular count, then it is your duty

to find Mr. Manzano not guilty on that count."

And still later:

"The Jury is Not to Consider Punishment.

"The question of the possible punishment that Mr. Manzano will receive if convicted is of no concern to the jury and should not, in any way, enter into or influence your deliberations. The duty of imposing a sentence rests exclusively upon the judge. Your function is to weigh the evidence in the case and to determine whether or not Mr. Manzano has been proven guilty beyond a reasonable doubt on the crimes charged, solely upon the basis of such evidence. Under your oath as jurors, you cannot allow a consideration of the punishment that may be imposed upon Mr. Manzano, if convicted, to influence your verdict or enter into your deliberations."

It is not clear to me what more the government wants me to do. And it would be -- I am not going to do anything to charge that they can nullify, to charge on the mandatory minimum, or to charge that they should in any way encourage or consider nullification as an option in this case. But it's not appropriate to seek mandamus to prevent Mr. Pattis from arguing, in closing arguments by counsel -- if I, under certain circumstances, can admit evidence of the mandatory minimum, if that evidence comes in as a matter of trial evidence, he is permitted to argue

from that to the jury, period.

I said this morning that I think it's outrageous that this prosecution is seeking a mandatory minimum of 15 years; and if Mr. Pattis is not allowed to argue jury nullification, in my view there is a risk of a Sixth Amendment violation here.

All that being said, I recognize that the government does not have the right to appeal a not guilty verdict, and so I recognize that there may be a need to raise whatever its argument is at the Second Circuit by way of mandamus. It's a shame that we're coming to that. But if that's what you intend to do, I think I'm just going to stay this case. Why stay it for two weeks, because we've lost the jury. We can't hold the jury for two weeks. I have no idea when we can next schedule this case.

Take as long as you want. Get your approval. Take as long as you want on the mandamus. Come back here when you're done in the Court of Appeals; and if and when we can schedule it at that time, we will.

So I'm granting the motion, but I think it's a shame that we've gone to this trouble to get a jury, and they're going to be charged appropriately, and I don't know what more I can do.

MR. PATEL: Thank you, Your Honor. Nothing

further from the government.

THE COURT: So you can release the jurors, Rody.

MR. PATTIS: Judge, just so the record is clear, I did not direct Mr. Manzano to come with me to this second proceeding today. I thought we were going to do it by phone. I looked at my email and then hopped in the car immediately. He would have come from a different location. I will inform him.

THE COURT: I don't think it's necessary for him to be here. This is an issue of law. I mean, it's a motion.

MR. PATTIS: Okay.

THE COURT: All right. Thank you. We'll stand in recess.

(Proceedings adjourned at 4:04 p.m.)

C E R T I F I C A T E

No. 3:18-cr-00095-sru
United States of America v. Yehudi Manzano

I, Sharon L. Masse, RMR, CRR, Official Court Reporter for the United States District Court for the District of Connecticut, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

October 30, 2018

/S/ Sharon L. Masse
Sharon L. Masse, RMR, CRR
Official Court Reporter
915 Lafayette Boulevard
Bridgeport, Connecticut 06604
Tel: (860)937-4177

APPENDIX F

Amicus Brief of the Honorable Stefan R. Underhill, United States District Court Judge, *In re United States*, No. 18-3430 (Dec. 19, 2019)

18-3430

United States Court of Appeals
for the
Second Circuit

In Re: UNITED STATES OF AMERICA,

Petitioner.

UNITED STATES OF AMERICA,

Petitioner,

– v. –

YEHUDI MANZANO,

Respondent.

PEITION FOR WRIT OF MANDAMUS OR WRIT OF PROHIBITION
TO THE UNITED STATES DISTRICT COURT
FOR CONNECTICUT (NEW HAVEN)

BRIEF FOR *AMICUS CURIAE* STEFAN R. UNDERHILL IN OPPOSITION TO PETITION

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Attorneys for Amicus Curiae
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Amicus Curiae Judge Stefan R. Underhill respectfully submits this brief in opposition to the Petition for Writ of Mandamus or Writ of Prohibition (the "Petition" or "Pet.") filed by the United States of America (the "Government").

PRELIMINARY STATEMENT

The Petition raises two discrete questions:

First, does the Government have a clear and indisputable right to an order from this Court directing that the District Court shall not, under any circumstances, allow testimony or other evidence of the applicable mandatory minimum sentences?

Second, assuming evidence of the mandatory minimums is indeed received at trial, does the Government have a clear and indisputable right to an order from this Court prohibiting the District Court from allowing defense counsel to argue for jury nullification based on the mandatory minimums under any circumstances?

The answer to the first question is clear. There is not only no case that holds that juries can never learn about applicable mandatory minimums, this Court has explicitly *rejected* that proposition. Moreover, the scope and extent of permissible cross-examination are always committed to the broad discretion of the district court. The Government's apparent belief that mandamus review is available whenever it fails to obtain categorical, irrevocable evidentiary decisions in its favor

in the pretrial stage reflects a misapprehension of the nature and purpose of the extraordinary relief it seeks.

The second question implicates an issue of first impression; the Government concedes that this Court has *never* held that a district court cannot allow a properly instructed jury to hear defense counsel argue for jury nullification. Pet. at 27 ("[T]his Court has not expressly held that a defendant may not argue for nullification."). And the issue is necessarily fact-specific, as it touches on a district court's supervision of defense counsel's closing argument, yet the Government seeks a blanket prohibition pre-trial. Thus, the Government's request for extraordinary relief should be rejected both because the order at issue is conditional (on the admission of evidence of the mandatory minimums), and because even if the condition arises, it would not be "clearly and indisputably" an abuse of discretion for the District Court to permit argument on jury nullification.

Finally, apart from the fact that the Government cannot satisfy the extremely heavy burden it has assumed by raising these issues in a petition for a writ of mandamus, there is an additional reason to deny the petition. Specifically, even if this Court were to apply the much less stringent standard of review applicable on a direct appeal, it would not be an abuse of discretion on the facts of this extraordinary case to inform the jury of the applicable mandatory minimum penalties and to permit defense counsel to argue that the jury should not convict

the defendant because of them. As we discuss below, the core rationale of the very cases on which the Government relies is inapplicable here. Those cases draw comfort from the historic division of labor between judges and juries, in which judges in the sentencing phase act as a check on the imprudent exercise of prosecutorial power. But in the event of convictions in this case, the District Court will have literally no role in determining the sentence, and can provide no such check on the executive. A properly informed jury can help fill that void in extreme cases like this one, where a harsh mandatory sentencing provision has been invoked to punish conduct that is different in kind from the conduct the statute was enacted to combat. Indeed, the approach that the District Court has declined to foreclose—in which a jury properly instructed on the law is informed of the consequences of its verdicts and exhorted by counsel to be lenient—dovetails precisely with the historic power of juries, repeatedly acknowledged and reaffirmed by the Supreme Court, to act as a check against arbitrary and oppressive exercises of prosecutorial power.

PROCEDURAL BACKGROUND

The defendant in this case, Yehudi Manzano ("Defendant"), was originally charged in state court with statutory rape, based on an alleged consensual sexual relationship with a fifteen-year old girl. The complainant informed state authorities that, on one occasion, she and the Defendant videotaped the two of them having

sex. Pet. at 4. The video was recorded on the Defendant's phone but later deleted; authorities discovered the video in the Defendant's Google account, where it had been backed-up. *Id.* at 5. Based on the video, the Defendant subsequently was indicted in federal court on two charges: (1) production of child pornography, in violation of 18 U.S.C. § 2251(a); and (2) transportation of child pornography, in violation of 18 U.S.C. § 2252A(a)(1). Both carry mandatory minimum prison terms—fifteen years on the production count and five years on the transportation count. 18 U.S.C. §§ 2251(e), 2252A(b).

Trial was scheduled to begin on October 29, 2018. *See* Dkt. 28. Prior to jury selection, the Defendant sought to present argument on jury nullification during the *voir dire*. *See* Dkt. 35 (proposing, for example, to notify jurors that they "have the right to determine whether the Government has justly prosecuted" the case). The District Court denied the request. Pet. at 8; *see also* Dkt. 62 (Pet. Attachment II) at 3.

In his proposed jury instructions, the Defendant included a charge on nullification. *See* Dkt. 44 (proposing an instruction that stated, among other things, that "[o]ne of your powers as jurors is to decide whether the Government has justly proceeded in this prosecution"). The District Court denied this request as well, ruling that it will not instruct the jury that it can nullify. *See* Dkt. 60 (Pet.

Attachment I) at 34, 39; Dkt. 62 at 4. To the contrary, the District Court explained that it will instruct the jury that:

- "[I]t would be a violation of your sworn duty to base a verdict upon any understanding or interpretation of the law other than the one I give you." Dkt. 62 at 5.
- "If you, the jury, find beyond a reasonable doubt from the evidence in this case that the government has proved each of the foregoing elements for a particular count, then proof of the charged crime is complete, and you should find [the Defendant] guilty on that count." *Id.*
- "The question of the possible punishment that [the Defendant] will receive if convicted is of no concern to the jury and should not, in any way, enter into or influence your deliberations." *Id.* at 6.
- "Under your oath as jurors, you cannot allow a consideration of the punishment that may be imposed upon [the Defendant], if convicted, to influence your verdict or enter into your deliberations." *Id.*

The Defendant also filed a motion seeking permission to introduce evidence of the mandatory minimum sentences if there are convictions on the charged counts, and to argue that the Government's "application of the law to the particular facts of this case is an obscene miscarriage of justice." Dkt. 30 at 1. The Government opposed the motion, *see* Dkt. 36, and filed its own motion *in limine* seeking the preclusion of such evidence and any argument on the propriety of the Government's prosecution, *see* Dkt. 45 at 9–10.

Addressing the motions at a pretrial conference, the District Court did not grant Defendant's motion, but it refused to foreclose the possibility that evidence and argument regarding the mandatory minimums might be received at trial. Judge

Underhill underscored the limited and conditional nature of his determination: "*[I]f* I, under certain circumstances, can admit evidence of the mandatory minimum, *if* that evidence comes in as a matter of trial evidence, [defense counsel] is permitted to argue from that to the jury, period." Dkt. 62 at 6–7 (emphasis added); *see also* Dkt. 60 at 35 (District Court, in response to Government's stated intention to argue that there would be no basis to credit the Defendant's argument, explaining that "[w]e'll have to see if it comes in into evidence").

After the jury was selected but before it was sworn, the Government asked for an adjournment of the trial so it could petition this Court for mandamus relief. The District Court granted that request and the Petition followed.

ARGUMENT

A. *The Legal Standard.*

A writ of mandamus[1] is "a drastic and extraordinary remedy reserved for really extraordinary causes." *Cheney v. United States*, 542 U.S. 367, 380 (2004) (citation and internal quotation marks omitted). An appellate court should issue mandamus relief only "when necessary to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *United States v. Coonan*, 839 F.2d 886, 889 (2d Cir. 1988) (citation and internal quotation marks omitted); *see also United States v. Will*, 389

[1] The Government alternatively seeks a writ of prohibition, and it is undisputed that the same standard applies to both writs. *See* Pet. at 21 n.7.

U.S. 90, 98 n.6 (1967) ("Courts faced with petitions for the peremptory writs must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of nonappealable orders on the mere ground that they may be erroneous.").

To obtain a writ of mandamus, the petitioner must also show that it has no other means to obtain the relief it seeks, and must demonstrate a clear and indisputable right to issuance of the writ. Even then, this Court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances. *See Cheney*, 542 U.S. at 380–81. The mere fact that the Government may be unable to appeal a district court's determination is insufficient to warrant mandamus relief. *See Will*, 389 U.S. at 96–98; *United States v. Sam Goody, Inc.*, 675 F.2d 17, 25 (2d Cir. 1982) (superseded by statute on other grounds). It is the Government's burden to show "that its right to issuance of the writ is clear and indisputable." *Will*, 389 U.S. at 96 (citation and internal quotation marks omitted).

The Petition here is premised on the assertions that the District Court has decided to "permit the introduction of evidence about the statutory mandatory minimum penalty" and to "allow arguments for jury nullification." Pet. at 18. As the procedural history set forth above makes clear, neither assertion is accurate. The District Court has merely declined to preclude the possibility that such evidence or argument will be allowed at trial. As discussed below, neither this

Court nor the Supreme Court has ever held that under no circumstances can evidence or defense argument on mandatory minimums or jury nullification be admitted. Circumstances may arise at trial that would permit the District Court, acting within its discretion, to allow both. Declining to extinguish that possibility in the pretrial phase is no abuse of discretion at all, let alone the "clear and indisputable" abuse of discretion a mandamus petitioner must show in order to be entitled to relief.

B. *The District Court's Refusal to Rule Out Evidence of the Mandatory Minimums at Trial is Not a Proper Subject of Mandamus Review.*

The Government's request for mandamus relief precluding evidence of the mandatory minimums fails for two independent reasons: The District Court did not foreclose the relief the Government seeks, and the Government fails to demonstrate that the District Court clearly and indisputably erred.

First, the District Court has made no ruling on the admissibility of evidence of the applicable mandatory minimums; it stated only that it was refusing to rule *out* the possibility that such evidence might be received at trial. As a result, the Government cannot show, as it must, that it has no means other than this Petition to obtain the relief it seeks.

It may be, depending on how the testimony unfolds, that defense counsel is unable to lay a foundation for questioning a witness about the applicable mandatory minimums. And if and when defense counsel attempts to do so, the

Government will be able to object, and to present argument to the District Court. An order sustaining such an objection has not been foreclosed by the rulings of the District Court. *See Kerr v. United States Dist. Court*, 426 U.S. 394, 404 (1976) (where decision below "did not foreclose" the relief sought by the petitioner, writ should be denied); *Chandler v. Judicial Council of the Tenth Circuit of the U.S.*, 398 U.S. 74, 86 (1970) (denying mandamus because "in the present posture of the case other avenues of relief on the merits may yet be open"); *cf. In re Dow Corning Corp.*, 261 F.3d 280, 285 (2d Cir. 2001) ("Where the record below is ambiguous, the writ of mandamus will not issue." (citation and internal quotation marks omitted)). In addition, the District Court can of course direct that the issue be addressed outside the presence of the jury, so, in the event the application to examine based on the mandatory minimums is denied, the jury will not need to be instructed to disregard the questions. In short, the Government has no right to mandamus review to correct *potential* evidentiary errors on the mere speculation that such errors might be made, the jury might then acquit the defendant, and the Government would then be unable to appeal.

A second fatal defect in the Petition is the nature of the relief it seeks. Specifically, the Government seeks a writ that categorically prohibits the district court from admitting evidence of the mandatory minimums when the case is tried. No decision supports such an extraordinary order. To the contrary, in the context

of jury instructions about mandatory minimums, the Supreme Court and this Court have made it clear that a categorical prohibition on such an instruction would be inappropriate. The Court in *Shannon v. United States*, 512 U.S. 573 (1994), explicitly recognized that an instruction regarding the sentencing consequences of a conviction "may be necessary under certain limited circumstances," and stated that its decision should not be "misunderstood as an absolute prohibition on instructing the jury with regard to the consequences" of its verdicts. *Id.* at 587–88; *see also id.* at 586 (noting that "*as a general matter*, jurors are not informed of mandatory minimum or maximum sentences" (emphasis added)). And in *United States v. Polouizzi*, 564 F.3d 142 (2d Cir. 2009), this Court rejected the government's argument "that a district court may never instruct the jury on an applicable mandatory minimum sentence." 564 F.3d at 159; *see also id.* at 161 (determining that "the law does not support … an absolute prohibition" on "district court discretion to instruct the jury as to the consequences of a verdict"). In the pretrial stage, before the evidence at trial unfolds and the prosecutor's summation is heard, it is never appropriate to foreclose the possibility that the jury will be informed of applicable mandatory minimums in the district court's instructions.[2]

[2] The District Court's pretrial rejection of the Defendant's request for such an instruction does not suggest otherwise. The fact that a defendant has no right to an instruction regarding mandatory minimum sentences does not strip a trial judge of discretion to give one if, in the court's view, justice requires. Both *Shannon* and *Polouizzi* cite a misleading statement by a witness or the prosecutor regarding the sentencing consequences of a conviction as an example of a circumstance in which such an instruction might be warranted. *Shannon*, 512

As for *evidence* of the mandatory minimums, there are reasons why such evidence might become admissible at the trial of this case. Defense counsel has already suggested that he may seek to question the complainant or government agents regarding bias, or a potential interest in the outcome of the case, and that such questioning, if permitted, could include reference to the mandatory minimums. Dkt. 60 at 17. Although the District Court has ruled that the Defendant will not be permitted to question why the U.S. Attorney's Office brought the case, it has not ruled out that cross-examination (or direct examination, if the Defendant calls the witness) may shed useful light on the witnesses' bias or interest in the outcome of the trial. Dkt. 60 at 20–21.

It is almost always impossible in the pretrial phase to anticipate how a trial will develop, but in this case, the possibility of permissible questioning about the mandatory minimum punishments meted out by the federal statutes at issue is patent. For example, the Defendant contends that the complainant represented that she was born in 1991, *see*, *e.g.*, Dkt. 48 at 6, and whether he was reasonably mistaken about her age will be a jury question at trial. Thus, the complainant's credibility will be at issue. The Defendant further alleges that she tried to extort money from him, stating that she would not report him to the authorities if he paid

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U.S. at 587; *Polouizzi*, 564 F.3d at 162. Judge Underhill's stated intention not to instruct the jury regarding the applicable mandatory minimums will obviously not impair his ability to revisit that decision in such a circumstance.

her. *See, e.g.*, Dkt. 48 at 5; Dkt. 60 at 14. He refused to do so, and the complainant is currently seeking money damages against him in a separate action. *See* Dkt. 48 at 5; Dkt. 60 at 15.

In these circumstances, it is at least conceivable that the threat of taking the complaint to federal court, where the Defendant would face onerous mandatory punishments, will play a role in probing the motives and credibility of the complainant. Similarly, it is possible that law enforcement agents mentioned those mandatory minimums to the Defendant before they brought a statutory rape case to federal court, and did so in ways that may bear on their credibility as well.

If this seems speculative, that is because predicting what will happen at trial is *inherently* speculative. What is clear is this: The scope and extent of cross-examination at trial always lies within the broad and sound discretion of the trial judge. *See, e.g.*, *United States v. Tutino*, 883 F.2d 1125, 1140 (2d Cir. 1989). And that discretion is best exercised at trial, not in the pre-trial stage, before the opening statements and testimony provide the context that is so important to such determinations. *Cf. Wheat v. Illinois*, 486 U.S. 153, 162–63 (1988) (lamenting the need for trial judges to decide motions to disqualify counsel in "the murkier pre-trial stage, when relationships between parties are seen through a glass, darkly"). The Government's attempt to use mandamus review to police that discretion before it is even exercised betrays a misapprehension of the nature and purpose of the

extraordinary writ. *See Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) ("Where a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'"); *United States v. DiStefano*, 464 F.2d 845, 850 (2d Cir. 1972) (denying writ where district court had power to exercise discretion, even if court on appeal determined that district court wrongly exercised that discretion, because mandamus's purpose "is not to control the decision of the trial court, but rather merely to confine the lower court to the sphere of its discretionary power" (quoting *Will*, 389 U.S. at 102) (internal quotation marks omitted)).

The cases on which the Government relies are inapposite. The Courts in *Shannon*, *Polouizzi*, and *United States v. Pabon-Cruz*, 391 F.3d 86 (2d Cir. 2004), all held, on appeal after trial, that the district court's refusal to inform the jury of the sentencing consequences of its verdict did not deprive the defendant of a fair trial. *Shannon*, 512 U.S. at 575; *Polouizzi*, 564 F.3d at 163; *Pabon-Cruz*, 391 F.3d at 95. Not only is this case still in the pretrial phase, but holdings that a defendant had no *entitlement* to such a jury charge shed no light on whether a district judge has the discretion to give one where the circumstances warrant. Most importantly, the issue before this Court is not whether there should be a jury charge regarding the mandatory minimums; indeed, Judge Underhill has already rejected the Defendant's request for such an instruction. The issue raised by the Petition is

whether the Government has a clear and indisputable right to an order from this Court precluding any testimony or other evidence of the mandatory minimums at trial. For the reasons stated above, the Government has no right to such an order.

C. *The Conditional Ruling that Defense Counsel May Argue for Jury Nullification Based on the Mandatory Minimums Is Not a Proper Subject of Mandamus Review.*

The Government's request for an order precluding defense counsel from arguing for jury nullification should be denied for two reasons.

First, the District Court was clear that it will permit such argument only if evidence of the mandatory minimums is found admissible at trial. Dkt. 62 at 6–7; Dkt. 60 at 35. As discussed above, mandamus relief is unavailable when a petition challenges such a conditional ruling, which does "not foreclose" the relief the Government seeks. *Kerr*, 426 U.S. at 404. If the Government prevails in objecting to the evidence at trial, no argument on that evidence, whether for jury nullification or otherwise, will be permitted.

Second, even if the rulings challenged here were not conditional—that is, even if Judge Underhill had ruled that evidence of mandatory minimums will be admitted at trial and jury nullification argument based on that evidence will be allowed—there would be no clear and indisputable abuse of discretion.

The decisions of this Court do not even address, let alone clearly and indisputably decide, the issue of whether a district court has the discretion to

permit defense counsel to argue in favor of jury nullification. Indeed, the Government concedes that its petition raises an issue of first impression. *See* Pet. at 27 ("[T]his Court has not expressly held that a defendant may not argue for nullification.").

In the absence of controlling precedent, the Government relies heavily on *United States v. Thomas*, 116 F.3d 606 (2d Cir. 1997). Specifically, it begins its petition with the emphatic pronouncement that "[e]stablished law requires the district court to *prevent* jury nullification, not to *allow arguments in support of it*." Pet. at 2 (emphases in original). But its only support for that pronouncement is its later argument that "[t]he Court's language in *Thomas* could hardly be more clear: Because nullification is an affront to the rule of law, a judge should prevent jury nullification *if it is within his authority to prevent*." *Id.* at 23 (quoting *Thomas*, 116 F.3d at 615) (emphases supplied by the Government).

Even assuming the quoted language from *Thomas* could fairly be read to extend to the circumstances of this case, it would not support or justify mandamus relief. Only *holdings* create "established law"; *language* that is unnecessary to those holdings does not. *See* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1282 (2006) ("If a rule was declared only in dictum, the question remains undecided."). The distinction is especially critical in this context, where the petitioner must show a clear and indisputable

right to the relief requested. The holding of *Thomas* was that a district judge may properly remove for cause a juror who refuses to follow the law as long as the record leaves no doubt that the juror would engage in nullification. 116 F.3d at 618, 622, 625. The question whether a district court has the discretion, in an appropriate case, to permit a defense lawyer to argue for jury nullification was not before the Court, was not decided by the Court, and, as the Government concedes, remains an open question in this Circuit.

In addition to being an open question, it is a difficult and nuanced one. Closing arguments of defense counsel have long been recognized as a fundamental aspect of a fair trial, and a judge presiding over trial "must be and is given great latitude" over the scope of summations. *Herring v. New York*, 422 U.S. 853, 862 (1975). Courts have also recognized that, even in the context of jury nullification, defense counsel enjoy certain "leeway in persuading the jury to acquit out of considerations of mercy or obedience to a higher law." *United States v. Burkhart*, 501 F.2d 993, 997 n.3 (6th Cir. 1974)[3]; *see also United States v. Lynch*, 903 F.3d 1061, 1087–88 (9th Cir. 2018) (Watford, J., dissenting) (examining the historic

[3] The Sixth Circuit, relying on *Shannon*, has subsequently held that a district court did not err in refusing to permit a criminal defendant to argue to the jury about the punishment he would receive if convicted. *See United States v. Chesney*, 86 F.3d 564, 574 (6th Cir. 1996) (rejecting defendant's contention that the district court's refusal violated his constitutional right to a fair trial). But a decision that it was not an abuse of discretion to permit such an argument in one case does not undermine the argument that trial judges have the discretion to permit it in appropriate circumstances.

role of the jury "to act as 'the conscience of the community,'" "in the teeth of both law and facts." (internal citations omitted)).

The question whether defense counsel might, in appropriate circumstances, be permitted to argue for jury nullification is both undecided by this Court and, at a minimum, debatable. Given the uncertainty of the law and the pretrial posture of this case, the Government's mandamus petition—which can be granted only when it is clear and indisputable that the petitioner is entitled to relief—is not the proper vehicle for addressing this issue.

D. *Even Under the Standard Applicable to Direct Review, It Would Not Be an Abuse of Discretion to Allow Evidence of Mandatory Minimums and Defense Argument on Nullification in This Case.*

As discussed above, the Government fails to meet the heavy burden that applies to a petition for an extraordinary writ, and for that reason the Petition should be denied in its entirety. But even if the Court were to apply the standard of review applicable to a direct appeal, on the record now before it, it would not be an abuse of discretion for the District Court to allow both evidence of the mandatory minimums and defense argument regarding nullification based on that evidence.

It bears emphasis that the District Court has assiduously followed all of this Court's precedents. It did not, and will not, inform the jury about nullification, and it denied defense counsel's request that it instruct the jury about mandatory minimums. *Cf. Pabon-Cruz*, 391 F.3d at 94; *Polouizzi*, 564 F.3d at 160. It has

stated that it will instruct the jury that it should find the Defendant guilty if it finds beyond a reasonable doubt that the Government has proved each of the relevant elements, and that the jury cannot concern itself with the punishment the Defendant will receive if convicted. *See* Dkt. 62 at 5–6.

The Petition begins by asserting that the District Court "dislikes the penalty that Congress set for" the offense of producing child pornography, Pet. at 1, but the record could hardly be clearer: the District Court dislikes the Government's decision to invoke that penalty *in this case*. And in light of the disconnect between the evils Congress had in mind in enacting the mandatory minimums at issue and the conduct alleged by the Government, the District Court's expressed frustration is entirely justified.

The Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today ("PROTECT") Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003), was designed to "strengthen[] law enforcement's ability to prevent, investigate, prosecute and punish violent crimes committed against children."[4] Among other things, the statute made certain sentencing enhancements more severe, resulting in the fifteen-year mandatory minimum applicable to Count One, and creating the five-year mandatory minimum for the transportation of child

[4] DOJ PROTECT Act Fact Sheet (April 30, 2003), available at https://www.justice.gov/archive/opa/pr/2003/April/03_ag_266.htm.

pornography charged in Count Two.[5] These provisions mandate harsh sentences for those who engage in the sexual exploitation of children through the internet, where the commerce in child pornography largely takes place.[6]

The District Court has every reason to believe that the Government has charged the Defendant with producing child pornography—and subjected him to the harsh fifteen-year mandatory sentence—not because he engaged in the kind of conduct Congress had in mind in prescribing that punishment, but simply because it could. There is no allegation that the Defendant created child pornography for mass internet consumption, which harms the photographed victim and sustains a market that victimizes countless others. Rather, it appears that the Defendant is facing fifteen years in prison for creating, for personal use during a consensual relationship, a single video that he never distributed and later deleted. Because that alleged conduct stands in stark contrast to the conduct Congress had in mind when it enacted the mandatory minimums the Defendant is facing, the District Court is rightfully concerned that the prosecutors are misusing the powers Congress gave them.

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[5] PROTECT Act §§ 103(b)(1)(A), (E), 117 Stat. at 653; U.S. Sent'g Comm'n, An Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System 13 (July 2017), *available at* https://www.ussc.gov/research/research-reports/2017-overview-mandatory-minimum-penalties-federal-criminal-justice-system.

[6] DOJ PROTECT Act Fact Sheet (April 30, 2003), available at https://www.justice.gov/archive/opa/pr/2003/April/03_ag_266.htm.

The Government obviously wants to exercise those powers unchecked, but the very same cases on which it relies presume the existence of a check on the sort of charging decisions it made in this case. When *Shannon* held in 1994 that judges are not required to instruct juries regarding the consequences of their verdicts, it relied on "the basic division of labor in our legal system between judge and jury," pursuant to which the jury serves as fact finder and the judge imposes the sentence. 512 U.S. at 579; *see also Pabon-Cruz*, 391 F.3d at 94–95 (quoting *id.*). The Supreme Court reasoned that, as a result of this separation, "[i]nformation regarding the consequences of a verdict is … irrelevant to the jury's task." *Shannon*, 512 U.S. at 579.

There will be no such "division of labor" in this case if the Government gets its way, and thus no check on its enormous power. The improvident deployment of the statutes at issue will require the imposition of a sentence so far in excess of what is fair that there will be no judging at the sentencing proceeding if the Defendant is convicted. *See* Dkt. 60 at 34 ("I am going to be allowed no discretion at sentencing to consider the seriousness of this conduct or the lack of seriousness of this conduct ….").

When the Government uses mandatory minimum sentencing provisions in ways that remove the judge's ability to "temper[] prosecutorial discretion,"[7] allowing the jury to hear argument from counsel on the mandatory minimums at stake makes sense. First, it is honest. Keeping information on the applicable mandatory minimums away from jurors will mislead them into believing that if they find the Defendant guilty, the court will give him individualized sentencing consideration.[8] In fact, their verdicts alone will both determine guilt and dictate harsh sentences.

Second, the carefully calibrated approach the District Court has in mind finds ample support in multiple Supreme Court cases that acknowledge and protect the historic role of jury nullification as a check on arbitrary and oppressive exercises of prosecutorial power.

Jury nullification is not uncommon, but because the Government cannot appeal acquittals, the topic reaches the appellate level only when the exercise of this power takes the form of a compromise verdict. The jury finds the defendant guilty of one charged crime but not another despite its finding that the government proved both. The Supreme Court held long ago, in *Dunn v. United States*, 284 U.S. 390 (1932), that the inconsistent verdicts those compromises produce cannot

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[7] Kristen K. Sauer, Note, *Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences*, 95 Colum. L. Rev. 1232, 1241–42 (1995).

[8] *See id.* at 1263.

be challenged on appeal. As Justice Holmes's opinion for the Court explained, quoting this Court with approval, compromise verdicts can reflect the jury's power to confer leniency on the defendant. *Id.* at 393 ("We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity." (quoting *Steckler v. United States*, 7 F.2d 59, 60 (2d Cir. 1925))).

A half-century later, the Supreme Court stated that *Dunn* and *United States v. Dotterweich*, 320 U.S. 277, 279 (1943), established "the unreviewable power of a jury to return a verdict of not guilty for impermissible reasons." *Harris v. Rivera*, 454 U.S. 339, 346 (1981). Then, in *United States v. Powell*, 469 U.S. 57 (1984), the Court both reaffirmed *Dunn* and observed that *Dunn* "has been explained by both courts and commentators as a recognition of the jury's historic function, in criminal trials, as a check against arbitrary or oppressive exercises of power by the Executive Branch." *Id.* at 65.

These precedents make it clear that the jury that hears this case will have the power to find the Defendant not guilty on one or both of the counts he faces even if it finds he was *proved* guilty of both, and that it can exercise that historic power in order to provide precisely the check on prosecutorial overreaching that the District Court itself will be precluded from providing. However, without information about the sentencing consequences of its verdicts, it will be stripped of that power.

No reasonable juror could intuit that convictions in this case would subject the Defendant to a mandatory fifteen-year term. And if the jurors choose to compromise, as many juries do in order to confer leniency, it would be anomalous indeed to require them to simply guess which count they should acquit on to produce that result, on pain of tripling the Defendant's sentence if they guess wrong.

In sum, a careful and thoughtful district judge has crafted an approach—one that is consistent with every controlling decision of the Supreme Court and this Court—that, if warranted by the circumstances of trial, will tap into the historic power of juries, repeatedly acknowledged and reaffirmed by the Supreme Court, to act as a check against arbitrary and oppressive exercises of prosecutorial power. Even if that approach were reviewed here under the more stringent standard of review applicable on direct review, we respectfully submit that this Court would not find an abuse of discretion.

CONCLUSION

For the reasons stated, the petition for writ of mandamus or writ of prohibition should be denied.

Dated: New York, New York
December 19, 2018

Respectfully submitted,

By: /s/ John Gleeson

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Certification of Compliance with
Federal Rule of Appellate Procedure 21(d) and 32(a)

This brief complies with the type-volume limitations of Fed. R. App. Proc. 21(d) because it contains 5,754 words, exclusive of the parts of the brief exempted by Fed. R. App. Proc. 32(f).

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I certify under penalty of perjury that the foregoing statements are true.

Dated: December 19, 2018

/s/ Pooja A. Boisture

APPENDIX G

18 U.S.C. § 3731

18 U.S. Code § 3731 - Appeal by United States

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, or any part thereof, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

The provisions of this section shall be liberally construed to effectuate its purposes.