

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.

SANDRA S. GLOVER, Assistant United States Attorney (Sarah P. Karwan, Neeraj Patel, Assistant United States Attorneys, *on the brief*), for John H. Durham, United States Attorney for the District of Connecticut, New Haven, CT, *for Petitioner*.

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.

Timothy Lynch, The Fully Informed Jury Association, Helena, MT, *for Amicus Curiae*
The Fully Informed Jury Association.

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. Facts¹

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

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