

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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

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:

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

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

4 MR. PATTIS: I raised a series of motions on the
5 26th, which was last Friday, and it would be my hope that
6 as many of them as possible could be resolved today.

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

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

19 MR. PATTIS: May I approach?

20 THE COURT: Yes, sure.

21 MR. PATTIS: (Handing.)

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

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

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

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

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

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

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

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

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

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

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

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

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

1 *Holton*, Second Circuit, 2003.

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

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

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

1 certain evidence.

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

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

25 THE COURT: The statute is not a specific intent

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

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

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

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

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

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

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

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

1 would justify throwing out the indictment.

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

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

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

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

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

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

11 THE COURT: Well...

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

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

22 MR. PATEL: Just one moment, Your Honor.

23 (Pause.)

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

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

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

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

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

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

24 THE COURT: Right.

25 MR. PATEL: -- but the actual what happens

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

3 THE COURT: Okay.

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

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

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

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

13 MR. PATTIS: Understood. Understood, sir.

14 THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 It strikes me that this is one of those vagaries

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 THE COURT: Right.

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

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

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

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

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

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

5 THE COURT: All right. What's next?

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

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

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

1 the first time.

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

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

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

17 MR. PATTIS: That's understood.

18 THE COURT: Okay.

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

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

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

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

9 THE COURT: Okay. Well --

10 MR. PATTIS: Understood.

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

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

24 THE COURT: All right.

25 MS. KARWAN: And will the jury be instructed

1 that at the onset, Your Honor?

2 THE COURT: In the preliminary instructions?

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

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

9 MS. KARWAN: Understood, Your Honor.

10 THE COURT: That's fine.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 THE COURT: All right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 MS. KARWAN: Your Honor, may I inquire?

7 THE COURT: Yes.

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

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

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

18 THE COURT: Correct.

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

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

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

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

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

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

20 MS. KARWAN: I understand, Your Honor. At
21 sentencing we would still present evidence related to the
22 3553(a) factors, and --

23 THE COURT: Why bother?

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

1 THE COURT: Why bother?

2 MS. KARWAN: I understand Your Honor's
3 frustration with the mandatory minimum, but I think
4 3553(a) is still applicable. Your Honor might conclude
5 that 15 years, the mandatory minimum is insufficient based
6 on relevant conduct.

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

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

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

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

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

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

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

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

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

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

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

1 THE COURT: Yes. He is.

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

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

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

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

15 THE COURT: Yes, he is.

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

20 THE COURT: I'm going to --

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

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

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

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

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

6 MR. PATTIS: Understood.

7 THE COURT: What else?

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

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

11 THE COURT: Okay. So we're here at
12 9:00 tomorrow. And did anybody have comments on the
13 preliminary jury instructions?

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

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

20 MR. PATEL: Yes, sir.

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

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

24 MR. PATTIS: No further comments, Judge.

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

1 in recess.

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

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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

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