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Nonconsensual Waiver of a Jury Trial: Closing the Door, But Not Completely: *United States v. United States District Court*

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CASE SUMMARY

NONCONSENSUAL WAIVER OF A JURY TRIAL: CLOSING THE DOOR, BUT NOT COMPLETELY

UNITED STATES v. UNITED STATES *DISTRICT COURT*

INTRODUCTION

In *United States v. United States District Court*, the Ninth Circuit held that the circumstances of a child sexual abuse case did not warrant an exception to Rule 23 of the Federal Rules of Criminal Procedure, which requires the government's consent for a defendant to waive a jury trial.¹ The court determined that the district court's ruling, which allowed the defendant to waive a jury trial without the government's consent, was clearly erroneous as a matter of law, and granted the government's petition for a writ of mandamus to require the district court to hold a jury trial.²

I. FACTS AND PROCEDURAL HISTORY

On August 19, 2003, the United States charged Allen Harrod, his wife, and another married couple with multiple counts arising from the transport of young children in interstate commerce with the purpose of

¹ *United States v. U.S. Dist. Court for the E. Dist. of Cal.*, 464 F.3d 1065, 1071 (9th Cir. 2006).

² *Id.* at 1072.

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engaging them in illegal sexual acts.³ The victims, defendants' own five children, allegedly suffered ritualistic sexual abuse for approximately ten years, including "oral copulation, vaginal and anal intercourse, and other acts committed upon the children, and acts that the children were forced to commit."⁴ Some of the children were as young as age seven when abused.⁵ Defense counsel indicated that they would not contest either that the sexual acts had occurred or that the children were transported between states.⁶ The defense planned to focus instead on lack of intent.⁷

On April 14, 2006, eleven days prior to the date set for trial, Harrod filed a "Motion to Waive Jury and to be Tried by Judge."⁸ The basis of the motion was that due to the horrific nature of the molestation evidence, "no jury could fairly consider defendants' argument that the government could not prove knowledge and intent at the time the children were transported in interstate commerce."⁹ The government opposed the motion.¹⁰

The United States District Court for the Eastern District of California held a hearing on defendants' motion for a bench trial on April 19, 2006.¹¹ Over the government's objections, the district court granted the motion.¹² The court noted that according to defendants' counsel, the only defense with any chance of success would be one based on lack of knowledge or intent, and stated that it would be "very difficult for the court to control the evidence in such a way that the jury is going to be able to focus upon that defense."¹³ The court further stated that it could "give both sides a fair trial, if [it was] a court trial," but said that the bottom line was that the court "[did] not know [whether it could] rule correctly on every one of the evidentiary objections that might be deemed to deny defendants a fair trial if [there was] a jury [trial]."¹⁴

³ *Id.* at 1067.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *United States v. U.S. Dist. Court for the E. Dist. of Cal.*, 464 F.3d 1065, 1067 (9th Cir. 2006).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* The government's opposition was predicated on Federal Rule of Criminal Procedure 23(a), which requires the consent of the government for a defendant to waive a jury trial. FED. R. CRIM. P. 23(a). See *infra* notes 20-21 and accompanying text.

¹¹ *United States v. U.S. Dist. Court for the E. Dist. of Cal.*, 464 F.3d 1065, 1067 (9th Cir. 2006).

¹² *Id.*

¹³ *Id.* (quoting the district court).

¹⁴ *Id.* at 1068 (quoting the district court).

The district court cited *Singer v. United States* and asserted “the likelihood that the defendants would not receive a fair trial to a jury outweighs any interest that the Government has under Rule 23 to a trial by jury.”¹⁵ Following its grant of defendants’ motion, the district court stayed the case to allow the government to file its mandamus petition.¹⁶

II. NINTH CIRCUIT ANALYSIS

In a per curiam opinion, the Court of Appeals for the Ninth Circuit began by articulating its five-factor test to determine whether to grant “the exceptional remedy of mandamus relief” and stated that “[a] petitioner need not establish all five . . . factors.”¹⁷ One of the factors the Ninth Circuit evaluates in its determination is “whether the district court’s order is clearly erroneous as a matter of law.”¹⁸

The Ninth Circuit then reviewed the history of Federal Rule of Criminal Procedure 23(a) (“Rule 23(a)”) and the United States Supreme Court decision in *United States v. Singer*, which addressed the constitutionality of that rule.¹⁹ Rule 23(a) was adopted in 1944 to codify the Supreme Court’s 1930 holding in *Patton v. United States*.²⁰ Rule 23(a) requires the consent of the government and the approval of the court in order for a defendant to waive a jury trial in a federal case.²¹ In *Singer*, the Court held that conditioning a defendant’s waiver on the consent of the government did not violate the defendant’s due process and fair trial rights.²²

¹⁵ *Id.* (quoting the district court); see *Singer v. United States* 380 U.S. 24 (1965).

¹⁶ *Id.*

¹⁷ *United States v. U.S. Dist. Court for the E. Dist. of Cal.*, 464 F.3d 1065, 1068-69 (9th Cir. 2006) (citing *United States v. Fei Ye*, 436 F.3d 1117, 1121-22 (9th Cir. 2006)).

¹⁸ *Id.* at 1069 (quoting *Fei Ye*, 436 F.3d at 1121-22). The complete five-factor test is as follows:

- (1) whether the petitioner has no other adequate means to attain the relief he or she desires;
- (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal;
- (3) whether the district court’s order is clearly erroneous as a matter of law;
- (4) whether the district court’s order is an oft-repeated error, or manifests a persistent disregard of the federal rules; and
- (5) whether the district court’s order raises new and important problems, or issues of law of first impression.

Id. (quoting *Fei Ye*, 436 F.3d at 1121-22).

¹⁹ See *id.* at 1069-70; see also *Singer v. United States* 380 U.S. 24 (1965).

²⁰ *Id.* at 1069. The text of Rule 23(a) reads as follows: “Jury Trial. If the defendant is entitled to a jury trial, the trial must be by jury unless: (1) the defendant waives a jury trial in writing; (2) the government consents; and (3) the court approves.” *Id.*

²¹ FED. R. CRIM. P. 23(a).

²² *United States v. U.S. Dist. Court for the E. Dist. of Cal.*, 464 F.3d 1065, 1070 (9th Cir. 2006) (citing *Singer v. United States*, 380 U.S. 24, 36 (1965)).

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The Ninth Circuit noted that the *Singer* Court had remarked it “need not determine . . . whether there might be some circumstances where a defendant’s reasons for wanting to be tried by a judge alone are so compelling that the Government’s insistence on trial by jury would result in the denial to a defendant of an impartial trial.”²³ The Ninth Circuit then examined case law after *Singer* and pointed out that the Supreme Court had never determined the circumstances alluded to in *Singer* to exist; to the contrary, the Court had on at least one occasion “characterized the requirement of government consent as absolute.”²⁴

The Ninth Circuit acknowledged that lower federal courts had generally assumed that *Singer* provides for a possible exception to the government consent requirement. However, the court noted that the two district court cases cited by the defendant that granted a waiver over the government’s objection were from the 1970’s, and observed that no circuit court that had considered the question had approved such a nonconsensual waiver.²⁵ The court also pointed to the Ninth Circuit case of *United States v. Reyes*, where it had stated that any “passion, prejudice . . . and public feeling” defendant feared from the jury was addressed during the voir dire proceedings, and upheld the trial court’s refusal to grant defendant’s nonconsensual waiver.²⁶

Moving on to the district court’s decision, the Ninth Circuit concluded that “a mistake ha[d] been committed.”²⁷ The court found that “the district court, as a matter of law, was clearly erroneous in ordering a non-jury trial without the consent of the prosecution.”²⁸ The court noted that “while trying this case [wa]s not without its challenges,” the court was confident that the trial judge was “fully capable of ensuring the[] defendants an impartial trial.”²⁹ The court observed that the trial court had an abundance of tools at its disposal, derived from the Federal Rules of Evidence and Criminal Procedure and the court’s inherent

²³ *Id.* (quoting *Singer*, 380 U.S. at 37).

²⁴ *Id.* (citing *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 383 (1979)).

²⁵ *Id.* at 1070-71 (citations omitted).

²⁶ *Id.* at 1071 (quoting *United States v. Reyes*, 8 F.3d 1379, 1390 (9th Cir. 1993)). One commentator has suggested that any possibility of a *Singer* exception based on fear of an impartial jury trial is illusory: “[S]ince a defendant has an absolute right to a trial by an impartial jury, any defendant who makes such a demonstration is entitled to a dismissal, thereby rendering any right to a bench trial grounded in the fair trial guarantee superfluous.” Jon Fieldman, Comment, *Singer v. United States and the Misapprehended Source of the Nonconsensual Bench Trial*, 51 U. CHI. L. REV. 222, 223 (1984).

²⁷ *United States v. U.S. Dist. Court for the E. Dist. of Cal.*, 464 F.3d 1065, 1071 (9th Cir. 2006) (quoting *United States v. Fei Ye*, 436 F.3d 1117, 1123 (9th Cir. 2006)).

²⁸ *Id.* at 1072.

²⁹ *Id.* at 1071.

power, to ensure an impartial trial.³⁰

The Ninth Circuit then returned to its discussion of the five-factor mandamus test, and found that in addition to the clearly erroneous factor, two other factors were met: the government had no other adequate means to force the district court to hold a jury trial, and this error was not correctable on appeal.³¹ The court also mentioned that the issue of government consent “raise[d] an important question of law,” thereby satisfying an additional mandamus factor.³² The court accordingly granted the government’s petition for a writ of mandamus, and directed the district court to rescind its order granting defendant’s jury trial waiver motion.³³

III. IMPLICATIONS OF THE DECISION

The Ninth Circuit’s decision in this case affirms the jurisprudence of other circuit courts.³⁴ This will likely make it harder for defendants in federal criminal trials to obtain a nonconsensual jury trial waiver, particularly in the Ninth Circuit. The underlying case here involved particularly heinous crimes, committed against children.³⁵ It is difficult to imagine a case with more potential for jury “passion, prejudice[, or] public feeling”³⁶ to render an impartial jury trial impossible; this raises the bar for defendants attempting to show impartiality such that a nonconsensual waiver is warranted.³⁷

The Ninth Circuit appears to have left the door open, however. In commenting on the *Singer* Court’s observation that it did not need to determine in that case whether a nonconsensual waiver might under some circumstances be warranted, the Ninth Circuit stated that, “Neither need we make such a determination.”³⁸ This statement might keep hope

³⁰ *Id.* The court listed several examples of such tools, including voir dire, limitations of cumulative and “bad acts” evidence, and jury instructions emphasizing that each and every element of the charged offense must be proved beyond a reasonable doubt. *Id.* at 1071-72.

³¹ *Id.* at 1072.

³² *United States v. U.S. Dist. Court for the E. Dist. of Cal.*, 464 F.3d 1065, 1072 (9th Cir. 2006).

³³ *Id.*

³⁴ *See id.* at 1070-71 (citing decisions of other circuit courts and noting that those circuit courts that had considered the issue had “uniformly upheld trial courts’ refusals to grant such waivers without government consent.”) (citations omitted).

³⁵ *Id.* at 1067.

³⁶ *Singer v. United States*, 380 U.S. 24, 37-38 (1965) (quoting petitioner’s brief at 24).

³⁷ One commentator asserts that such an exception for impartiality would be superfluous. *See Fieldman, supra* note 26, at 223.

³⁸ *United States v. U.S. Dist. Court for the E. Dist. of Cal.*, 464 F.3d 1065, 1071 (9th Cir. 2006).

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alive for defendants, wishing to obtain a nonconsensual bench trial, that their circumstances could merit a *Singer* exception.

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