

2010

Utah v. Jamie Lynn Greenwood : Brief of Appellee

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,)	
)	
Plaintiff / Petitioner,)	Case No. 20100632-SC
)	
v.)	
)	
JAMIE LYNN GREENWOOD,)	
)	
Defendant / Respondent.)	

BRIEF OF RESPONDENT

Appeal from interlocutory order granting Defendant's motion to waive jury trial, entered in the Third Judicial District Court, Salt Lake County, the Honorable Robert W. Adkins, presiding

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UTAH APPELLATE COURTS

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STATEMENT OF JURISDICTION

Having granted the State's Petition for Interlocutory Appeal, involving four first-degree felonies, this Court has jurisdiction over the instant appeal pursuant to article VIII, § 3, of the Utah Constitution and Utah Code Ann. § 78A-3-102(3)(h).

STATEMENT OF ISSUES

1. Whether the trial court abused its discretion by granting Defendant's motion to waive trial by jury.

Standard of Review. The trial court's application of the legal concept of waiver of trial by jury to a given set of facts constitutes a mixed question of fact and law. *State v. Levin*, 2006 UT 50, ¶ 21 & n.20, 144 P.3d 1096 (citing *State v. Pena*, 869 P.2d 932, 938 (Utah 1994) and *Searle v. Milburn Irrig. Co.*, 2006 UT 16, ¶ 16, 133 P.3d 382). When reviewing mixed questions of fact and

law, "the considerations that favor a more-deferential standard of review and those that favor a less-deferential standard of review compete for dominance, and the amount of deference that results will vary according to the nature of the legal concept at issue." *Id.*; see also *State v. Virgin*, 2006 UT 29, ¶¶ 27-28, 137 P.3d 787. See Argument I.A. below for a detailed discussion of the standard of review in the instant case.

DETERMINATIVE AUTHORITY

The constitutional provisions, statutes, ordinances, rules, and regulations, the interpretation of which is determinative, are set out verbatim with the appropriate citation in the body and arguments of the instant Brief of Respondent.

STATEMENT OF THE CASE

This case involves the State's interlocutory appeal from the trial court's order granting Defendant's motion to waive trial by jury. As such, it involves critical questions about the circumstances that are so compelling as to provide an exception to the State's lack of consent to waiver and its insistence to trial by jury.

Defendant was charged with two counts of Rape and two counts of Forcible Sodomy, all of which are first-degree felonies, in addition to one count of Forcible Sexual Abuse, a second-degree

felony. According to the charges, Defendant allegedly had a sexual relationship with her son's teenage friend. Defendant pleaded not guilty to all the charges.

Prior to trial, the court held a preliminary hearing where the alleged victim testified. In addition, the court held a hearing on Defendant's 412 Motion, in which Defendant requested the trial court to admit, at trial, evidence of the alleged victim's juvenile record of prior sexual misconduct. At trial, Defendant moved the court for a waiver of her right to trial by jury. The trial court granted the motion after consideration of the particular circumstances of Defendant's case.

The State sought interlocutory appeal of the trial court's order, which this Court granted.

STATEMENT OF FACTS

The facts are recited in the light most favorable to the trial court's findings. See *State v. Anderson*, 910 P.2d 1229, 1230 (Utah 1996) ("In reviewing the trial court's ruling, we recite the facts in the light most favorable to the trial court's findings.") (citing *State v. Pena*, 869 P.2d 932, 936 (Utah 1994) and *State v. Ramirez*, 817 P.2d 774, 782 (Utah 1991)).

The Five Felony Charges:

1. In March 2010, the State charged Defendant with the following: two counts of Rape, both first-degree felonies, in violation of Utah Code Ann. § 76-5-402; two counts of Forcible Sodomy, both first-degree felonies, in violation of Utah Code Ann. § 76-5-403(2); and one count of Forcible Sexual Abuse, a second-degree felony, in violation of Utah Code Ann. § 76-5-404 (R. 1-4).

2. According to the charging document, Defendant had a sexual relationship with her son's teenage friend, A.B. (R. 3-4).

The Preliminary Hearing:

3. The parties appeared before the district court for a preliminary hearing on April 7, 2010, during which A.B. testified (R. 16).¹ At the conclusion of the hearing, the trial court bound Defendant over on all counts to which Defendant pleaded not guilty (*Id.*).

The 412 Motion:

4. On May 13, 2010, Defendant, pursuant to Utah Rule of Evidence 412(b)(2)(A), moved the trial court to admit evidence of the victim's juvenile record of prior sexual misconduct,² arguing that the relationship was consensual in nature and that Defendant,

¹No transcript of the preliminary hearing was requested or produced on appeal.

²Defendant alleged that A.B.'s juvenile record included a sex abuse charge (R. 25).

at times, was threatened and intimidated by A.B. into the sexual conduct (R. 24-26). Defendant further argued that given the consensual nature of the relationship, the charges would be significantly different (R. 25).

5. The prosecution ardently opposed the Motion, arguing that A.B.'s alleged sexual behavior was inadmissible under Rule 412 of the Utah Rules of Evidence (R. 27-37).

6. The trial court deferred ruling on the 412 Motion until counsel provided the court with the juvenile court records (R. 48).

7. On June 17, 2010, counsel appeared before the district court and presented oral argument on the Motion (R. 53).³ The trial court thereafter determined that Defendant was prohibited from utilizing A.B.'s juvenile court records at trial (R. 54).

The Motion to Waive Trial by Jury:

8. On August 4, 2010, the parties appeared for a jury trial, where Defendant, after careful consideration, moved the trial court to waive her right to a jury trial (R. 139:3-4).

9. The reasons for Defendant's waiver included: (a) the seriousness of the charges, the crucial issue of consent, and the relatively fine line between the issue of consent in the instant case; (b) that, given the issue of consent, there are lesser

³No transcript of the 412 Motion hearing was requested or produced on appeal.

included offenses requiring a weighing of factors more objectively analyzed by a court; and (c) the "high profile" publicity and nature of the allegations in the case (R. 139:4-6).⁴

10. The prosecution objected pursuant to Utah Rule of Criminal Procedure 17(c), arguing that it did not consent to the waiver (R. 139:7-8). In addition, the prosecution contended that Defendant's concerns could be addressed through the voir dire and jury instruction process (R. 139:8). In so arguing, the prosecution essentially acknowledged the merits of the lesser included offenses, and that the case had drawn the publicity stated by Defendant (R. 139:7-10).

The Trial Court's Initial Ruling:

11. At the outset, the trial court acknowledged the relevant case law underlying the general rule that a defendant cannot waive a jury trial without the approval of the court and consent of the prosecution (R. 139:10-11). However, the court expressed concern about the "tremendous control" placed in the hands of the prosecution to determine whether the case will be tried by the jury or the court (R. 139:11:2-16).

12. Prior to its ruling, the trial court indicated that it "would prefer the jury making the decision [as trier of fact]

⁴A true and correct copy of the transcript of the hearing held on August 4, 2010, R. 139, is attached to this Brief as Addendum A.

rather than the Court", and, in addition, making sure that Defendant understood the difference between a jury and bench trial (R. 139:11-12).⁵

13. At the outset of its ruling, the trial court confirmed its understanding of Rule 17(c) and the applicable case law (R. 139:13:18-21). However, the court stated that it did not believe a defendant is prevented in every case from waiving his or her right to a jury trial (R. 139:13:21-23). The trial court stated:

The Court believes that upon a proper showing, that the defendant should be able to waive her right to a jury trial, that to allow the State in every case to defeat that would place a tremendous burden on the defendant that if a showing can be made, that there is a proper reason why the case should be tried to the Court rather than to the jury. It appears to the court that there would be an implication of due process rights to the defendant if the Court were to deny that simply because the State refuses to give its consent to the waiver.

(R. 139:13-14).

14. The court granted the motion to waive the jury trial, stating that it was "satisfied in this case because of the nature of the allegations and the prior publicity along with the . . . very fine line between the offenses charged and the lesser included offenses." (R. 139:10-14). In light of the particular

⁵The trial court went so far as to have trial counsel take a moment with Defendant to make sure she understood the difference between a bench trial with one trier of fact as opposed to a jury trial with eight triers of fact (R. 139:11-13).

circumstances of this case, the court stated that "it would be a denial of Ms. Greenwood's due process rights to force her to be tried by a jury." (R. 139:15-17).

The Trial Court's Further Consideration of the Waiver Matter:

15. After granting the prosecution's request for a recess to prepare a written objection, the prosecution filed its Objection to Waiver of a Jury Trial, and Memorandum in Support (R. 114-17).

16. In its written Objection, the prosecution argued that both Rule 17(c) and binding case law of this Court require the prosecution's consent for a waiver and as such the trial court should proceed with the scheduled jury trial (*Id.*).

17. After additional oral argument, the trial court cited the United States Supreme Court's decision in *Singer v. United States*, where the Court recognized there might be 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 (R. 139:23-24).

18. The trial court further stated:

I think the Supreme Court in *Singer* leaves open, as an exception to that general rule which the Court recognizes that that is the general rule, but I think, based on what has been presented, the reasons why the defendant wants to waive a jury in this case, because of the nature of the allegations, because of the publicity, because of

the lesser included offenses that the cumulative impact of those facts seem, to this Court, to require that the Court grant the motion, that the State cannot, in every case, prevent the defendant's waiver, and it's in the unusual case that the State -- only in the unusual case is there a waiver of the right would be granted, and I think this is the unusual case.

(R. 139:24:8-22).

19. The prosecution informed the court of its intent to file an interlocutory appeal (R. 139:25:5-8).

The Trial Court's Written Findings and Order:

20. At the prosecution's request, the court directed Defendant's trial counsel to prepare written findings and an order on the motion (R. 139:30:4-10).

21. The trial court signed its Decision on Defendant's Motion to Waive Trial by Jury on August 4, 2010, which was entered that same day (R. 106-07).⁶

The State's Interlocutory Appeal:

22. That same day, the State petitioned this Court for permission to appeal the interlocutory order, accompanied by a petition for emergency stay -- both of which were granted (R. 121).

⁶A true and correct copy of the trial court's Decision on Defendant's Motion to Waive Trial by Jury, R. 106-07, is attached to this Brief as Addendum B.

SUMMARY OF ARGUMENTS

1. The trial court did not abuse its discretion by granting Defendant's motion for waiver of trial by jury.

A. For purposes of review, the trial court's waiver of jury trial determination constitutes a mixed question of fact and law due to the trial court's application of the legal concept of waiver to the fact scenario presented in the instant case. The test employed for determining the standard of review for mixed questions demonstrates that deference should be granted to the trial court when analyzing a request for waiver of jury trial.

B. The trial court, based on the particular facts and circumstances of the case, acted within its discretion by granting the waiver of trial by jury. In light of the United States Supreme Court's statement in *Singer*, the prosecution's consent does not appear to be an inflexible condition precedent to trial before a judge alone. Rather, one may conclude that *Singer* suggests an exception to the general rule when "passion, prejudice or public feelings" would deny an accused a fair and impartial trial.

The trial court acted within its discretion in granting Defendant's motion to waive the jury trial inasmuch as the decision was based on a thoughtful consideration of the

particular facts and circumstances of the case and pursuant to binding case law that, at the very least, provides an exception to the general rule of waiver of trial by jury.

C. The State failed to marshal the evidence supporting the challenged findings. Instead of marshaling the evidence, the State challenged only the trial court's legal ruling of waiver -- the same argument presented to the trial court. The State made no effort to challenge the facts or circumstances underlying the trial court's determination that a waiver of the trial by jury was appropriate.

If the marshaling requirement is not met, the appellate court has grounds to affirm the court's findings on that basis alone. Moreover, the appellate court assumes that the evidence supports the trial court's findings.

D. The State failed to provide this court with an adequate record of the predicated error. When a party predicates error to this Court, it has the duty and responsibility of supporting such allegation with an adequate record. Without an adequate record, this Court simply cannot rule on a question which depends for its existence upon alleged facts unsupported by the record.

Because the transcripts of the preliminary hearing and hearing on Defendant's 412 Motion are not part of the record -

the record is silent concerning matters critical to the trial court findings, which, in turn, served as a basis for granting Defendant's waiver of a trial by jury. These critical matters included the relatively fine line between the issue of consent in the instant case, and that, given the issue of consent, there are lesser included offenses requiring a weighing of factors to be analyzed by a court. As such, the State failed to provide this Court with a complete record of all the evidence that was before the trial court that is relevant to the alleged error. Because the State failed to provide an adequate record, this Court presumes the correctness of the proceedings below.

ARGUMENTS

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY GRANTING DEFENDANT'S MOTION FOR WAIVER OF TRIAL BY JURY.

Utah Rule of Criminal Procedure 17(c) dictates that "[a]ll felony cases shall be tried by jury unless the defendant waived a jury in open court with the approval of the court and the consent of the prosecution." Utah R. Crim. P. 17(c).⁷ Federal Rule of Criminal Procedure 23(a) is the counterpart to Rule 17(c), which likewise provides, "If a defendant is entitled to a jury trial, the

⁷A true and correct copy of Utah R. Crim P. 17 is attached to this Brief as Addendum C.

trial must be by jury unless: (1) the defendant waives a jury trial in writing; (2) the government consents; and (3) the court approves." Fed. R. Crim. P. 23(a).⁸

In *Singer v. United States*, 380 U.S. 24, 85 S.Ct. 783 (1965),⁹ the United States Supreme Court took the opportunity to interpret the permissibility of Rule 23(a) of the Federal Rules of Criminal Procedure. In that case, Singer had been charged in federal district court with 30 infractions of the federal mail fraud statute. *Id.* at 25; 85 S.Ct. at 785. On the first day of trial, Singer offered in writing to waive a trial by jury solely and simply "[f]or the purpose of shortening the trial." *Id.* Although the trial court approved the waiver, the government refused to give its consent. *Id.* Singer was subsequently convicted by a jury on 29 of the 30 counts, and the Ninth Circuit Court of Appeals affirmed. *Id.* The United States Supreme Court granted certiorari. *Id.*

On appeal, Singer challenged the permissibility of the federal rule, arguing that the United States Constitution gives a defendant the right to waive a jury trial whenever he believes such waiver "to be to his advantage", regardless of whether the government

⁸A true and correct copy of Federal Rule of Criminal Procedure 23(a) is attached as Addendum A to the State's Brief of Appellant.

⁹A true and correct copy of *Singer v. United States*, 380 U.S. 24, 85 S.Ct. 783 (1965), is attached to this Brief as Addendum D.

consents and the court approves of the waiver. *Id.* at 25-26; 88 S.Ct. at 785.

In the course of its analysis, the Court determined that "there is no federally recognized right to a criminal trial before a judge sitting alone, but a defendant can . . . in some instances waive his right to a trial by jury." *Id.* at 34; 88 S.Ct. at 790. According to the Court, "[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right" and "although a defendant can under some circumstances waive his constitutional right to a public trial, he has no absolute right to compel a private trial" *Id.* at 34-35; 88 S.Ct. at 790.

The Court consequently upheld the validity of Rule 23(a), determining that there is "no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury -- the very thing that the Constitution guarantees him." *Id.* at 36; 88 S.Ct. at 790. The Court then limited its ruling by stating the following:

We need not determine in this case 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. Petitioner argues that there might arise situations where "passion, prejudice . . . public feeling" or some other factor may render impossible or unlikely an impartial trial by jury. However, since petitioner gave no reason for wanting to forgo jury trial other than to save time, this is not such a case, and petitioner does not claim that it is.

Id. at 37-38; 88 S.Ct. at 791 (footnote omitted).

In *State v. Black*, 551 P.2d 518 (Utah 1976), which appears to be one of the earliest Utah cases addressing a request for waiver of trial by jury, the defendant had moved, at the end of the State's case, to waive the jury and be tried by the court. *Id.* at 520. The trial court refused the request and the defendant appealed. *Id.* This Court held that "[t]here is no constitutional right to be tried without a jury. The right guaranteed by the Constitution of Utah is to be tried by a jury. This right may be waived in some instances." *Id.* The Court further opined that "[c]ertainly the court has a discretion not to dismiss the jury in the middle of the trial simply because the defendant may deem it advantageous to his cause." *Id.*

Since that time, this Court has, for the most part, essentially held that "there is no constitutional right to a trial by a judge rather than a jury." *State v. Robbins*, 709 P.2d 771, 772 (Utah 1985) (citing *Singer v. United States*, 380 U.S. 24, 85 S.Ct. 783 (1965); *State v. Davis*, 689 P.2d 5, 12-13 (Utah 1984);

State v. Studham, 655 P.2d 669 (Utah 1982)). In *Robbins*, this Court's most recent pronouncement, the defendant moved to waive trial by jury, which the trial court denied. *Id.* On appeal, the defendant challenged the constitutionality of the rule and statute allowing a prosecutor to veto a defendant's waiver of jury trial. *Id.* The defendant claimed that "prejudicial publicity" made it impossible for him to receive an impartial jury trial. *Id.* However, the Court did not reach the issue because there was "nothing before the Court that even suggests that Robbins was denied a fair trial because the case was tried to a jury." *Id.* (citing *Davis*, 689 P.2d at 13).

In this case, the trial court granted Defendant's motion for waiver of jury trial over the objection of the prosecutor. In so doing, the court confirmed its understanding of Rule 17(c) and the applicable case law, stating that it did not believe a defendant is prevented in every case from waiving his or her right to a jury trial (R. 139:13:18-23). Citing the *Singer* decision, the trial court stated that this case, in light of the specific grounds presented to the court, provided an exception to the general rule (R. 139:24:8-22). Those grounds included "the nature of the allegations and the prior publicity along with the . . . very fine line between the offenses charged and the lesser included offenses." (R. 139:10-14).

**A. The Trial Court's Waiver of Jury Trial
Determination Constitutes a Mixed Question of
Fact and Law.**

"It is widely agreed that the primary function of a standard of review is to apportion power and, consequently, responsibility between trial and appellate courts for determining an issue or a class of issues." *State v. Thurman*, 846 P.2d 1256, 1265-66 (Utah 1993) (citations omitted). Standards of review allocate discretion between the trial and appellate courts in a way that takes into account the "relative capabilities of each level of the court system to take evidence and make findings of fact in the face of conflicting evidence, on one hand, and to set binding jurisdiction-wide policy, on the other." *State v. Levin*, 2006 UT 50, ¶ 19, 144 P.3d 1096 (citing *Thurman*, 846 P.2d at 1266).

The State claims that the standard of review in the instant case is for correction of error. See State's Brief of Appellant, p. 2. However, the trial court's application of the legal concept of waiver of trial by jury to the particular fact scenario at bar presents a mixed question of fact and law. *State v. Virgin*, 2006 UT 29, ¶ 27, 137 P.3d 787. This application of the general rule of law to the particular facts or circumstances of the case is necessary to determine if they are so compelling that the prosecutor's objection would result in the denial to defendant of a fair and impartial trial. See *United States v. Singer*, 380 U.S.

24, 37-38, 85 S.Ct. 783, 791 (1965); *see also State v. Robbins*, 709 P.2d 771, 772 (Utah 1985) (citing *State v. Davis*, 689 P.2d 5, 13 (Utah 1984)); and *State v. Black*, 551 P.2d 518, 520 (Utah 1976) (stating that the constitutional right to be tried by a jury "may be waived in some instances").

The analytical complexity of an appellate court's review is at its height when reviewing a trial court's application of a legal concept to a given set of facts. *See Levin*, 2006 UT 50 at ¶ 21. When reviewing mixed questions, the resulting amount of deference to be provided to the trial court will vary according to the nature of the legal concept at issue. *Id.* (citing *State v. Pena*, 869 P.2d 932, 939 (Utah 1994); *Searle v. Milburn Irrig. Co.*, 2006 UT 16, ¶ 16, 133 P.3d 382). The test employed for determining the standard of review for mixed questions considers the following factors: (1) the degree of variety and complexity in the facts to which the legal rule is to be applied; (2) the degree to which a trial court's application of the legal rule relies on "facts" observed by the trial judge that cannot be adequately reflected in the record on appeal; and (3) other "policy reasons that weigh for or against granting discretion to trial courts." *Levin*, 2006 UT 50 at ¶ 25 (citing *Virgin*, 2006 UT 29 at ¶ 28).

Applying the test to the instant case - the first factor weighs in favor of granting discretion¹⁰ to the trial court inasmuch as the cases presented will be of varying complexity, making it difficult to balance and articulate a rule that adequately takes into consideration the variations of facts and circumstances that arise under each factual scenario. See, e.g., *United States v. Braunstein*, 474 F.Supp. 1, 13 (D.N.J. 1979) (waiver allowed over government's objection in case of alleged Medicaid fraud and income tax charges); *United States v. Panteleakis*, 422 F.Supp. 247, 249 (D.R.I. 1976) (waiver of jury trial granted over objection of government involving 21 count indictment for Medicare fraud, multiple defendants, and intricate rulings of admissibility); *United States v. Schipani*, 44 F.R.D. 461, 463 (E.D.N.Y. 1968) (non-jury trial ordered over the government's objection due to substantial danger that the defendant would be prejudiced because no admonition and exclusions of evidence would erase that substantial danger).

¹⁰Prior Utah Supreme Court case law addressing waiver of trial by jury indicates that discretion has been granted to trial courts when performing a waiver analysis. See *State v. Black*, 551 P.2d 518, 520 (Utah 1976) (stating that the right to trial by jury "may be waived in some instances" and that the trial court has "discretion" not to grant the requested waiver in the middle of trial); see also *State v. Studham*, 655 P.2d 669, 671 (Utah 1982) (stating that the record reflected "no circumstance that so clearly demonstrates an invasion of due process or waiver of rights such as to constitute an abuse of discretion" by the trial court).

Second, the consideration of a request for waiver of jury trial, when properly presented, would require the trial court to observe and assess witness demeanor and credibility. Although the trial court's credibility determinations in this context may be limited in nature -- the court's proximity to the particular facts and circumstances of the case weights in favor of granting some discretion.

Finally, policy considerations weigh in favor of granting trial courts discretion. Trial courts play an important role in this context by ferreting out groundless reasons for requesting a waiver of trial by jury. *See, e.g., United States v. Caldarazzo*, 444 F.2d 1046 (7th Cir.), *cert. denied*, 404 U.S. 958, 92 S.Ct. 328 (1971) (request for waiver without consent of government denied where the defendant claimed "possible factual complexities" involving conspiracy charge). Further, the "novelty of the situation" as borne out by the paucity of Utah case law on the topic weighs in favor of granting trial courts deference in these situations. *See Levin*, 2006 UT 50 at ¶ 30.

B. The Trial Court, Based on the Particular Facts and Circumstances of the Case, Acted Within its Discretion by Granting the Waiver of Trial by Jury.

Defendant moved to waive her right to trial by jury pursuant to Rule 17(c) of the Utah Rules of Criminal Procedure. Rule 17(c)

provides, "All felony cases shall be tried by jury unless the defendant waived a jury in open court with the approval of the court and the consent of the prosecution." Utah R. Crim. P. 17(c).

In *Singer v. United States*, 380 U.S. 24, 85 S.Ct. 783 (1965), the United States Supreme Court stated:

We need not determine in this case 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. Petitioner argues that there might arise situations where "passion, prejudice . . . public feeling" or some other factor may render impossible or unlikely an impartial trial by jury. However, since petitioner gave no reason for wanting to forgo jury trial other than to save time, this is not such a case, and petitioner does not claim that it is.

Id. at 37-38; 88 S.Ct. at 791 (footnote omitted). In light of this statement, the prosecution's consent does not appear to be an inflexible condition precedent to trial before a judge alone. At the very least, one may conclude that *Singer* suggests an exception to the general rule when "passion, prejudice or public feelings" would deny an accused a fair and impartial trial. See *id.*; see also *State v. Black*, 551 P.2d 518, 520 (Utah 1976) (stating "[t]his right may be waived in some instances") and *State v. Robbins*, 709 P.2d 771, 772 (Utah 1985) (considering whether claim of "prejudicial publicity" amounted to denial of impartial jury trial).

The parties in the instant case appeared for a jury trial, when Defendant, upon careful consideration, moved the trial court to waive her right to a jury trial (R. 139:3-4). The reasons for Defendant's waiver included: (a) the seriousness of the charges, the crucial issue of consent, and the relatively fine line between the issue of consent in the instant case; (b) that, given the issue of consent, there are lesser included offenses requiring a weighing of factors more objectively analyzed by a court; and (c) the "high profile" publicity and nature of the allegations in this case (R. 139:4-6). The prosecution objected to the waiver, contending that Defendant's concerns could be addressed through the voir dire and jury instruction process (R. 139:7-8). In the course of its argument, the prosecution essentially acknowledged the merits of the lesser included offenses, and that the case had drawn the publicity stated by Defendant (R. 139:7-10).¹¹

The trial court initially acknowledged the relevant case law along with the general rule that a defendant cannot waive a jury trial without the approval of the court and consent of the

¹¹The record contains a Media Request for Still Photography by the Salt Lake Tribune, submitted on August 4, 2011, at 9:20 a.m., and signed by the trial court the same day (R. 120). That next weekend, an article appeared in the Salt Lake Tribune, referring to this case as the "lunch lady sex case". See Stephen Hunt, *High Court Will Decide Judge v. Jury in Lunch Lady Sex Case*, Salt Lake Tribune, October 9, 2010, at B3, a true and correct copy of which is attached to this Brief as Addendum E.

prosecution (R. 139:10-11). However, the court expressed concern about the "tremendous control" placed in the hands of the prosecution to determine whether the case will be tried by the jury or the court (R. 139:11:2-16). The trial court also indicated that it "would prefer the jury making the decision [as trier of fact] rather than the Court", and, in the process, making sure that Defendant understood the difference between a jury and bench trial (R. 139:11-12).

Upon confirming its understanding of Rule 17(c) and the applicable case law, the court stated that it did not believe a defendant is prevented in every case from waiving his or her right to a jury trial (R. 139:13:18-23). The trial court stated:

The Court believes that upon a proper showing, that the defendant should be able to waive her right to a jury trial, that to allow the State in every case to defeat that would place a tremendous burden on the defendant that if a showing can be made, that there is a proper reason why the case should be tried to the Court rather than to the jury. It appears to the court that there would be an implication of due process rights to the defendant if the Court were to deny that simply because the State refuses to give its consent to the waiver.

(R. 139:13-14).

The court granted the motion to waive the jury trial, stating that it was "satisfied in this case because of the nature of the allegations and the prior publicity along with the . . . very fine line between the offenses charged and the lesser included

offenses." (R. 139:10-14). Based on the particular circumstances presented, the court stated that "it would be a denial of Ms. Greenwood's due process rights to force her to be tried by a jury." (R. 139:15-17).

After granting the prosecution's request for a recess to prepare a written objection, the prosecution filed its Objection to Waiver of a Jury Trial and supporting Memorandum (R. 114-17). In its Objection, the prosecution argued that both Rule 17(c) and binding case law of this Court require the prosecution's consent for a jury trial waiver and as such the trial court should proceed with the scheduled jury trial (*Id.*).

After entertaining additional oral argument, the trial court cited the *Singer* decision in which the Court recognized that a defendant's circumstances and reasons might be so compelling that the government's insistence on trial by jury would result in the denial to a defendant of an impartial trial (R. 139:23-24). The trial court further stated:

I think the Supreme Court in *Singer* leaves open, as an exception to that general rule which the Court recognizes that that is the general rule, but I think, based on what has been presented, the reasons why the defendant wants to waive a jury in this case, because of the nature of the allegations, because of the publicity, because of the lesser included offenses that the cumulative impact of those facts seem, to this Court, to require that the Court grant the motion, that the State cannot, in every case, prevent the

defendant's waiver, and it's in the unusual case that the State -- only in the unusual case is there a waiver of the right would be granted, and I think this is the unusual case.

(R. 139:24:8-22).

The trial court acted within its discretion in granting Defendant's motion to waive the jury trial. This decision was based on a thoughtful consideration of the particular facts and circumstances of the case, pursuant to binding case law that, at the very least, provides an exception to the general rule of waiver of trial by jury.

C. The State Failed to Marshal the Evidence Supporting the Challenged Findings.

The State's primary arguments on appeal are that the trial court erred by not enforcing Rule 17(c) because the prosecutor did not consent to the waiver, and that the trial court erroneously relied upon the United States Supreme Court's decision in *Singer* in finding an exception to the general rule. See State's Brief of Appellant, pp. 9-18. The State's argument contains a fatal flaw.

Rule 24(a)(9) of the Utah Rules of Appellate Procedure requires that "[a] party challenging a fact finding [must] first marshal all the record evidence that supports the challenged finding." Utah R. App. P. 24(a)(9); see also *Beehive Tel. Co. v. Public Serv. Comm'n*, 2004 UT 18, ¶ 15, 89 P.3d 131. When challenging the trial court's findings of fact, "[a]n [a]ppellant

must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be against the clear weight of the evidence." *In re Estate of Bartell*, 776 P.2d 885, 886 (Utah 1989). The burden of overturning factual findings is a heavy one, reflecting the policy that appellate courts do not sit to retry cases. *Id.*

The marshaled evidence must contain the appropriate citation to the record pursuant to Utah Rule of Appellate Procedure 24(e). Utah R. App. P. 24(e); see also *In re W.A.*, 2002 UT 127, ¶ 45, 63 P.3d 607. Marshaling requires that the party challenging the finding show the appellate court where the evidence can be located and list the specific evidence supporting the verdict. See *In re W.A.*, 2002 UT 127 at ¶ 45 (citing *Harding v. Bell*, 2002 UT 108, ¶ 19, 57 P.3d 1093). A party cannot avoid the duty to marshal by attempting to frame fact-dependent questions as legal conclusions. See *United Park City Mines Co. v. Stichting Mayflower Mountain Fonds*, 2006 UT 35, ¶¶ 19, 25, 140 P.3d 1200 (holding that challenges to issue consisting of mixed question of law and fact do not relieve party of marshaling duty).

The State failed to marshal the evidence. Instead of marshaling the evidence, the State challenges only the legal ruling of the trial court as to waiver, which is essentially the same

argument presented to the trial court. The State makes no effort to challenge the underlying facts or circumstances of the trial court's determination that the jury trial waiver was appropriate. The court's underlying findings included, among others, the following: the circumstances surrounding the issue of consent; the fine line between the charged offenses and lesser included offenses, which the State acknowledged and the court agreed to consider; and the nature of the case and publicity received in the media.

To properly discharge the marshaling duty, a party is required to "temporarily remove [its] own prejudices and fully embrace the adversary's position"; [it] must play the 'devil's advocate.'" *Chen v. Stewart*, 2004 UT 82, ¶ 78, 100 P.3d 1177 (quoting *Harding v. Bell*, 2002 UT 108, ¶ 19, 57 P.3d 1093). In so doing, the appellant must present the evidence in a light most favorable to the trial court and not attempt to construe the evidence in a light favorable to its case. *Id.* Thus, to properly marshal the evidence, "the challenging party must demonstrate how the court found the facts from the evidence and then explain why those findings contradict the clear weight of the evidence." *United Park City Mines, Co.*, 2006 UT 35 at ¶ 26. This the State failed to do.

"If the marshaling requirement is not met, the appellate court has grounds to affirm the court's findings on that basis alone."

Chen, 2004 UT 82 at ¶ 80 (citing *Wilson Supply, Inc. v. Fraden Mfg. Corp.*, 2002 UT 94, ¶ 26, 54 P.3d 1177); see also *State v. Clark*, 2005 UT 75, ¶ 17, 124 P.3d 235. "If appellants have failed to properly marshal the evidence, [the appellate court] assume[s] that the evidence supports the trial court's findings. *Chen*, 2002 UT 82 at 80 (citing *Utah Med. Prods., Inc. v. Searcy*, 958 P.2d 228, 232 (Utah 1998)); see also *Saunders v. Sharp*, 806 P.2d 198, 199 (Utah 1991) ("If the appellant fails to marshal the evidence, the appellate court assumes that the record supports the findings of the trial court").

D. The State Failed to Provide this Court with an Adequate Record of the Predicated Error.

"When a [party] predicates error to this Court, [it] has the duty and responsibility of supporting such allegation by an adequate record. Absent that record, [the party's] assignment of error stands as a unilateral allegation which the review court has no power to determine." *State v. Linden*, 761 P.2d 1386, 1388 (Utah 1988). "This Court simply cannot rule on a question which depends for its existence upon alleged facts unsupported by the record." *Id.* (citations omitted). "The burden of showing error is on the party who seeks to upset the judgment. In the absence of record evidence to the contrary, [the appellate court] assume[s] regularity in the proceedings below, and affirm[s] the judgment."

State v. Jones, 657 P.2d 1263, 1267 (Utah 1982) (citing *State v. Norman*, 580 P.2d 237, 240 (Utah 1978); *State v. Kaae*, 30 Utah 2d 73, 513 P.2d 435 (Utah 1973); *Whetton v. Turner*, 28 Utah 2d 47, 497 P.2d 856 (Utah 1972); *State v. Hamilton*, 18 Utah 2d 234, 239, 419 P.2d 770, 773 (Utah 1966)).

In the instant case, the parties appeared before the district court for a preliminary hearing on April 7, 2010, during which A.B., the alleged victim, testified at length (R. 16). A transcript of the preliminary hearing was neither requested nor produced as part the record on appeal.

Approximately a month later, Defendant moved the trial court to admit evidence of the victim's juvenile record of prior sexual misconduct pursuant to Utah Rule of Evidence 412(b)(2)(A) (R. 24-26). An underlying claim of the Motion was that A.B.'s juvenile record included a sex abuse charge (R. 25). Defendant, in the Motion, argued that the relationship was consensual in nature and that Defendant, at times, was threatened and intimidated by A.B. into the sexual conduct (*Id.*). Defendant further argued that given the consensual nature of the relationship, the charges would be significantly different (*Id.*). The prosecution ardently opposed the Motion, arguing that A.B.'s alleged sexual behavior was inadmissible under Rule 412 of the Utah Rules of Evidence (R. 27-37).

The trial court deferred ruling on the 412 Motion until counsel provided the court with the juvenile court records (R. 48). Later, on June 17, 2010, counsel appeared before the district court and presented oral argument on the Motion (R. 53). However, a transcript of the hearing is not part of the record on appeal.

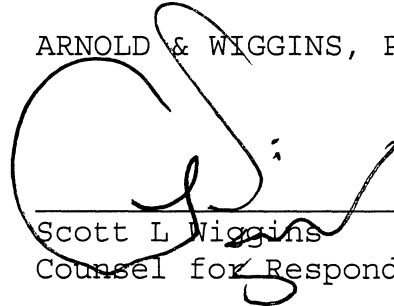
Because the transcripts of the previously mentioned proceedings are not part of the record - the record is silent concerning matters critical to the trial court findings, which, in turn, served as a basis for granting Defendant's waiver of a trial by jury. These matters included the relatively fine line between the issue of consent in the instant case, and that, given the issue of consent, there are lesser included offenses requiring a weighing of factors to be analyzed by a court. As such, the State, upon whom the burden lies, failed to provide this Court with a complete record of all the evidence that was before the trial court that is relevant to the alleged error. *Turner v. Nelson*, 872 P.2d 1021, 1024 (Utah 1994) (citing Utah R. App. P. 11(e)(2) (requiring transcript of "all evidence regarding challenged finding or conclusion")). Because the State failed to provide an adequate record on appeal on the waiver of jury trial issue, this Court will "presume the correctness of the proceedings below" *State v. Mead*, 2001 UT 58, ¶ 48, 27 P.3d 1115 (citing *State v. Wetzel*, 868 P.2d 64, 67 (Utah 1993)).

CONCLUSION

Based on the foregoing, Defendant respectfully asks that this Court affirm the trial court's grant of her waiver of trial by jury, and that the Court grant her any other relief it deems just or appropriate under the circumstances.

RESPECTFULLY SUBMITTED this 7th day of October, 2011.

ARNOLD & WIGGINS, P.C.



Scott L. Wiggins
Counsel for Respondent

CERTIFICATE OF SERVICE

I, SCOTT L WIGGINS, hereby certify that I personally caused to be mailed by First-Class Mail, postage prepaid, two (2) true and correct copies of the foregoing **BRIEF OF RESPONDENT** to the following on this 11th day of October, 2011:

Ms. Christine F. Soltis
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Counsel for Petitioner



Scott L Wiggins

ADDENDA

- Addendum A. Transcript of Hearing held August 4, 2010, R. 139
- Addendum B: Decision on Defendant's Motion to Waive Trial by Jury, R. 106-07
- Addendum C: Utah R. Crim. P. 17
- Addendum D: *Singer v. United States*, 380 U.S. 24, 85 S.Ct. 783 (1965)
- Addendum E: Stephen Hunt, *High Court Will Decide Judge v. Jury in Lunch Lady Sex Case*, Salt Lake Tribune, October 9, 2010, at B3

Tab A

ORIGINAL TRANSCRIPT

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH,

STATE OF UTAH,

Case No. 101400544

Plaintiff,

vs.

JAMIE LYNN GREENWOOD,

Defendant.

TRANSCRIPT OF HEARING

AUGUST 04, 2010

BEFORE THE HONORABLE ROBERT ADKINS

FILED DISTRICT COURT
Third Judicial District

OCT 26 2010

SALT LAKE COUNTY

By

MD
Deputy Clerk



THACKER & CO.
COURT REPORTERS LLC

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UTAH APPELLATE COURTS

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Transcript of Hearing

August 4, 2010

PROCEEDINGS

BAILIFF: Sorry, Your Honor. Mr. Arrington, I think, just walked to the restroom.

THE COURT: That's fine. It took me a little longer than I anticipated. Alright, we're on the record in the case of *State of Utah v. Jamie Lynn Greenwood*. It's Case 010400544. Counsel will state their appearances, please.

MR. ARRINGTON: Mark Arrington representing Jamie Greenwood, co-counsel with Jim Retallick.

THE COURT: Alright, and for the State?

MS. CRANDALL: Kim Crandall and Marc Mathis for the State, Your Honor.

THE COURT: Alright, and the defendant is present. We're outside the presence of the jury panel. I did have an in chambers meeting with all counsel this morning. Mr. Arrington indicated that Ms. Greenwood wanted to waive her right to be tried by jury, and I was informed the State objected to that. So I wanted to put that on the record. Mr. Arrington, I'll hear from you.

MR. ARRINGTON: Well, Your Honor, and

1 obviously, as I've been talking with my client over
2 the months, and especially the last few weeks
3 looking at options, discussing the numerous avenues
4 that we have, and weighing the particulars of this
5 case, my client wants to place her confidence and
6 trust in having a bench trial at this time, and
7 wishes to waive the option or the right of a jury.

8 THE COURT: Alright, and Ms. Greenwood,
9 is that accurate? Is that what you would like to
10 do?

11 MS. GREENWOOD: Yes, Sir.

12 THE COURT: And Mr. Arrington, without
13 getting too far into the specifics of it, I've
14 looked at a few of the cases in this area and also
15 the rule. The Court, I believe, to make a
16 decision, would need to know the reason behind that
17 waiver if I'm going to be able to grant it, and
18 I'll hear from you, Mr. Arrington. I don't want to
19 get into the facts of it, but just generally, the
20 reason that Ms. Greenwood wants to waive a trial by
21 jury.

22 MR. ARRINGTON: Well, and just to make
23 it clear, Your Honor, she understands she has the
24 constitutional right to choose a jury of her peers
25 chosen from the community. I've explained that to

1 her exhaustively. She feels that, first of all, to
2 say nothing of judicial comity and so forth, that
3 her faith and her belief about getting a fair and
4 reasonable and objective trier of fact at this
5 point and under the circumstances of this case lies
6 greater with a bench trial, rather than a jury and
7 believes that the legal analysis that's going to be
8 applied specifically to this case, the argument is
9 not if illegal circumstances happened. She
10 cooperated with authorities on this and gave
11 admissions. The question that this whole case
12 surrounds is a question of consent, and reviewing
13 the law with my client, believes that there is a
14 relatively fine line between--in issues of consent.

15 If there is consent under the
16 circumstances and the facts of the case between the
17 victim and my client, then there are lesser
18 included offenses than what she is charged with.
19 We believe that having an analytical and legal pre-
20 trained mind looking and weighing the factors is
21 going to give her a much more objective decision
22 than trying to, in a very short time, explain and
23 try to articulate to a jury the fine lines between
24 perhaps rape and unlawful sexual activity or
25 unlawful sexual conduct with a minor, and for this

1 reason, she is choosing to go with the bench as a
2 trier of fact.

3 THE COURT: Alright. Does part of the
4 decision to ask to waive the jury, does that have
5 anything to do with the publicity in this case, or
6 the nature of the allegations?

7 MR. ARRINGTON: It does, Your Honor.
8 It does, although the last couple of final pre-
9 trials, for instance, that we've had hasn't
10 included media. It was heavily in the media at the
11 time and feels that there was at least some
12 exposure, if not quite a bit of exposure. There
13 was multiple channels and T.V. stations. Her
14 picture is plastered on the website at KSL and the
15 State has maintained in their negotiations that
16 this is a public interest, high-profile case and
17 that causes concern for my client as well and,
18 again, feels that a bench trial is going to be more
19 objective in looking specifically at the facts and
20 not weighing out the media and the impression that
21 they may have already made upon the public down
22 here in the Salt Lake Valley.

23 THE COURT: Alright, and as to the
24 lesser and included offenses, I will tell all
25 counsel that I spent quite a bit of time yesterday

1 looking at the case, and also specifically dealing
2 with lesser included offenses. I do believe that
3 if the matter were tried by a jury, that a court,
4 at this point, preliminarily at least, would be
5 inclined to submit some lesser and included
6 offenses, and I don't know whether based on that,
7 that would change Ms. Greenwood's decision on
8 requesting the waiver of the jury.

9 MR. ARRINGTON: It would not, Your
10 Honor.

11 THE COURT: Alright. Mr. Arrington, is
12 there anything further at this time?

13 MR. ARRINGTON: I would submit it on
14 those arguments, Your Honor.

15 THE COURT: Alright, and Ms. Crandall?

16 MS. CRANDALL: Your Honor, this morning
17 is the first we've even heard it. I understand
18 he's been in discussion for the last couple of
19 weeks about it, but this is the first the State
20 ever even heard of this. When we had the pretrial
21 last week, it never came up about her possibly
22 waiving the jury trial.

23 Rule 17(c), under the Rules of Criminal
24 Procedure, is clear. It says all felony cases
25 shall be tried by jury unless the defendant waives

1 a jury in open court with the approval of the court
2 and the consent of the prosecution. This is a case
3 where the prosecution is not consenting to the
4 waiver. I understand the concerns with the legal
5 arguments, but that's what we're here for. We're
6 here to explain to the jury what needs to happen
7 and instruct them on the law. That's why we have
8 the jury instructions, and that's why we're going
9 to go through this *voir dire* process. If there
10 were huge concerns as far as the media or something
11 like that, then it should have been brought up
12 before now. We could have done a jury
13 questionnaire or something like that to try to
14 alleviate some of those concerns, but we're here
15 now. We didn't do that. It's just going to have
16 to go through the *voir dire* process, and then
17 through the instruction process.

18 As far as the lesser included, the
19 State's position is that the ones that have been
20 submitted by Mr. Arrington are probably
21 appropriate, other than a few variations, and I
22 have prepared that I'll work on and can hand out
23 after lunch to Your Honor and Counsel. I think
24 they are a little bit-- They deal with 16 and 17
25 year-olds. I think the facts of this case will

1 support a finding that only one offense happened
2 when he was 16, the rest would have been when he
3 was 15. So I think, just as far as the lesser
4 included, we maybe need to re-work those so I'll
5 have some I'll submit. We're not objecting to the
6 lesser included.

7 And I think the Jury--juries all the
8 time find guilty if they are going to find guilty
9 on a lesser included, they do. It's a disservice
10 to them to say that they are unable to do that and
11 understand the law.

12 THE COURT: Mr. Crandall, Mr. Arrington
13 indicated that the DA's office has indicated that
14 this is a public interest, high profile case. Do
15 you have any comment on that?

16 MS. CRANDALL: Well, I think that that,
17 as Mr. Arrington said, yes. There has been media
18 interest in it. I received a phone call from Steve
19 Hunt at *The Tribune* yesterday wondering if it was
20 going forward. We're not denying that, but that
21 shouldn't be a deciding factor over whether or not
22 it's a judge or a bench trial, or a bench trial or
23 a jury trial. If that was a concern, then, as I
24 said, that needed to be addressed through a jury
25 questionnaire process which, you know, we do jury

1 questionnaires all the time. I did one a couple
2 weeks ago on a case. So that could have easily
3 been handled. Now is not the time to say that
4 because it's high profile, that at this point it
5 should be a bench trial, and I don't have it in
6 front of me right now, but I know there's Utah
7 Supreme Court case law on this issue and if you are
8 inclined to look at that, if you give us some time,
9 we can run downstairs and get a motion to that
10 effect.

11 THE COURT: Ms. Crandall, I have looked
12 at *State v. Serpent*, S-E-R-P-E-N-T, a 1989 decision
13 of the Utah Court of Appeals. I've also looked at
14 *State of Utah v. Robbins*, a 1985 decision of the
15 Utah Supreme Court, and I've also looked at *State*
16 *of Utah v. Davis*, the 1984 decision of the Utah
17 Supreme Court. The *Robbins* case and the other
18 cases indicate that as a general rule, that the
19 defendant cannot waive a right to a jury trial in a
20 felony case, and I understand that I'm bound by
21 that, but with that said, the defendant is the one
22 that is on trial. The defendant is the one that
23 faces a loss of freedom for life, and certainly has
24 a right to a jury trial, but the Courts have held,
25 generally, that she's not--that a defendant is not

1 entitled to generally waive that right to a jury.

2 The Court is concerned that the
3 defendant, in order to waive that right, has to
4 have the consent of both the Court and the
5 prosecution, and if the Court were inclined to give
6 its consent and the State did not in this case, it
7 seems to this Court that it really places a
8 tremendous control over the action in the hands of
9 the prosecution when the prosecution and the Court
10 understands that the prosecution is representing
11 the State, but the State is not the one that's
12 subject to a loss of liberty, and the Court is
13 concerned about the State having the ability to
14 control the case from the standpoint of whether
15 it's going to be tried by the jury or by the
16 Court.

17 I will indicate to all parties that I
18 would prefer the jury making that decision rather
19 than the Court, and I should indicate, Ms.
20 Greenwood, that before you could be convicted, all
21 eight members of the jury would have to unanimously
22 agree that you were guilty of each and every charge
23 alleged and, ma'am, do you understand the
24 difference between the jury trial and the bench
25 trial that with a jury trial, all eight members of

1 the jury would have to unanimously agree, beyond a
2 reasonable doubt, that you were guilty of the
3 offense charged or offenses charged, but with a
4 bench trial, that there would only be one finder of
5 fact and that would be the Court, and so instead of
6 having to convince eight people, the State would
7 only have to agree one and I would ask Mr.
8 Arrington if you would take a moment and just make
9 sure that Ms. Greenwood understands that.

10 MR. ARRINGTON: Yes, thank you.

11 (Inaudible discussion)

12 MR. ARRINGTON: If I may address the
13 Court, Your Honor?

14 THE COURT: Yes, please.

15 MR. ARRINGTON: Thank you. I have
16 explained to her prior to this, I have visited her
17 at least once every two weeks to ten days or even
18 lately every several days the last few weeks and
19 spent time with her and she does understand that
20 the idea of a unanimous jury, that all eight jurors
21 would have to find unanimously in favor of the
22 State, whether it's the charges filed or we're
23 hoping would be lesser included offenses. Even
24 those must be by unanimous decision and that should
25 there be one, even one strong hold out out of eight

1 jurors that would not budge, then we end up with a
2 hung jury. She does know that under the
3 circumstances, if there were a hung jury that the
4 State would have the option of re-trying her,
5 basically, a whole new trial and that should she go
6 with a bench, that her fate would lie in the
7 decision of one individual, tat being this Court.
8 She still feels strongly that she believes the more
9 objective and fairness option between the jury and
10 the bench lies with the bench.

11 THE COURT: Alright, and is there
12 anything further from either counsel?

13 MR. ARRINGTON: We would submit, Your
14 Honor.

15 THE COURT: Ms. Crandall?

16 MS. CRANDALL: No, Your Honor. The
17 State has made its position clear.

18 THE COURT: The Court understands the
19 conflicting interests and the Court also
20 understands the rule, Rule 17(c) and the cases that
21 have come down; however, the Court does not believe
22 that that in every case prevents a defendant from
23 waiving their right to a jury trial. The Court
24 believes that upon a proper showing, that the
25 defendant should be able to waive her right to a

1 jury trial, that to allow the State in every case
2 to defeat that would place a tremendous burden on
3 the defendant that if a showing can be made, that
4 there is a proper reason why the case should be
5 tried to the Court rather than to the jury. It
6 appears to the court that there would be an
7 implication of due process rights to the defendant
8 if the Court were to deny that simply because the
9 State refuses to give its consent to the waiver.

10 The Court is satisfied in this case
11 because of the nature of the allegations and the
12 prior publicity, along with the, as Mr. Arrington
13 indicated, the very fine line between the offenses
14 charged and the potential lesser included offenses.
15 The Court believes that it would be a denial of Ms.
16 Greenwood's due process rights to force her to be
17 tried by a jury. The defense motion to waive the
18 jury is granted.

19 I will need to take a few moments and
20 speak to the jury and let them know that their
21 services are not going to be needed. I'm not going
22 to go into any detail with them. With that said,
23 I assume, Ms. Crandall, that you probably
24 anticipated that you would not present any
25 witnesses until this afternoon, I'm assuming.

1 MS. CRANDALL: Your Honor, yes. If we
2 could have a recess, we'll decide where we're going
3 to go from here. Are you willing to even look at
4 this motion that we could put together within ten
5 minutes?

6 THE COURT: If you want to do that, I
7 will certainly consider it, you know, where I am at
8 this point, but if there's something else that you
9 would like to submit to convince the Court
10 otherwise, Ms. Crandall, I'll give you an
11 opportunity to do so. I don't want to foreclose
12 you from presenting anything that you want
13 regarding the motion because it is a very important
14 motion to both the state and to the defendant. So
15 if you want ten minutes, we'll recess and give you
16 that opportunity.

17 MS. CRANDALL: Okay, thank you, Your
18 Honor.

19 MR. ARRINGTON: Thank you, Your Honor.

20 (Recess)

21 THE COURT: Alright, let's go back on
22 the record. We're back on the record in the case
23 of *State of Utah v. Jamie Lynn Greenwood*. The
24 defendant is present and so are both counsel.
25 Before we get to the matter we were addressing

1 before the recess, juror number 51 is Dr. Brown. He
2 has surgery scheduled at noon. Unless there is
3 some objection, I would like to excuse him now. Is
4 there any objection to the excusing Dr. Brown at
5 this time from the State?

6 MS. CRANDALL: No, Your Honor.

7 THE COURT: From the defendant?

8 MR. RETALLICK: No, Your Honor.

9 MR. ARRINGTON: No, Your Honor.

10 THE COURT: Alright, Casey, if you would
11 let Dr. Brown know that he is excused. I've also
12 now received the State's objection to waiver of the
13 jury trial and memorandum in support thereof. I
14 will indicate to counsel that I misspelled, when I
15 indicated that I read cases, the case that was not
16 applicable was *Case v. Serpent*. That is not
17 applicable, and that was included in all of the
18 ones that I read, but that has no application to
19 this issue, and I'll hear from the State, but I
20 will tell the State that I've seen that motion
21 because it appears to be very similar to *State v.*
22 *Fagness*, and I had the benefit of that file.
23 That's where I got those earlier cases. So--

24 MR. MATHIS: And, Your Honor, we do
25 have copies of the case law that is cited in that

1 motion if you've had an opportunity to read.

2 THE COURT: If you would like to argue
3 that, I'll hear from you, Mr. Mathis.

4 MR. MATHIS: Well, I just have copies
5 for the Court before proceeding.

6 THE COURT: Oh, alright. Thank you.
7 Alright, and I had previously seen *Davis* and
8 *Robbins*. If you would give me a moment to look at
9 *Black* and *Singer*.

10 MR. MATHIS: Your Honor, I believe that
11 the State did submit those, the *Studham* case is
12 attached to the *Robbins* case, and that's stapled
13 separately.

14 THE COURT: Alright, alright, thank you.
15 Alright, I'll hear from the State, Mr. Mathis or
16 Ms. Crandall?

17 MR. MATHIS: Your Honor, I think, just
18 to echo the earlier argument that the plain reading
19 of the Rule 17(c) clearly does indicate that in
20 order for a defendant to waive or for there to be
21 a waiver of a jury trial, that three things need to
22 happen: (1) that the defendant requests it, (2)
23 that the Court approves it, and (3) that the State
24 gives its consent.

25 This identical issue was brought up in

1 State v. Robbins, which is a Utah Supreme Court
2 case; State v. Davis, which is another Utah Supreme
3 Court case; State v. Studham, additionally a Utah
4 Supreme Court case, and Singer v. United States, a
5 United States Supreme Court case. In all the Utah
6 Supreme Court cases, judge, the Supreme Court held
7 that it is a meritless argument to say that it is
8 an unconstitutional rule that they have violated
9 due process by denying the waiver of a jury trial.

10 I don't know that--I have not heard any
11 authority that the defendant has cited that would,
12 could even come close to circumventing these cases
13 or give a separate rationale to say that we're not
14 making that same argument. They're making the
15 identical argument and this--I believe that the
16 Supreme Court is saying that it is a meritless
17 claim because it is well settled law.

18 I think the plain language of the rule
19 which is accepted by the Utah Supreme Court, plus
20 the Utah Supreme Court rulings in all the
21 aforementioned cases and the holding in the U.S.
22 Supreme Court case clearly states that the
23 Constitution's guarantee of a fair trial gives a
24 defendant a right to safeguard themselves against
25 possible jury prejudice by insisting on trial

1 before the judge alone. That is not the argument
2 that's necessarily being made today.

3 In light of the Constitution emphasis on
4 a jury trial, we find it difficult to understand
5 how the petitioner could submit the bald
6 proposition that to compel the defendant in a
7 criminal case to undergo a jury trial against his
8 will is contrary to the right to a fair trial or
9 due process. There is no constitutional impediment
10 to a conditioning a waiver of this right on the
11 consent of the prosecuting attorney and the trial
12 judge when, if either refuses to consent, the
13 result is simply that the defendant is subject to
14 an impartial trial by the jury, the very thing that
15 the Constitution guarantees them.

16 That's what we're dealing with today,
17 Judge, and I think that it's very well settled law
18 that there is no defendant right to waive a jury
19 trial in the absence of consent of the State.

20 THE COURT: Alright, thank you. Mr.
21 Arrington or Mr. Retallick, anything further?

22 MR. RETALLICK: Well, Your Honor,
23 it's difficult. We're at a disadvantage. We don't
24 have an office with law clerks that can run down in
25 the extended ten minute break and write up a brief

1 in this matter, Your Honor, but we do maintain that
2 some of the cases that's cited indicate that there
3 are certain circumstances where this right to a
4 jury may be waived in some instances and the Court
5 has the discretion which the Court exercised here.
6 I just don't have the time and I don't know if Mr.
7 Arrington has anything to add to provide further
8 legal analysis to this because, as I say, we've
9 just received these cases and we're going through
10 them right now.

11 MR. ARRINGTON: Just to echo, Your
12 Honor, just that the way the law is written here in
13 Utah, and under which--although there's similar
14 cases, I don't know that they're identical as far
15 as the charges are concerned. There is a legal
16 fine line between the charges that have been--in
17 fact, if I can go back for a moment. She was
18 originally booked on charges that we've asked for
19 jury instructions of the lesser included offenses.
20 The State, upon reviewing the information and the
21 discovery submitted by the police department,
22 amends the charges to include the rape, the first
23 degree felonies.

24 There is a fine line in between the
25 charges filed and the charges she was arrested on,

1 and what we're asking for if this goes to a jury,
2 to the lesser included offenses. It boils down to
3 an issue of consent, and there is jury instructions
4 that have been submitted by the State that we're
5 going to, at least when it comes to that, take
6 issue as to defining coercion, enticement, those
7 kinds of things and have brought case law to back
8 that up.

9 The point being is that there--it's
10 going to take, whether it's a bench trial or a jury
11 trial, fine hair analysis and coming down to an
12 issue of factual v. legal consent in this case, and
13 reiterating that my client is, although it would
14 rest with a single individual, that being this
15 Court, to decide her fate. She is more comfortable
16 because we go to deliberation with a legal mind
17 versus the jury who, in all likelihood, have no
18 understanding of the details and the fine analysis
19 between rape and unlawful sexual intercourse and
20 unlawful sexual conduct involving a minor, and I
21 don't know that they are going to be, although we
22 do normally rely on Americans to be intelligent and
23 objective in our daily dealings, I don't know that
24 they are going to be able to completely understand
25 the gravamen in the short time we have in giving

1 jury instructions and for them weighing
2 objectively, again, with the media attention that
3 has been present on this case. I submit.

4 THE COURT: Alright, Mr. Mathis?

5 MR. MATHIS: Judge, first I would like
6 to respond to the issue that was raised that the
7 defense is not given the same advantage as we have.
8 I can assure you, we also do not have law clerks
9 that do this research for us. We have to do it on
10 our own, number one. Number two, given the
11 defendant's own admission, this is something that
12 they've been talking about for months. So to say
13 that this is an unanticipated argument, I think, is
14 unpersuasive to me and I believe to be unpersuasive
15 to the Court.

16 Given also the arguments given by
17 defendant today, his claim is that he is afraid
18 that the, or that he believes that the Court will
19 be more fair and objective than the jury who hasn't
20 even been, we haven't even gone through the *voir*
21 *dire* process. So without even going through the
22 *voir dire* process, Your Honor, I think that that
23 puts the burden on the Court, if the Court stays
24 with its original ruling, to make the finding that
25 the jury pool, as assembled today, is unfair and

1 would be unobjective in hearing the matter today,
2 and I think the safe argument, although I haven't
3 talked to Mr. Arrington or his colleague today, say
4 that they have much more experience than I do or
5 Ms. Crandall combined discussing and arguing to
6 juries the fine lines of legal analysis in
7 different laws. To say that we're unable to do
8 that, or they would be unable to do that, I think,
9 Your Honor, is just unpersuasive. I mean, that's
10 what the very trial is and what it entails.

11 THE COURT: Alright, thank you, counsel.
12 Let me just say that in my short time on the
13 bench, I have been surprised and amazed at the
14 collective wisdom of the juries that I've had the
15 experience of viewing here in this Courtroom.

16 In looking at the Supreme Court, United
17 States Supreme Court decision of *Singer v. The*
18 *United States*, I'm looking at the last page of
19 that, the Court states: we need not determine in
20 this case whether there might be some circumstances
21 where a defendant's reasons for wanting to be tried
22 by a judge alone are so compelling that the
23 government's insistence on trial by jury would
24 result in the denial of a defendant of an impartial
25 trial. Petitioner argues that there might arise

1 situations where passion, prejudice, public feeling
2 or some other factor may render impossible or
3 unlikely by an impartial trial by jury; however,
4 since petitioner gave no reason for wanting to
5 forego jury trial, other than to save time, this is
6 not such a case and the petitioner does not claim
7 that it is.

8 I think the Supreme Court in *Singer*
9 leaves open, as an exception to that general rule
10 which the Court recognizes that that is the general
11 rule, but I think, based on what has been
12 presented, the reasons why the defendant wants to
13 waive a jury in this case, because of the nature of
14 the allegations, because of the publicity, because
15 of the lesser included offenses that the cumulative
16 impact of those factors seem, to this Court, to
17 require that the Court grant the motion, that the
18 State cannot, in every case, prevent the
19 defendant's waiver, and it's in the unusual case
20 that the State--only in the unusual case is there a
21 waiver of the right would be granted, and I think
22 this is the unusual case.

23 The Court believes that to not waive
24 the--not allow the defendant to waive a jury trial
25 implicates her due process rights and for those

1 reasons the motion is granted.

2 We will take a recess. I will excuse
3 the jury panel and, Ms. Crandall, when did you
4 anticipate starting testimony?

5 MS. CRANDALL: Your Honor, the State
6 won't be beginning today. If Your Honor would
7 issue a written finding, we'll be planning on doing
8 an interlocutory appeal on this.

9 THE COURT: And does counsel want to be
10 heard on that?

11 MR. ARRINGTON: Well, Your Honor,
12 granted that our concern is my client was
13 originally arrested on third degree felony charges.
14 She was booked into the jail, bail was set at ten
15 thousand dollars for third degree felonies, which
16 is a little high, but she paid that bail. The
17 State got the case, got the information, amended
18 the information, re-filed it as first degree
19 felony. She was booked on bail of five hundred
20 thousand dollars, even though she is 42 years old.
21 She has no prior record. She's born and raised in
22 Utah. She has been in the same house for 13 years.
23 She's been married for 20 years.

24 We were able to get the bail down to
25 two hundred and fifty thousand dollars; however,

1 that is way above anything that she or her family
2 combined to come up with. Understanding that the
3 interlocutory appeal is going to take some time,
4 she has been a model prisoner. She has even been
5 in as a trustee during her stay. She's been in
6 custody for five months. There have been no write-
7 ups or anything. I think it would be appropriate
8 to re-visit her custody status and either allow her
9 O.R., because she has paid a bail in this matter on
10 charges that would be lesser included offenses, or
11 at least place her on home confinement pre-trial
12 services where she is being constantly supervised.
13 It is available down here, or at least lower that
14 bail down to something that's much more reasonable.
15 Again, any pre-trial services, home confinement
16 would be satisfactory for us.

17 THE COURT: Alright, anything further
18 from the State?

19 MS. CRANDALL: Yes, Your Honor, just so
20 we're clear. There was never an amended
21 information. The defendant was booked on probable
22 cause by police officers, by Sandy police, and
23 that's what she was booked on. That's what she
24 bonded out on.

25 The State, once they received the case

1 and actually filed an information, we requested two
2 hundred and fifty thousand, at which time, when I
3 believe it was Judge Coriss at the time, saw the
4 information, he raised it to five hundred thousand.

5 We already had a bond hearing back in
6 March in front of Judge Kelly. At that point, it
7 was lowered to the two hundred and fifty thousand.
8 He said if she bailed out, ordered pre-trial
9 services after forty-eight hours. We've already
10 had that hearing. I don't think what has happened
11 here today really changes that in any material
12 manner, and the victim has a right, if you are
13 inclined to grant for some reason, even though
14 there's no legal basis to do so, another bond
15 hearing, and we have the right to have the victim
16 present, at least speak to him and get some input
17 from him.

18 MR. ARRINGTON: And we would stipulate
19 to a bond hearing, Your Honor.

20 THE COURT: And Mr. Arrington and Mr.
21 Retallick, what is the defendant's position on not
22 proceeding with the trial. The State, apparently,
23 is going to take an interlocutory appeal, and
24 whether or not that will be granted, the Court
25 anticipated that we would go ahead and proceed with

1 the trial.

2 MR. ARRINGTON: Well, I think the
3 interlocutory appeal has been availed just because
4 it requires a disposition, I think. We're
5 objecting to--we would like to go forward with the
6 trial today and proceed. The interlocutory appeal
7 is going to take some time. It's going to involve
8 other counsel, lots of legal argument and
9 preparation I think that this Court is well aware
10 of. We would like to proceed with trial today.

11 MR. RETALLICK: Your Honor, if I may,
12 just one additional point on the interlocutory
13 appeal. I've been involved in many of them and one
14 of the keys to the interlocutory appeal is that the
15 issue that is sought to be decided by the Court of
16 Appeals must be--have some dispositive impact on
17 the case before the Court. It's not dispositive.
18 The only decision would be to reverse you and say
19 we should have a jury. Having a jury or not
20 having a jury is not going to be dispositive of the
21 underlying charges.

22 Typical interlocutory appeal is on a
23 suppression issue where the district court--someone
24 claims the district court made an error. So if the
25 evidence--if the denial of the suppression hearing

1 is reversed, the evidence is allowed in, then that
2 becomes dispositive if everything else flows
3 through it.

4 And so I think, in this claim of a
5 right to an interlocutory appeal, while they may
6 file it, I don't believe it's provident, and I
7 believe it's just another delaying tactic to keep
8 defendant in custody longer than absolutely
9 necessary.

10 THE COURT: Alright, anything further
11 from the State?

12 MS. CRANDALL: Other than, Your Honor,
13 to say this is a delaying tactic to keep the
14 defendant in custody is highly offensive. This is
15 the first we've heard of even them saying that they
16 wanted to waive the jury trial was this morning.
17 It hasn't even been brought up. We're just kind of
18 snow-balled with it. It's up to the Court of
19 Appeals to decide whether or not the interlocutory
20 appeal is appropriate and if Your Honor's decision
21 is appropriate, and we have the right to request
22 that.

23 THE COURT: Alright. What we're going to
24 do, we will recess until tomorrow morning at 8:30.
25 I intend to proceed with the trial at 8:30, unless

1 the Supreme Court or the Court of Appeals directs
2 me to do otherwise. Thank you. We'll see you
3 back here at 8:30 tomorrow morning.

4 MR. MATHIS: Your Honor, will the Court
5 be placing its findings in writing, or would you
6 like defense or the State to do that?

7 THE COURT: Mr. Arrington or Mr.
8 Retallick, could you prepare findings and an order
9 on the motion, and how long would you need to do
10 that?

11 MR. RETALLICK: If we can get a copy of
12 the audio tape, Your Honor, of this proceeding, we
13 can get it done probably by the end of the day.

14 MR. ARRINGTON: Your Honor, obviously,
15 this tape would be to get it done before the end
16 of the day in order to contact the Attorney
17 General's Office.

18 MR. RETALLICK: Okay, it gets two
19 minutes, Your Honor. It's 10:30. We could have it
20 probably done by 1:00.

21 THE COURT: Alright. That will be the
22 order. Have that submitted. We'll give you our e-
23 mail for both the Court, and if the District
24 Attorney's Office would give them your e-mail and
25 we'll expect that by 1:00 o'clock. Thank you.

1 We'll be in recess.

2 MS. CRANDALL: Your Honor, maybe, just
3 so we can track where we're at, if we could have a
4 Court hearing maybe later this afternoon. We can
5 make sure we have those written rulings and, I
6 think, at that point, we'll be able to--maybe we
7 can give Your Honor the State's better position as
8 far as the Attorney General's Office and Court of
9 Appeals would say on the matter. I don't know if
10 there's any objection to that. I think--

11 THE COURT: Well, I suppose we could do
12 it by phone. Mr. Retallick has to return to Ogden
13 to get that done, and Mr. Arrington to North Salt
14 Lake. So what is your preference, Mr. Arrington or
15 Mr. Retallick?

16 MS. CRANDALL: A phone conference is
17 fine.

18 MR. ARRINGTON: Telephone conference.

19 MR. RETALLICK: Telephone conference
20 would be fine, Your Honor.

21 THE COURT: Alright. We will plan on a
22 telephone conference at 1:30 then.

23 MR. RETALLICK: Very good, Your Honor.

24 MR. ARRINGTON: Thank you, Your Honor.

25 THE COURT: And my clerk will set that

1 up. Thank you.

2 MR. ARRINGTON: Very well. Thank you.

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CERTIFICATE

STATE OF UTAH)
 : ss.
Salt Lake County)

I, Ruby M. Rudisill, do hereby certify that the foregoing pages contain a true and accurate transcript of the electronically recorded proceedings and was transcribed by me to the best of my ability from the audiotapes furnished to me.

DATED: October 20, 2010


Ruby M. Rudisill

Tab B

FILED
THIRD DISTRICT COURT
AUG 04 2010
WEST JORDAN DEPT

IN THE THIRD JUDICIAL DISTRICT COURT, WEST JORDAN DEPARTMENT,
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,
Plaintiff,

v.

JAMIE GREENWOOD,
Defendant.

**DECISION ON DEFENDANT'S
MOTION TO WAIVE
TRIAL BY JURY**

Case No.: 101400544
Honorable Robert W. Adkins

THIS MATTER came before the Court prior to the beginning of the jury selection process in the trial of the above-captioned matter. Defense counsel, on behalf of Defendant, moved to waive the jury in this matter and to proceed with a bench trial. The State objected to the waiver of a jury pursuant to Rule 17(c) of the Utah Rules of Criminal Procedure.

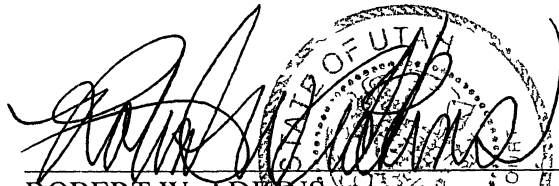
The Court, after having reviewed the applicable case law in this area, requested Defense Counsel to state on the record the basis for the motion. After receiving the basis for the motion and the State's argument in objection thereto, this Court hereby makes the following ruling:

1. This Court understands Rule 17(c) of the Utah Rules of Criminal Procedure and the case law applicable to the matter at hand. The Court believes that upon a proper showing a defendant should be able to waive his or her right to a jury trial. To allow the State in every case to defeat this ability would place a tremendous burden upon a Defendant and a tremendous amount of power in the hands of the State. The State, although representing the people, is not subject to the loss of liberty as is a defendant.
2. This court believes that if a defendant can make a showing upon a proper basis why a defendant desires to waive a jury, this Court believes that by denying such request simply at the objection of the State would implicate the due process rights of the Defendant.
3. The Court is satisfied that Defendant has met ^{her} burden because of the nature of the case, the publicity this case has received, and the fine line between the offenses charged and lesser included offenses which the court has agreed to consider. In the Supreme Court

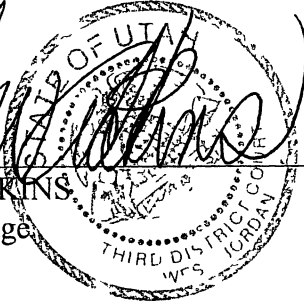
decision of *Singer v United States*, the Supreme Court stated, “we need not determine in this case whether there might be some circumstances where a defendant’s reasons for wanting to be tried by a judge alone are so compelling that the Government’s insistence on a trial by jury would result in the denial to a defendant of an impartial trial.” This Court believes that the cumulative impact of the factors stated above creates such an unusual circumstance.

4. This Court finds that it would be a denial of Defendant’s due process rights to refuse to honor Defendant’s request to waive a jury trial. Therefore, Defendant’s motion is hereby granted.

DATED this 4 day of August, 2010.



ROBERT W. ADKINS
District Court Judge



Tab A

Tab B

Tab C

Tab D

Rule 17. The trial.

(a) In all cases the defendant shall have the right to appear and defend in person and by counsel. The defendant shall be personally present at the trial with the following exceptions:

- (1) In prosecutions of misdemeanors and infractions, defendant may consent in writing to trial in his absence;
- (2) In prosecutions for offenses not punishable by death, the defendant's voluntary absence from the trial after notice to defendant of the time for trial shall not prevent the case from being tried and a verdict or judgment entered therein shall have the same effect as if defendant had been present; and
- (3) The court may exclude or excuse a defendant from trial for good cause shown which may include tumultuous, riotous, or obstreperous conduct.

Upon application of the prosecution, the court may require the personal attendance of the defendant at the trial.

(b) Cases shall be set on the trial calendar to be tried in the following order:

- (1) misdemeanor cases when defendant is in custody;
- (2) felony cases when defendant is in custody;
- (3) felony cases when defendant is on bail or recognizance; and
- (4) misdemeanor cases when defendant is on bail or recognizance.

(c) All felony cases shall be tried by jury unless the defendant waives a jury in open court with the approval of the court and the consent of the prosecution.

(d) All other cases shall be tried without a jury unless the defendant makes written demand at least ten days prior to trial, or the court orders otherwise. No jury shall be allowed in the trial of an infraction.

(e) In all cases, the number of members of a trial jury shall be as specified in Section 78-46-5, U.C.A. 1953.

(f) In all cases the prosecution and defense may, with the consent of the accused and the approval of the court, by stipulation in writing or made orally in open court, proceed to trial or complete a trial then in progress with any number of jurors less than otherwise required.

(g) After the jury has been impaneled and sworn, the trial shall proceed in the following order:

- (1) The charge shall be read and the plea of the defendant stated;
- (2) The prosecuting attorney may make an opening statement and the defense may make an opening statement or reserve it until the prosecution has rested;
- (3) The prosecution shall offer evidence in support of the charge;
- (4) When the prosecution has rested, the defense may present its case;
- (5) Thereafter, the parties may offer only rebutting evidence unless the court, for good cause, otherwise permits;
- (6) When the evidence is concluded and at any other appropriate time, the court shall instruct the jury; and
- (7) Unless the cause is submitted to the jury on either side or on both sides without argument, the prosecution shall open the argument, the defense shall follow and the prosecution may close by responding to the defense argument. The court may set reasonable limits upon the argument of counsel for each party and the time to be allowed for argument.

(h) If a juror becomes ill, disabled or disqualified during trial and an alternate juror has been selected, the case shall proceed using the alternate juror. If no alternate has been selected, the parties may stipulate to proceed with the number of jurors remaining. Otherwise, the jury shall be discharged and a new trial ordered.

(i) Questions by jurors. A judge may invite jurors to submit written questions to a witness as provided in this section.

(1) If the judge permits jurors to submit questions, the judge shall control the process to ensure the jury maintains its role as the impartial finder of fact and does not become an investigative body. The judge may disallow any question from a juror and may discontinue questions from jurors at any time.

(2) If the judge permits jurors to submit questions, the judge should advise the jurors that they may write the question as it occurs to them and submit the question to the bailiff for transmittal to the judge. The judge should advise the jurors that some questions might not be allowed.

(3) The judge shall review the question with counsel and unrepresented parties and rule upon any objection to the question. The judge may disallow a question even though no objection is made. The judge shall preserve the written question in the court file. If the question is allowed, the judge shall ask the question or permit counsel or an unrepresented party to ask it. The question may be rephrased into proper form. The judge shall allow counsel and unrepresented parties to examine the witness after the juror's question.

(j) When in the opinion of the court it is proper for the jury to view the place in which the offense is alleged to have been committed, or in which any other material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. The officer shall be sworn that while the jury are thus conducted, he will suffer no person other than the person so appointed to speak to them nor to do so himself on any subject connected with the trial and to return them into court without unnecessary delay or at a specified time.

(k) At each recess of the court, whether the jurors are permitted to separate or are sequestered, they shall be admonished by the court that it is their duty not to converse among themselves or to converse with, or suffer themselves to be addressed by, any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.

(l) Upon retiring for deliberation, the jury may take with them the instructions of the court and all exhibits which have been received as evidence, except exhibits that should not, in the opinion of the court, be in the possession of the jury, such as exhibits of unusual size, weapons or contraband. The court shall permit the jury to view exhibits upon request. Jurors are entitled to take notes during the trial and to have those notes with them during deliberations. As necessary, the court shall provide jurors with writing materials and instruct the jury on taking and using notes.

(m) When the case is finally submitted to the jury, they shall be kept together in some convenient place under charge of an officer until they agree upon a verdict or are discharged, unless otherwise ordered by the court. Except by order of the court, the officer having them under his charge shall not allow any communication to be made to them, or make any himself, except to ask them if they have agreed upon their verdict, and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon.

(n) After the jury has retired for deliberation, if they desire to be informed on any point of law arising in the cause, they shall inform the officer in charge of them, who shall communicate such request to the court. The court may then direct that the jury be brought before the court where, in the presence of the defendant and both counsel, the court shall respond to the inquiry or advise the jury that no further instructions shall be given. Such response shall be recorded. The court may in its discretion respond to the inquiry in writing without having the jury brought before the court, in which case the inquiry and the response thereto shall be entered in the record.

(o) If the verdict rendered by a jury is incorrect on its face, it may be corrected by the jury under the advice of the court, or the jury may be sent out again.

(p) At the conclusion of the evidence by the prosecution, or at the conclusion of all the evidence, the court may issue an order dismissing any information or indictment, or any count thereof, upon the ground that the evidence is not legally sufficient to establish the offense charged therein or any lesser included offense.

Advisory Committee Notes

Tab D

SINGER *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

No. 42. Argued November 18, 1964.—Decided March 1, 1965.

Petitioner, a defendant in a federal criminal mail fraud case, claims that he had an absolute right to be tried by a judge alone if he considered such a trial to be to his advantage. *Held*: Federal Rule of Criminal Procedure 23 (a) sets forth a reasonable procedure governing proffered waivers of jury trials. A defendant's only constitutional right concerning the method of trial is to an impartial trial by jury. Although he may waive his right to trial by jury, *Patton v. United States*, 281 U. S. 276, there is no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is that the defendant is subject to an impartial trial by jury—the very thing that the Constitution guarantees him. Pp. 24–38.

326 F. 2d 132, affirmed.

Sidney Dorfman argued the cause and filed a brief for petitioner.

Beatrice Rosenberg argued the cause for the United States. With her on the brief were *Solicitor General Cox*, *Assistant Attorney General Miller* and *Sidney M. Glazer*.

Briefs of *amici curiae* were filed by *Victor Rabinowitz* and *Leonard Boudin* for *Joni Rabinowitz*, and by *Justin A. Stanley* for *Nicholas Jacop Uselding*.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

Rule 23 (a) of the Federal Rules of Criminal Procedure provides:

“Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.”

Petitioner challenges the permissibility of this rule, arguing that the Constitution gives a defendant in a federal criminal case the right to waive a jury trial whenever he believes such action to be in his best interest, regardless of whether the prosecution and the court are willing to acquiesce in the waiver.

Petitioner was charged in a federal district court with 30 infractions of the mail fraud statute, 18 U. S. C. § 1341 (1958 ed.). The gist of the indictment was that he used the mails to dupe amateur songwriters into sending him money for the marketing of their songs. On the opening day of trial petitioner offered in writing to waive a trial by jury "[f]or the purpose of shortening the trial."¹ The trial court was willing to approve the waiver, but the Government refused to give its consent. Petitioner was subsequently convicted by a jury on 29 of the 30 counts and the Court of Appeals for the Ninth Circuit affirmed. We granted certiorari, 377 U. S. 903.

Petitioner's argument is that a defendant in a federal criminal case has not only an unconditional constitutional right, guaranteed by Art. III, § 2, and the Sixth Amendment,² to a trial by jury, but also a correlative right to

¹ R. 17.

² Art. III, § 2, of the United States Constitution provides:

"The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

The Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

have his case decided by a judge alone if he considers such a trial to be to his advantage. He claims that at common law the right to refuse a jury trial preceded the right to demand one, and that both before and at the time our Constitution was adopted criminal defendants in this country had the right to waive a jury trial. Although the Constitution does not in terms give defendants an option between different modes of trial, petitioner argues that the provisions relating to jury trial are for the protection of the accused. Petitioner further urges that since a defendant can waive other constitutional rights without the consent of the Government, he must necessarily have a similar right to waive a jury trial and that the Constitution's guarantee of a fair trial gives defendants the right to safeguard themselves against possible jury prejudice by insisting on a trial before a judge alone. Turning his attention to Rule 23 (a), petitioner claims that the Fifth, Sixth, Ninth, and Tenth Amendments are violated by placing conditions on the ability to waive trial by jury.

We have examined petitioner's arguments and find them to be without merit. We can find no evidence that the common law recognized that defendants had the right to choose between court and jury trial. Although instances of waiver of jury trial can be found in certain of the colonies prior to the adoption of the Constitution, they were isolated instances occurring pursuant to colonial "constitutions" or statutes and were clear departures from the common law. There is no indication that the colonists considered the ability to waive a jury trial to be of equal importance to the right to demand one. Having found that the Constitution neither confers nor recognizes a right of criminal defendants to have their cases tried before a judge alone, we also conclude that Rule 23 (a) sets forth a reasonable procedure governing attempted waivers of jury trials.

I.

English Common Law. The origin of trial by jury in England is not altogether clear. At its inception it was an alternative to one of the older methods of proof—trial by compurgation, ordeal or battle. I Holdsworth, A History of English Law 326 (7th ed. 1956). Soon after the thirteenth century trial by jury had become the principal institution for criminal cases, Jenks, A Short History of English Law 52 (5th ed. 1938); yet, even after the older procedures of compurgation, ordeal and battle had passed into disuse, the defendant technically retained the right to be tried by one of them. Before a defendant could be subjected to jury trial his “consent” was required, but the Englishmen of the period had a concept of “consent” somewhat different from our own. The Statute of Westminster I, 1275, 3 Edw. 1, c. 12, which described defendants who refused to submit to jury trial as “refus[ing] to stand to the Common Law of the Land,” marks the beginning of the horrendous practice known as *peine forte et dure* by which recalcitrant defendants were tortured until death or until they “consented” to a jury trial.

It is significant that defendants who refused to submit to a jury were not entitled to an alternative method of trial,³ and it was only in 1772 that *peine forte et dure* was officially abolished in England. By a statute enacted in that year, 12 Geo. 3, c. 20, a defendant who stood mute when charged with a felony was deemed to have pleaded guilty. Not until 1827, long after the adoption of our Constitution, did England provide by statute, 7 & 8

³ It appears that many hardy defendants were willing to be tortured to death rather than submit to a jury trial, not because of any inherent distrust of the jury system but because of their desire to avoid a conviction and thereby prevent forfeiture of their lands and the resultant hardships for their descendants. Cf. I Holdsworth, *supra*, at 326.

Geo. 4, c. 28, for the trial of those who stood mute. Even this statute did not give the defendant the right to plead his case before a judge alone, but merely provided that he would be subject to jury trial without his formal consent.

Thus, as late as 1827 the English common law gave criminal defendants no option as to the mode of trial. The closest the common law came to such a procedure was that of the "implied confession," described briefly in 2 Hawkins, Pleas of the Crown, c. 31 (6th ed. 1787), by which defendants accused of minor offenses did not explicitly admit their guilt but threw themselves on the King's mercy and expressed their willingness to submit to a small fine. Despite the "implied confession," the court heard evidence and could discharge the defendant if it found the evidence wanting. Griswold, *The Historical Development of Waiver of Jury Trial in Criminal Cases*, 20 Va. L. Rev. 655, 660 (1934). It cannot seriously be argued that this obscure and insignificant procedure, having no applicability to serious offenses, establishes the proposition that at common law defendants had the right to choose the method of trial in all criminal cases. On the contrary, "[b]y its intrinsic fairness as contrasted with older modes, and by the favor of the crown and the judges, [trial by jury] grew fast to be regarded as the one regular common-law mode of trial, always to be had when no other was fixed." Thayer, *A Preliminary Treatise on Evidence at the Common Law* 60 (1898).

The Colonial Experience. The colonies which most freely permitted waiver of jury trial as a matter of course were Massachusetts and Maryland. The "first constitution" of Massachusetts—The Body of Liberties of 1641—contained as Liberty XXIX the following:

"In all actions at law, it shall be the liberty of the plaintiff and defendant, by mutual consent, to choose

whether they will be tried by the Bench or by a Jury, unless it be where the law upon just reason has otherwise determined. The like liberty shall be granted to all persons in Criminal cases."

It should be noted that Liberty XXIX's language explicitly provided that the right to choose trial by judge alone was subject to change "where the law upon just reason has otherwise determined." Moreover, those drafting and administering the Liberty recognized that it was a departure from the English common law. Grinnell, *To What Extent is the Right to Jury Trial Optional in Criminal Cases in Massachusetts?* 8 Mass. L. Q. No. 5, 7, 23-25 (1923). Several cases can be cited, at least up until 1692, in which defendants in Massachusetts waived jury trial and were tried by the bench. See Grinnell, *supra*, at 27-29; Griswold, *supra*, at 661-664. However, from 1692 on, in light of increasing hostility to the Crown, the colonists of Massachusetts stressed their right to trial by jury, not their right to choose between alternate methods of trial. Instead of being a settled part of the jurisprudence of Massachusetts at the time of the Constitutional Convention, the ability to choose between judge and jury had become a forgotten option in Massachusetts:

"With the state of mind then existing among the colonists, presumably nobody bothered about this question of any one's wanting to waive a jury. The General Court was then concerned with the question of a man's right to a jury *when he asked for it*, which they thought in danger. The 'Body of Liberties' never having been printed and the nineteen original official manuscript copies having doubtless been lost or forgotten, the 'bar' (which did not begin to develop until the beginning of the 18th century) and

the 18th century people, probably grew up without any general knowledge of the expressly optional character of the right to a jury established as a 'fundamental' by the common law of Massachusetts in the colonial period."⁴

It appears that from the early days of Maryland's colonization minor cases were tried by judges sitting alone. Bond, *The Maryland Practice of Trying Criminal Cases by Judges Alone, Without Juries*, 11 A. B. A. J. 699, 700 (1925). But the defendant who submitted his case to the judge was not considered on a par with the defendant who chose to have a jury hear his case, as is evidenced by a Maryland statute of 1793 which provided that submission to a judge would be considered an admission of crime (analogous to the "implied confession" of minor offenses under English common law) at least insofar as to render the person submitting his case to a judge liable for the costs of prosecution. In 1809, Maryland declared by statute that waiver of jury trial was to be encouraged and the willing defendant was to suffer no increased liability for so doing. It was not until 1823, however, that major cases began also to be submitted to judges alone, and the first major case so submitted caused some surprise and sharp comment in Maryland legal circles. See Bond, *supra*, at 701.

Other possible examples of optional jury trial procedures can be cited in colonial New Hampshire, Vermont, Connecticut, New Jersey and Pennsylvania.⁵ See Gris-

⁴ Grinnell, *supra*, at 33.

⁵ The Pennsylvania case of *Proprietor v. Wilkins*, Pennypacker's Pennsylvania Colonial Cases 88 (1892), decided in 1685-1686, is of interest in that the court tried a fornication case without a jury over the objection of the prosecution. The punishment involved in the case was a 10-pound fine. The case is, therefore, little authority for the proposition that defendants had the right to waive jury trials in all cases.

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would, *supra*, at 664-667. The most that can be said for these examples is that they are evidence that the colonists believed it was possible to try criminal defendants without a jury. They in no way show that there was any general recognition of a defendant's right to be tried by the court instead of by a jury. Indeed, if there had been recognition of such a right, it would be difficult to understand why Article III and the Sixth Amendment were not drafted in terms which recognized an option.

The Constitution and Its Judicial Interpretation. The proceedings at the Constitutional Convention give little insight into what was meant by the direction in Art. III, § 2, that the "Trial of all Crimes . . . shall be by jury." The clause was clearly intended to protect the accused from oppression by the Government, see III Farrand, Records of the Federal Convention 101 (James Wilson), 221-222 (Luther Martin) (1911); but, since the practice of permitting defendants a choice as to the mode of trial was not widespread, it is not surprising that some of the framers apparently believed that the Constitution designated trial by jury as the exclusive method of determining guilt, see The Federalist, No. 83 (Alexander Hamilton) (Cooke ed. 1961); IV Elliot's Debates 145, 171 (James Iredell) (2d ed. 1876); III Elliot's Debates 521 (Edmund Pendleton) (2d ed. 1876).

In no known federal criminal case in the period immediately following the adoption of the Constitution did a defendant claim that he had the right to insist upon a trial without a jury. Indeed, in *United States v. Gibert*, 25 Fed. Cas. 1287 (No. 15204) (C. C. D. Mass. 1834), Mr. Justice Story, while sitting on circuit, indicated his view that the Constitution made trial by jury the only permissible method of trial. Similar views were expressed by other federal judges. See *Ex parte McClusky*, 40 F. 71, 74-75 (C. C. D. Ark. 1889) (by implication); *United*

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States v. Taylor, 11 F. 470, 471 (C. C. D. Kan. 1882) (dictum).⁶

Although not necessary to the holding in the case, in *Thompson v. Utah*, 170 U. S. 343, this Court also expressed a view that the Constitution made jury trial the exclusive method of determining guilt in all federal criminal cases. However, in *Schick v. United States*, 195 U. S. 65, the Court decided there was no constitutional requirement that petty offenses be tried by jury. These two decisions were construed by the lower federal courts as establishing a rule that in all but petty offenses jury trial was a constitutional imperative. See *Coates v. United States*, 290 F. 134 (C. A. 4th Cir. 1923); *Blair v. United States*, 241 F. 217, 230 (C. A. 9th Cir. 1917); *Frank v. United States*, 192 F. 864, 867-868 (C. A. 6th

⁶ In construing their own constitutions, which generally had clauses designed to preserve the common-law right to trial by jury, the state courts took a similarly limited view of the ability of a defendant to waive jury trial. Some state courts ruled that in the absence of a statute there could be no waiver of jury trial. See, e. g., *Wilson v. State*, 16 Ark. 601 (1855); *State v. Maine*, 27 Conn. 281 (1858); *People v. Smith*, 9 Mich. 193 (1861). Several other courts determined that the State could by statute prohibit waiver of jury trials. See, e. g., *Arnold v. Nebraska*, 38 Neb. 752, 57 N. W. 378 (1894); *In re McQuown*, 19 Okla. 347, 91 P. 689 (1907); *State v. Battey*, 32 R. I. 475, 80 A. 10 (1911); *State v. Hirsch*, 91 Vt. 330, 100 A. 877 (1917); *Mays v. Commonwealth*, 82 Va. 550 (1886). Some state courts interpreted their constitutions to say that under no circumstances could waiver be allowed. See, e. g., *State v. Holt*, 90 N. C. 749 (1884); *Williams v. State*, 12 Ohio St. 622 (1861). Several courts, of course, held that waiver of a jury was permissible, even in the absence of enabling legislation. See, e. g., *State ex rel. Warner v. Baer*, 103 Ohio St. 585, 134 N. E. 786 (1921) (overruling *Williams v. State*, *supra*); *Ex parte King*, 42 Okla. Cr. 46, 274 P. 682 (Okla. Crim. App. 1929). In *Hallinger v. Davis*, 146 U. S. 314, this Court held that a state statute permitting waiver of jury trial in criminal cases did not violate the Due Process Clause of the Fourteenth Amendment.

Cir. 1911) (dictum); *Low v. United States*, 169 F. 86 (C. A. 6th Cir. 1909); *Dickinson v. United States*, 159 F. 801 (C. A. 1st Cir. 1908), cert. denied, 213 U. S. 92.

The issue whether a defendant could waive a jury trial in federal criminal cases was finally presented to this Court in *Patton v. United States*, 281 U. S. 276. The *Patton* case came before the Court on a certified question from the Eighth Circuit. The wording of the question, *id.*, at 287, is significant:

“After the commencement of a trial in a Federal Court before a jury of twelve men upon an indictment charging a crime, punishment for which may involve a penitentiary sentence, if one juror becomes incapacitated and unable to further proceed with his work as a juror, can defendant or defendants and the Government through its official representative in charge of the case consent to the trial proceeding to a finality with eleven jurors, and can defendant or defendants thus waive the right to a trial and verdict by a constitutional jury of twelve men?”

The question explicitly stated that the Government had agreed with the defendant that his trial should proceed with 11 jurors. The case did not involve trial before a judge alone, but the Court believed that trial before 11 jurors was as foreign to the common law as was trial before a judge alone, and therefore both forms of waiver “in substance amount[ed] to the same thing.” *Id.*, at 290. The Court examined Art. III, § 2, and the Sixth Amendment and concluded that a jury trial was a right which the accused might “forego at his election.” *Id.*, at 298. The Court also spoke of jury trial as a “privilege,” not an “imperative requirement,” *ibid.*, and remarked that jury trial was principally for the benefit of the accused, *id.*, at 312. Nevertheless, the Court was conscious of the precise question that was presented by the Eighth Circuit, and concluded its opinion, *id.*, at 312—

313, with carefully chosen language that dispelled any notion that the defendant had an absolute right to demand trial before a judge sitting alone:

“Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity.”

In *Adams v. United States ex rel. McCann*, 317 U. S. 269, 277–278, this Court reaffirmed the position taken in *Patton* that “one charged with a serious federal crime may dispense with his Constitutional right to jury trial, where this action is taken with his express, intelligent consent, where the Government also consents, and where such action is approved by the responsible judgment of the trial court.”

II.

Thus, there is no federally recognized right to a criminal trial before a judge sitting alone, but a defendant can, as was held in *Patton*, in some instances waive his right to a trial by jury. The question remains whether the effectiveness of this waiver can be conditioned upon the consent of the prosecuting attorney and the trial judge.

The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the oppo-

site of that right. For example, although a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial, see *United States v. Kobli*, 172 F. 2d 919, 924 (C. A. 3d Cir. 1949) (by implication); although he can waive his right to be tried in the State and district where the crime was committed, he cannot in all cases compel transfer of the case to another district, see *Platt v. Minnesota Mining & Mfg. Co.*, 376 U. S. 240, 245; *Kersten v. United States*, 161 F. 2d 337, 339 (C. A. 10th Cir. 1947), cert. denied, 331 U. S. 851; and although he can waive his right to be confronted by the witnesses against him, it has never been seriously suggested that he can thereby compel the Government to try the case by stipulation. Moreover, it has long been accepted that the waiver of constitutional rights can be subjected to reasonable procedural regulations: Rule 7 (b) of the Federal Rules of Criminal Procedure sets forth the procedure to be followed for waiver of the right to be prosecuted by indictment; Rule 20 describes the procedure for waiver of the right to be tried in the district in which an indictment or information is pending against a defendant; and Rule 44 deals with the waiver of the right to counsel.

Trial by jury has been established by the Constitution as the "normal and . . . preferable mode of disposing of issues of fact in criminal cases." *Patton v. United States*, 281 U. S. 276, 312. As with any mode that might be devised to determine guilt, trial by jury has its weaknesses and the potential for misuse. However, the mode itself has been surrounded with safeguards to make it as fair as possible—for example, venue can be changed when there is a well-grounded fear of jury prejudice, Rule 21 (a) of the Federal Rules of Criminal Procedure, and prospective jurors are subject to *voir dire* examination, to challenge for cause, and to peremptory challenge, Rule 24 (a) and (b).

In light of the Constitution's emphasis on jury trial, we find it difficult to understand how the petitioner can submit the bald proposition that to compel a defendant in a criminal case to undergo a jury trial against his will is contrary to his right to a fair trial or to due process. A defendant's only constitutional right concerning the method of trial is to an impartial trial by jury. We find no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury—the very thing that the Constitution guarantees him. The Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result. This recognition of the Government's interest as a litigant has an analogy in Rule 24 (b) of the federal rules, which permits the Government to challenge jurors peremptorily.

We are aware that the States have adopted a variety of procedures relating to the waiver of jury trials in state criminal cases. Some have made waiver contingent on approval by the prosecutor, *e. g.*, California (Cal. Const. Art. I, § 7), Indiana (Ind. Ann. Stat. § 9-1803 (1956 Repl. vol.), *Allredge v. Indiana*, 239 Ind. 256, 156 N. E. 2d 888 (1959)), and Virginia (Va. Const. § 8, Va. Code Ann. § 19.1-192 (1950 Repl. vol.), *Boaze v. Commonwealth*, 165 Va. 786, 183 S. E. 263 (1936)). Others, while not giving the prosecutor a voice, have made court approval a prerequisite for waiver, *e. g.*, Georgia (Ga. Code Ann. § 102-106 (1955), *Palmer v. State*, 195 Ga. 661, 25 S. E. 2d 295 (1943)), and Washington (Wash. Rev. Code § 10.01.060 (1963 Supp.)). Still others have provided

that the question of waiver is a matter solely for the defendant's informed decision, *e. g.*, Connecticut (Conn. Gen. Stat. Rev. § 54-82 (1958)), and Illinois (Ill. Ann. Stat. c. 38, § 103-6 (Smith-Hurd ed. 1964), *Illinois v. Spegal*, 5 Ill. 2d 211, 125 N. E. 2d 468 (1955)). However, the framers of the federal rules were aware of possible alternatives when they recommended the present rule to this Court, see Orfield, Trial by Jury in Federal Criminal Procedure, 1962 Duke L. J. 29, 69-72; this Court promulgated the rule as recommended; and Congress can be deemed to have adopted it, 18 U. S. C. § 3771 (1958 ed.).

In upholding the validity of Rule 23 (a), we reiterate the sentiment expressed in *Berger v. United States*, 295 U. S. 78, 88, that the government attorney in a criminal prosecution is not an ordinary party to a controversy, but a "servant of the law" with a "twofold aim . . . that guilt shall not escape or innocence suffer." It was in light of this concept of the role of prosecutor that Rule 23 (a) was framed, and we are confident that it is in this light that it will continue to be invoked by government attorneys. Because of this confidence in the integrity of the federal prosecutor, Rule 23 (a) does not require that the Government articulate its reasons for demanding a jury trial at the time it refuses to consent to a defendant's proffered waiver. Nor should we assume that federal prosecutors would demand a jury trial for an ignoble purpose. We need not determine in this case 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. Petitioner argues that there might arise situations where "passion, prejudice . . . public feeling"⁷ or some other

⁷ Petitioner's Brief, p. 24.

factor may render impossible or unlikely an impartial trial by jury. However, since petitioner gave no reason for wanting to forgo jury trial other than to save time, this is not such a case, and petitioner does not claim that it is.

Petitioner has also raised questions involving the instructions to the jury and alleged misconduct by the prosecuting attorney. We have examined the record and find that the jury was adequately instructed. In any event, no timely objection was made as required by Rule 30 of the Federal Rules of Criminal Procedure and, in the absence of plain error, the Court of Appeals correctly affirmed the judgment of the trial court. Similarly without merit are petitioner's specifications of misconduct by the prosecuting attorney during the trial, since the record reveals that the misconduct, if any, was neither purposeful nor flagrant, and the trial court's admonitions to the jury seem to have been well designed to cure whatever prejudicial impact some of the prosecutor's remarks may have had in this case.

The judgment of the Court of Appeals is

Affirmed.

Tab E

High court will decide judge v. jury in lunch lady sex case

Court » Justices' decision could take eight to 12 months.

By STEPHEN HUNT

The Salt Lake Tribune

The Utah Supreme Court has agreed to decide if a middle-school cafeteria worker accused of having sex with a 16-year-old boy can have a judge, rather than a jury, weigh the evidence against her.

Jamie Lynn Greenwood, 41, is charged with felony counts of rape, forcible sodomy and forcible sexual abuse.

Greenwood was set to go to trial by jury in August when she and her attorney asked 3rd District Judge Robert Adkins to hear the case instead.

Prosecutors objected, noting that a Utah court rule requires all felony cases to be tried by a jury unless the prosecution consents to a bench trial and the judge approves the change. Prosecutors also cited three cases in which the Utah Supreme Court determined a defendant has no constitutional right to a bench trial.

But Adkins granted the defense's request, citing a U.S. Supreme Court case that appears to make an exception to the general rule under "some circumstances."

In a written ruling, Adkins wrote that "the cumulative

impact" of several factors had created just such "an unusual circumstance" as was envisioned by the high court. The judge noted "the nature of the case, the publicity this case has received, and the fine line between the offenses charged and lesser included offenses which the court had agreed to consider."

The judge was informed this week that the high court had agreed to decide the issue, and that the process would take eight to 12 months.

Adkins set a review hearing for March 8. Meanwhile, Greenwood is free on \$10,000 bail in conjunction with supervision by Pretrial Services.

Greenwood, who was a cafeteria supervisor employed at Eastmont Middle School in Sandy since 2006, resigned in March.

During an April preliminary hearing, the alleged victim — who was a friend and classmate of Greenwood's son — testified he was 14 years old when Greenwood befriended him. Over the next two years, he said, Greenwood bought him gifts and then demanded sexual favors as repayment.

The boy testified he wanted the relationship to stop but that Greenwood threatened to tell his mother and people at school if it ended.

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