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United States v. Pachay: Whose Life is it Anyway?

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CASENOTE

United States v. Pachay: Whose Life is it Anyway?

This casenote examines the recent decision of United States v. Pachay,[1] in which the United States Court of Appeals for the Second Circuit addressed the issue of whether a defendant in a federal criminal proceeding can waive Federal Rule of Criminal Procedure 31(a), which requires that a jury verdict be unanimous. The author finds the decision consistent with prior case law but concludes that the court is substituting its estimation of what is in the best interest of the defendant for the judgment of the defendant and his counsel.

Fred Pachay was one of two defendants named in a three-count indictment charging distribution of cocaine and conspiracy to distribute cocaine.[2] Pachay was tried in the United States District Court for the Southern District of New York on August 2, 1981.[3] The jury began deliberations on Wednesday, August 4th.[4] Throughout the next two days, the jury twice sent word to District Court Judge John E. Sprizzo that the jury was deadlocked.[5] On Friday, August 6th, the jury sent word that the difference of opinion of a single juror prevented it from reaching a verdict, and that glaring tempers made further deliberations that day impossible.[6] Additionally, the foreman expressed fear that certain jurors would not return if the jury were to disband for the weekend and resume on Monday.[7] Judge Sprizzo then approached the defendant with the alternative of accepting an 11 to 1 verdict.[8] The judge explained that unless this course of action were taken, he would be

1. 711 F.2d 488 (2d Cir. 1983).
2. 21 U.S.C. §§ 841, 846 (1976).
3. *Pachay*, 711 F.2d at 489.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*

compelled to decide whether to declare a mistrial.[9] The defendant, the court, and the government then stipulated to the waiver of unanimity of verdict; the jury found Pachay guilty on all counts.[10] On September 24, 1982, the district court sentenced Pachay to two years in prison, to be followed by five years of probation.[11] On appeal, the United States Court of Appeals for the Second Circuit reversed and remanded, holding that Federal Rule of Criminal Procedure 31(a) prohibits any waiver of unanimous jury verdicts.[12]

I. UNANIMITY AS A GUARANTEED RIGHT

Federal Rule of Criminal Procedure 31(a) provides that "[t]he verdict shall be unanimous." This rule does not expressly forbid or allow waiver, unlike other rules that allow waiver of trial by jury,[13] that permit waiver of a twelve-person jury,[14] that permit waiver of preliminary examination,[15] or that allow waiver of indictment.[16]

The Supreme Court has never considered whether a criminal defendant in federal court can constitutionally waive the requirement of a unanimous jury verdict. The Supreme Court has held, however, that the sixth amendment as made applicable to states by the fourteenth amendment does not require unanimity in state criminal trials.[17] It has also held that there is no constitutional bar to waiver of other essential elements of trial by jury, for example, that the federal and state courts can accept waivers of trial by jury;[18] that parties may consent to a jury consisting of less than twelve members;[19] and that the defendant may forego his right to trial by pleading guilty.[20]

In *Patton v. United States*,[21] the Supreme Court examined

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9. *Id.*
10. *Id.* at 489-90.
11. *Id.* at 490.
12. *Id.*
13. FED. R. CRIM. P. 23(a).
14. FED. R. CRIM. P. 23(b).
15. FED. R. CRIM. P. 5(c).
16. FED. R. CRIM. P. 7(b).
17. Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972).
18. Patton v. United States, 281 U.S. 276 (1930); *see also* Adams v. United States *ex rel.* McCann, 317 U.S. 269 (1942) (defendant allowed to waive both the right to jury trial and the right to counsel).
19. *Patton*, 281 U.S. 276.
20. FED. R. CRIM. P. 11. *But cf.* Boykin v. Alabama, 395 U.S. 238 (1969) (acceptance of guilty plea valid only when record shows that defendant understood and voluntarily entered his plea of guilty).
21. 281 U.S. 276 (1930).

the question whether the constitutional provisions with respect to trial by jury establish a tribunal as part of the frame of government or simply guarantee the accused the right to such a trial.[22] The Supreme Court concluded that "Article III, Section 2, is not jurisdictional but was meant to confer a right upon the accused, primarily for the protection of the accused, which he may forego at his election. To deny his power to do so, is to convert a privilege into an imperative requirement."[23] Furthermore, the Supreme Court, in *Schick v. United States*,[24] held that an accused may waive any privilege that he enjoys, provided that there is no constitutional or statutory mandate and no public policy prohibiting the waiver.[25] A defendant's right to demand a jury trial is but one step that modern law takes to surround the accused person with the means to make an effective defense. Other measures that facilitate the defendant's right to an effective defense include the right to testify or not testify in one's own defense,[26] the right to counsel,[27] the furnishing of counsel to an indigent accused,[28] and the state's assumption of the cost of summoning witnesses for indigent defendants.[29]

Nevertheless, in the instant case, the court of appeals set aside a verdict obtained after a waiver of unanimity, labeling Rule 31(a) a "mandatory requirement."[30] This broad holding contradicts the position that the courts take of allowing the accused the freedom necessary to frame the most effective defense. By foreclosing the accused's ability to accept a less than unanimous jury verdict under any circumstances, the court interferes with the right of the accused to determine what defense strategy is in his best interest.

II. THE REASONING OF *Pachay*

The court of appeals in *Pachay* reasoned that because the drafters of the Federal Rules of Criminal Procedure did not expressly provide for waiver, it was therefore their intention to pro-

22. *Id.* at 293.
23. *Id.* at 298.
24. 195 U.S. 65 (1904).
25. *Id.* at 72.
26. U.S. CONST. amend. V, cl. 3.
27. Gideon v. Wainwright, 372 U.S. 335 (1963); U.S. CONST. amend. VI, cl. 3.
28. Glaser v. United States, 315 U.S. 60 (1942); Walker v. Johnson, 312 U.S. 275 (1941); Johnson v. Zerbst, 304 U.S. 458 (1938).
29. FED. R. CRIM. P. 17(b).
30. *Pachay*, 711 F.2d at 490.

hibit waiver.[31] The *Pachay* court expounded on the history of Rule 31(a), indicating that the original draft did provide for waiver.[32] Yet, due to considerable objection from legal authorities, the drafters deleted the waiver provision of Rule 31(a).[33] The *Pachay* court pointed out that its conclusion that the drafter's intent was to prohibit waivers is consistent with the position of three other circuits that have confronted the issue of waiver of jury unanimity.[34]

One major ground advanced in support of the no-waiver rule is the fear that the trial court will inadvertently coerce the defendant into a waiver.[35] Once the jury becomes deadlocked, the trial judge faces the possibility of a mistrial. The judge then offers the defendant the alternative of accepting a non-unanimous verdict to avoid the lost time and expense of a mistrial. The defendant might feel compelled to consent for fear of falling into judicial disfavor and perhaps receiving a harsher sentence upon the trial's completion. Waiver of the right to a unanimous verdict in this context should not be permitted. In *Hibdon v. United States*,[36] the sixth circuit disallowed waiver where the district judge suggested it as an alternative.[37] The *Hibdon* court stated that a waiver by the accused under these circumstances "was not the free and unfettered judgment of the accused."[38]

The court in *Pachay* expressed the same concern for the possibility of coercion when it expounded on the reasoning behind the exclusion of a waiver provision in Rule 31(a).[39] The opinion cites the comments of Judge Merril Otis in opposition to a waiver provision.[40] Judge Otis argues that permitting non-unanimous verdicts would be unfair to the criminal defendant, who might feel coerced into agreeing to a non-unanimous verdict by the risk of the prejudicial consequences of refusal.[41] The waiver of a constitutionally guaranteed right should be voluntary. Rule 31(a) does no more than protect that right from the infringement of involuntariness. If the accused waives the right on his own motion, and if the trial

31. *Id.* at 490.
32. *Id.*
33. *Id.* at 490-91.
34. *See* United States v. Lopez, 581 F.2d 1338 (9th Cir. 1978); United States v. Scalzitti, 578 F.2d 507 (3d Cir. 1978); Hibdon v. United States, 204 F.2d 834 (6th Cir. 1953).
35. *See Hibdon*, 204 F.2d at 836.
36. Id. at 834.
37. *Id.* at 839.
38. *Id.*
39. *Pachay*, 711 F.2d at 490-91.
40. *Id.*
41. *Id.* at 490 (footnote omitted).

judge makes an inquiry as to the accused's complete understanding of the existing alternatives, the element of coercion is absent. Such a waiver is based on the accused's own reasoning and judgment as to what is in his best interest.

The court in *Pachay* also cited *United States v. Scalzitti*[42] and *Hibdon v. United States*[43] in their analysis. In *Scalzitti*, the Third Circuit Court of Appeals denied a waiver of unanimity of verdict, stating that the lack of a waiver provision in Rule 31(a) is grounded in part in the strong historical tradition of unanimity in federal trials.[44] Moreover, the court in *Hibdon* reasoned that unanimity served the standard of proof beyond a reasonable doubt.[45] This holding articulates the idea that unanimity of verdict is intertwined with the reasonable doubt standard of proof. Under this view, if there is no unanimity, then reasonable doubt exists.[46]

The Supreme Court has held that proof beyond a reasonable doubt is the standard that must be met so as not to violate a defendant's right to due process of law.[47] In *Simons v. United States*,[48] the Ninth Circuit held that an accused cannot waive a right if the waiver infringes on his right to due process of law.[49] Nevertheless, the proposition that a unanimous jury verdict guarantees proof beyond a reasonable doubt is open to question. A distinction must be made between the need to convince an entire jury and the need to convince a single juror. Proof beyond a reasonable doubt is the standard in both cases.[50] A reasonable doubt is defined as:

> [S]uch a doubt as will leave the juror's mind after a candid and impartial investigation of all the evidence, so undecided that he is unable to say that he has an abiding conviction of the defendant's guilt, or such a doubt as in the graver and more important transactions of life, would cause a reasonable and prudent

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42. 578 F.2d 507, 510-12 (3d Cir. 1978), *cited in* United States v. Pachay, 711 F.2d 488, 491 (2d Cir. 1983).

43. 204 F.2d 834 (6th Cir. 1953), *cited in* United States v. Pachay, 711 F.2d 488, 491 (2d Cir. 1983).

44. *Scalzitt*, 578 F.2d at 512.

45. *Hibdon*, 204 F.2d at 838.

46. *See* Morano, *Historical Development of the Interrelationship of Unanimous Verdicts and Reasonable Doubt*, 10 VAL. U.L. REV. 223 (1976). *But see* Silverstein, *Rebuttal: An Alternate Viewpoint on the Relationship of Unanimous Jury Verdicts and Reasonable Doubt*, 11 VAL. U.L. REV 29 (1976).

47. *In re* Winship, 397 U.S. 358 (1970).

48. 119 F.2d 539 (9th Cir. 1941).

49. *Id.* at 544.

50. *See In re* Winship, 397 U.S. 358 (1970).

man to hesitate and pause.[51]

On an individual basis, it is the subjective standard of the reasonable doubt of each juror that must be met in order for the juror to cast a vote of guilty. If the unanimity of jury verdicts is necessary to achieve the "beyond a reasonable doubt" standard, then it follows that a non-unanimous "group mind" evidences reasonable doubt, and thus mandates a verdict of not guilty.

The law dictates, however, that where there is a hung jury, a new trial, and not acquittal, is mandated.[52] Therefore, according to the Supreme Court, jury unanimity is not equated with the reasonable doubt standard. Moreover, the court has held that unanimity is not essential to establish guilt beyond a reasonable doubt in state courts.[53] This suggests that the rights of an accused to waive jury unanimity and the satisfaction of the reasonable doubt standard may co-exist in light of the necessity for convincing an individual juror beyond a reasonable doubt.[54]

Courts considering the right to waive unanimity have also concluded that unanimity is necessary to ensure that the views of each juror are considered and evaluated. There is, however, no constitutional requirement that a verdict embody the views of all members of the community.[55] Furthermore, a court will waive unanimity only when the jury is deadlocked as a result of deliberation, and the only option is to declare a mistrial.

It may be that permitting the waiver of jury unanimity would lead to a lightening of the prosecutor's burden of persuasion. Unanimity requires that the prosecutor not only prove his case beyond a reasonable doubt as to each individual juror, but he must also convince all twelve jurors. By removing the need to convince all of the jurors, the prosecutor's burden is greatly reduced. For this reason, it would seem that a defendant's waiver of unanimity of verdict would be a rare occurrence. Yet there may be factors that motivate a defendant to waive unanimity.

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51. Egan v. United States, 287 F. 958, 967 (D.C. Cir. 1923).

52. Johnson v. Louisiana, 406 U.S. 356, 363 (1972); Dreyer v. Illinois, 187 U.S. 71, 84-86 (1902); United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824); *cf.* Downum v. United States, 372 U.S. 734, 736 (1963) (disallowing a new trial where a witness was absent but advocating it in the case of a hung jury).

53. Johnson v. Louisiana, 406 U.S. 356, 359-63 (1972).

54. *Contra id.* at 363-64.

55. Apodaca v. Oregon, 406 U.S. 404, 413 (1972).

III. CONCLUSION: THE NECESSITY OF WAIVER

A defendant may evaluate his case and decide that he has convinced a majority of the jury. Alternatively, because a hung jury means a retrial, the defendant may waive the unanimity rule in order to avoid another trial, even when a majority of jurors have voted to convict him in the first trial. Indeed, a second trial with new evidence in front of a new jury presumably gives the prosecution a better opportunity to present a case for conviction. Furthermore, the government has unlimited resources and can make repeated attempts to convict the accused, thus increasing the possibility of conviction. The accused, on the other hand, lacking the resources of a state prosecutor, will not be able to maintain the same quality of defense in repeated trials. Thus a defendants conviction may be more likely at a second trial. As the Supreme Court stated in *Green v. United States*:[56]

> [T]he state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[57]

Other considerations may also persuade a defendant to waive the unanimity requirement. Hung juries and retrials prolong the agony and doubt of the proceeding. Even though a particular trial may have ended in a hung jury, the defendant may still have been exposed to the risk of conviction throughout. Criminal actions stigmatize the accused; they are invasions into the private life of the defendant that should be kept to a minimum. The retrials that hung juries necessitate revive all of the unpleasantness involved in the original trial. And in the final analysis, the prosecution has already had its day in court. Indeed, with this in view, the fifth amendment prohibits the retrial of an acquitted defendant for the same crime.[58] The ominous aspects of a hung jury, however, may be more undesirable to the accused than the gamble of a majority verdict.

The freedom of the accused to plan his own defense according to his own reason and judgment is of paramount importance. The

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56. 355 U.S. 184 (1957).

57. *Id.* at 187-88.

58. "No person shall . . . for the same offense . . . be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V, cl. 2.

right to a unanimous verdict is a restraint on the government; it should not act to restrain the accused. A rule that denies the right of the accused to waive unanimity during the progress of a trial would be more dangerous than a rule giving the accused, upon knowing and intelligent waiver with the consent of the government and with the approval of the court, the ability to waive a fraction of the given right of unanimity. In addition, waiver saves the accused the expense, delay, and unpleasantness of another trial. A defendant's protections with regard to jury trials are privileges, to be utilized or waived at his option.[59]

The defendant should have the opportunity to exercise this option. It is not the function of the court to determine what is and what is not in the best interest of the accused; that choice should be left to the defendant. The Supreme Court has rejected any paternalistic rule that protects a defendant from his intelligent and voluntary decisions concerning his own criminal defense unless he is incompetent.[60] In *Adams v. United States ex rel. McCann*,[61] the Supreme Court held that to take the choice from the defendant in such a manner would "imprison a man in his privileges" and would disregard that respect for the individual that is the life-blood of the law.[62] It is the defendant, not the judge or the prosecutor, that is in the best position to evaluate the situation regarding his defense. It is also the defendant, not the judge or the prosecutor, who "will bear the personal consequences of a conviction."[63] A defendant may prefer to waive a small part of his right in order to save a more substantial right. By restricting the right of an accused who has been subjected to a criminal proceeding to waive the requirement of unanimity of Rule 31(a), the second circuit makes the right to jury unanimity an instrument of oppression, not protection. The preventive measure thus becomes worse than the apprehended danger.

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59. Patton v. United States, 281 U.S. 276 (1930).

60. Michigan v. Mosely, 423 U.S. 96, 109 (1975) (White, J., concurring) (citing Faretta v. California, 422 U.S. 806 (1975)).

61. 317 U.S. 269 (1942).

62. *Id.* at 280.

63. Faretta v. California, 422 U.S. 806, 834 (1975).