

QUESTIONS PRESENTED

1. Whether the command of Rule 16(a)(1)(A), Federal Rules of Criminal Procedure (as amended in 1991) to disclose “any written record” of a defendant’s oral statement to a government agent requires disclosure of the agent’s contemporaneous notes of such a statement.

2. Whether a defendant who is forbidden by the trial judge from establishing at trial that false oral statements he is charged with making to an FBI agent appear nowhere in the agent’s contemporaneous notes of the interview is denied his right under the Confrontation Clause of the Sixth Amendment.

3. Whether the Sixth Amendment permits empanelment of a jury of persons whose identities and places of employment are kept secret from the defendant, in a case not presenting any threat to the safety or security of jurors.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner James H. Brown respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 3a - 39a) is reported at 303 F.3d 582 (5th Cir. 2002). Two orders of the district court denying petitioner's request for disclosure of the agent's contemporaneous notes (App. 102a - 103a, and 110a - 111a) are unreported. The district court's opinion granting the government's request to empanel an anonymous jury (App. 104a - 109a) is unreported. The trial court's opinion denying petitioner's motion for a new trial (App. 40a - 101a) is unreported.

JURISDICTION

The court of appeals entered its judgment August 23, 2002. Timely petitions for rehearing and rehearing en banc were denied on September 23, 2002. (App. 1a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 16(a)(1)(A), Federal Rules of Criminal Procedure, provides in relevant part as follows:

Rule 16. Discovery and Inspection

(a) Governmental Disclosure of Evidence.

(1) Information Subject to Disclosure.

(A) Statement of Defendant. Upon request of a defendant the government must disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. The government must also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial. * * *

Rule 16(a)(1)(A), prior to its amendment in 1991, provided in relevant part as follows:

Rule 16. Discovery and Inspection

(a) Disclosure of Evidence by the Government.

(1) Information Subject to Disclosure.

(A) Statement of Defendant. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. * * *

The Sixth Amendment to the United States Constitution provides as follows:

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.

STATEMENT

Petitioner served as Louisiana's elected Insurance Commissioner from 1991 until his conviction in this case in October 2000. In the fall of 1996, the government installed wiretaps on the telephone of former Governor Edwin Edwards and a bug in his law office. In the course of that surveillance the FBI

recorded numerous conversations between Edwards and others, including petitioner Brown, concerning attempts to resolve a controversy between Edwards' client David Disiere on the one hand and the Louisiana "insurance duty judge," A. Foster Sanders, and his appointees on the other. The controversy was the subject of a settlement involving payment of \$2.5 million by Disiere to the court-appointed Receiver of Cascade Insurance Company in December 1996.

In 1999, the government brought an indictment containing numerous counts charging, in essence, that the Cascade settlement was "fixed" and was a "sham." There was no evidence that petitioner or any other public official solicited or received payment of any kind. The government's central theory was that Edwards offered Judge Sanders assistance in resolving a criminal investigation on an unrelated matter, in exchange for Sanders' assistance in resolving the Disiere matter, and that petitioner and attorney Ron Weems assisted him in doing so. The wiretap tapes and testimony, however, failed to establish the charges and the jury acquitted the petitioner, Edwards and Weems on all counts charging misconduct relating to the Cascade matter.¹

¹Edwin Edwards was convicted in a separate case involving riverboat gaming licenses, which is related to this one only by the fact that the evidence arose in part from the same wiretaps. A codefendant in that case was Cecil Brown, who is not related to petitioner Jim Brown. The convictions of Edwards and Cecil Brown were affirmed by the Fifth Circuit in an opinion rendered the same day as the decision in the present case, and petitioner understands that petitions for certiorari by Edwards and Cecil Brown have been or will be filed. Apart from the fact that anonymous juries were empaneled in both cases, the issues presented by petitioner here

In May of 1997, before disclosure of the wiretap, FBI agent Harry Burton interviewed petitioner regarding the Cascade settlement. The interview was not recorded and not under oath. Most of Burton's questions concerned what he already knew from the undisclosed wiretap tapes – including what Brown had discussed with whom, when and where. Burton took 11 pages of detailed notes during the 45-minute interview. Three days later he prepared a typewritten Form 302 memorandum purporting to summarize the interview. That 302 formed the basis of 13 false statement charges against the petitioner under 18 U.S.C. § 1001. Petitioner was found guilty on seven counts by the jury. The district court granted a judgment of acquittal notwithstanding the verdict on two of those counts. Petitioner was sentenced to imprisonment for six months, a fine of \$50,000.00 and two years' probation.

Petitioner's defense at trial was that Agent Burton manufactured the false statement charges by "twist[ing] and misrepresent[ing] practically everything Jim Brown said in that interview." Tr. 477. To support that defense, petitioner sought disclosure of Burton's contemporaneous notes under Fed. R. Crim. P. 16(a)(1)(A), 16(a)(1)(C), the Jencks Act, and the Brady doctrine. Although the government produced to codefendant Weems the contemporaneous notes of Burton's interview

are entirely unrelated to those asserted by Edwin Edwards and Cecil Brown in the riverboat gaming case.

of Weems, it consistently refused to disclose the notes of Brown's interview. The district court denied petitioner's requests to compel disclosure that were made pretrial, during trial, and after trial. (App. 102a, 111a).²

Agent Burton was the sole witness called by the prosecution regarding the interview, and (to rebut Brown's argument that the interview was not tape-recorded) he claimed on direct examination that he had "recorded the interview" by taking contemporaneous notes.³ Despite that testimony, the district court denied a renewed request for the notes made by petitioner during Burton's cross-examination. Petitioner then requested the court to advise the jury that Mr. Brown did not have the notes.⁴ However, in doing so, the court without warning told the jury that it had determined the 302 was "accurate based on the handwritten notes." (App. 118a.) A motion for mistrial based on this instruction was denied, and when asked to give a corrective instruction, the court told the jury only that its determination was "irrelevant" because it was the jury's province to determine credibility of the witness. (App. 122a.)

² The notes were disclosed to the defense by order of the Fifth Circuit, and are in the record on appeal.

³ "Q. You already went over the method of how you record the interview normally, and that's with notes, correct? A. Yes, sir." (Tr. 1543.)

⁴ Such an instruction was felt necessary by Brown because of Burton's testimony that he had recorded the interview by taking notes, and to avoid any adverse inference by the jury from the fact that the notes were not used in cross-examination by Brown. (Weems, by contrast, did use the notes of his interview extensively in his cross-examination of Burton and was acquitted on the false statement charge against him.)

The trial judge nevertheless sustained an objection to any and all questions by petitioner asking Agent Burton whether his contemporaneous notes reflected statements recited in the 302 and charged in the indictment. For example, Agent Burton testified that, as recited in his 302 and alleged in the indictment, Brown falsely told him he had not discussed “what it would take to settle the Cascade matter” with Edwin Edwards. That statement does not appear in Burton’s contemporaneous notes, but the jury never learned that. When petitioner sought to question Burton on the subject, the objection and ruling were as follows:

Q. Do your notes that you actually wrote down when you were in that interview say that Jim Brown said that he didn’t discuss with Edwin Edwards what it would take

—

Mr. James Mann: I object. We talked about the notes earlier, Your Honor, that that has already been previously determined, and I think that that is going to be misleading to the jury to put those at issue here. That’s exactly what Mr. Jeffress is trying to do by putting those notes at issue.

The Court: I think that’s correct. Stick to the 302.
(App. 123a.)

All counts upon which the petitioner was ultimately convicted involved alleged denials by him of having discussed “settlement issues” or “what it would take to settle the matter” with Edwards, Weems, or anyone else, or (in Count 55) a denial of discussing “specifics of a settlement” with Judge Sanders. Petitioner’s defense on these counts was that he did not make the statements alleged; rather, Burton asked and petitioner answered only about the actual settlement of the

lawsuit, in which petitioner played no role and did not discuss with Edwards, Weems or Sanders. The contemporaneous notes demonstrably assist this defense. If petitioner had been able to confront Burton with his contemporaneous notes, he would have established at least the following:

- The statement alleged in Count 44 and contained in Burton's 302 – that Brown was only “vaguely aware” of Cascade Insurance Company – is not contained in Burton's notes.
- The statement alleged in Count 46 and contained in the 302 is contradicted by Burton's notes, which state – exactly as petitioner testified at trial – that petitioner denied having seen a draft RICO suit, not having been aware of it.
- The statements alleged in Count 50 and contained in the 302 – that Brown denied discussing with Edwards “settlement issues” or “what it would take to settle the case” – are not contained in Burton's notes.
- The key statements contained in the 302 regarding Count 51 – that a conversation in Edwards' office “related to political matters” and “had nothing to do with Cascade Insurance Company or David Disiere” – are not contained in the notes.

- The key phrase “settlement issues,” contained four times in the 302 and six times in the indictment (Counts 47, 48 and 50), appears nowhere in Burton’s contemporaneous notes of the interview.

Notwithstanding the foregoing and other discrepancies between the notes and the 302, the court below concluded that “with the possible exception of Count 50,” the notes “are substantially identical to the 302 report that was disclosed to Brown with respect to all counts of which Brown was convicted” (App. 9a, *infra*), and that with respect to Count 50, any error in nondisclosure of the notes was harmless in light of Brown’s testimony regarding that count. App. 24a, *infra*. In reaching this conclusion, the court applied the Fed. R. Crim. P. 52(a) standard, rather than the standard of harmless error for errors abridging constitutional rights.

The court of appeals concluded that Rule 16(a)(1)(A) “does not grant a criminal defendant a right to preparatory interview notes where the content of those notes have been accurately captured in a typewritten report, such as a 302, that has been disclosed to the defendant.” App. 8a - 9a, *infra*. It relied on decisions by the Seventh Circuit in two cases which did not discuss the language of the rule as amended in 1991.⁵ With respect to the amended rule, the court in a footnote held that the amendment merely gave the defendant the right to disclosure

⁵ United States v. Muhammad, 120 F.3d 688, 699 (7th Cir. 1997); United States v. Coe, 220 F.3d 573, 583 (7th Cir. 2000).

of oral statements whether or not the government intended to use them at trial, and did not change “the types of records that must be disclosed...” App. 9a n.18, infra (emphasis in original).

With respect to the Confrontation Clause, the court of appeals applied an abuse of discretion standard. Although the issue was whether petitioner was entitled to confront Agent Burton with the content of his notes, the court of appeals found the Confrontation Clause was not violated because petitioner was allowed “substantial leeway in questioning Burton on his note-taking procedures and report preparation.” App. 27a, infra. With regard to the trial court’s instruction to the jury that it had determined the 302 was “accurate based on the handwritten notes,” the court of appeals found this instruction “did not improperly vouch for the accuracy of the 302.” App. 27a, infra.⁶

With respect to the propriety of an anonymous jury, the court of appeals applied the five factors identified in United States v. Krout, 66 F.3d 1420, 1426-28 (5th Cir. 1995), cert. denied, 516 U.S. 1136 (1996), as justifying the use of such a measure. It found three of those factors applicable: (1) that there had been past attempts by the defendants to interfere with the judicial process or witnesses,

⁶ The court of appeals also stated that the instruction “accurately described the disclosure process, as Brown requested.” App. 27a, infra. In fact, there was no such request. Following the trial court’s ruling that counsel could not see Burton’s notes, counsel – in an effort to explain to the jury why the content of those notes was not being addressed in cross-examination – asked the court simply to instruct that “Mr. Jeffress does not have the notes. I have ruled he is not entitled to the notes.” App. 116a, infra.

because two co-conspirators had pleaded guilty to witness tampering;⁷ that the defendants faced lengthy sentences if convicted; and that the extensive publicity of the trial could expose the jurors to intimidation and harassment. App. 32a - 33a, *infra*. Because of these factors, the court of appeals held, the trial court did not “abuse its discretion in ordering an anonymous jury.” *Id.* at 34a.

REASONS FOR GRANTING THE WRIT

The petitioner was accused under 18 U.S.C. § 1001 of making false oral statements to an FBI agent in an unsworn, unrecorded interview at which the agent, but not the petitioner, was aware of secret recordings of the petitioner’s words at the meetings and conversations about which the agent was asking. At trial, petitioner contended that the agent’s 302 memorandum of the interview, upon which the indictment was based, twisted and misrepresented the defendant’s statements during the interview, in an effort to lay the basis for a false statements prosecution.

The agent’s contemporaneous notes of the interview do not reflect at all certain of the statements contained in the 302 and in the indictment, and they differ with respect to virtually every statement charged in respects that are sometimes

⁷ These alleged co-conspirators were Judge Sanders and the Receiver, Robert Bourgeois. The alleged witness tampering was changing the payment terms for the attorney prosecuting a civil RICO lawsuit against Cascade’s former owner from an hourly rate to a contingency fee, in order to induce him to settle the threatened lawsuit.

subtle but uniformly helpful to the defense. The jury, however, never learned that. The petitioner was convicted at a trial where he was not allowed to inspect the contemporaneous notes, where he was not allowed to question the agent about the content of those notes, and where the trial court told the jury that the undisclosed notes supported the accuracy of the 302 on which the indictment was based.

In holding that the petitioner under these circumstances received a trial consistent with the requirements of the Constitution and the Federal Rules of Criminal Procedure, the court of appeals decided two important and recurring issues on which federal courts have disagreed. The court also decided an issue that is raised with increasing frequency in the lower federal courts, and which this Court has not decided: the circumstances under which, if at all, the Sixth Amendment permits empanelment of a jury in a criminal case where the identities, residence and place of employment of jurors is withheld from the defendant. These issues warrant review by this Court in this case.

A. Whether A Defendant Is Entitled To Disclosure of An Agent's Contemporaneous Notes of His Oral Statement Under Fed. R. Crim. P 16(a)(1)(A) Is An Important And Frequently Occurring Issue On Which Federal Courts Have Disagreed

Before the amendment of Rule 16(a)(1)(A) in 1991, a defendant who had made unrecorded oral statements to a government agent was entitled to disclosure only of the “substance” of those statements, and then only if the government intended to use the statement at trial. (See *supra* pp. 3-4.) The 1991 amendment

for the first time gave the defendant the right not just to the “substance” of the statement, but to “any written record” of it. Where such a record exists, the defendant is entitled to disclosure whether or not the government intends to use the statement at trial. Where no such record exists, the defendant continues to be entitled to disclosure of the “substance” of the statement only when the government intends to use it at trial.

As amended, the rule makes no distinction among types of written records, and does not permit the record to be withheld based upon a judgment by the government or by the court that it would not be helpful to the defense. The language of the rule is plain, and it is mandatory: the government “must disclose to the defendant...that portion of any written record containing the substance of any relevant oral statement made by the defendant” to a government agent. There is no question that contemporaneous notes qualify as a “written record.” As stated in the Advisory Committee Note to the 1991 amendment, “[t]he written record need not be a transcription or summary of the defendant’s statement but must only be some written reference which would provide some means for the prosecution and defense to identify the statement.”

Before 1991, courts generally ruled that a defendant was not entitled to disclosure of an agent’s notes unless disclosure was required by the Jencks Act or the Brady doctrine. The Seventh Circuit in United States v. Muhammad, 120 F.3d

688, 699 (7th Cir. 1997), applied this principle in a case arising after the 1991 amendment, but did not cite Rule 16(a)(1)(A), much less consider the 1991 amendment of that rule; it relied entirely on cases deciding issues under the Jencks Act and the Confrontation Clause. The same court again stated the principle in United States v. Coe, 220 F.3d 573, 583 (7th Cir. 2000), but merely cited Muhammad and again did not discuss the amended rule.

By contrast, other federal courts have applied Rule 16(a)(1)(A)'s plain language to require disclosure of an agent's contemporaneous notes, without regard to whether a memorandum of the statement has been produced. In United States v. Molina-Guevara, 96 F.3d 698, 705 (3d Cir. 1996), the court of appeals considered whether the district court erred in refusing to order production of an agent's handwritten notes of her interview of the defendant "from which the agent's final report was prepared." Although the final report had been disclosed, the court found: "as the government conceded before us, production of these notes was required by Federal Rule of Criminal Procedure 16," and directed the notes to be produced at retrial. Federal district judges have frequently reached the same conclusion. E.g., United States v. Carucci, 183 F.R.D. 614, 615 (S.D.N.Y. 1999) (citing the "unambiguous and unequivocal language of Rule 16(a)(1)(A)"); United States v. Wright, 2001 WL 523394 (D. Kan. Apr. 26, 2001) (ordering production of agent's filed notes); United States v. Griggs, 111 F. Supp. 2d 551, 555 (M.D. Pa.

2000) (ordering disclosure of rough notes taken by police officer during post-arrest interview of defendant); United States v. Gonzalez, 1998 U.S. Dist. LEXIS 3838 (N.D.N.Y. Mar. 24, 1998). Other district courts, however, have refused disclosure. See, e.g., United States v. Mango, 1997 U.S. Dist. LEXIS 6145, *66-67 (N.D.N.Y. May 1, 1997), rev'd in part on other grounds, 199 F.3d 85 (2d Cir. 1999); United States v. Walker, 922 F. Supp. 732, 744 (N.D.N.Y. 1996); United States v. Mebust, 857 F. Supp. 609, 615 (N.D. Ill. 1994).

The amended language of Rule 16(a)(1)(A) was also considered by the First Circuit in United States v. Service Deli Inc., 151 F.3d 938 (9th Cir. 1998), reversing a conviction because the government, even though it produced a typewritten memorandum of a witness interview, did not produce the contemporaneous notes on which it was based. Although the court based its ruling on Brady, it made clear in a footnote that, if the interview had been of the defendant himself rather than a former officer of the corporate defendant, Rule 16(a)(1)(A) would have required disclosure. See 151 F.3d at 943 n.4.

In the present case, the court of appeals followed Muhammad and Coe, and dealt with the language of the amended rule in a footnote. The court opined that the “purpose” of the 1991 amendment was “merely to require full disclosure of every statement of the defendant, regardless of whether the government intended to use the statement at trial.” App. 9a n.18, infra (emphasis in original). The court

obviously overlooked the fact that where no “written record” exists, the amended rule continues to predicate disclosure of the substance of a relevant statement on an intent by the government to use the statement at trial. Further, in its effort to divine the “purpose” of the amendment, the court overlooked its plain language. As this Court has observed, without qualifying language the statutory term “any” is virtually unlimited in scope. United States v. Gonzales, 520 U.S. 1, 5 (1997); Salinas v. United States, 522 U.S. 52, 57 (1997). The court of appeals’ reading of “any written record” to mean “a” or “some” written record violates the principle that statutes and rules are to be applied according to their plain language.

The issue presented by this case is demonstrably one that frequently occurs and on which lower courts have disagreed. Whether the rule commands disclosure of contemporaneous notes, or only of an agent’s subsequent typewritten and “polished” account of a witness’s statement, is one likely to trouble lower courts in criminal cases until it is settled by this Court. The present case squarely presents the issue in its most important application: one where the notes were not simply an account of the defendant’s words concerning the offense, but were an account of the offense itself.

B. Whether the Confrontation Clause Permits A Defendant To Be Barred From Questioning the Sole Witness Against Him About the Witness's Contemporaneous Record of the Alleged Offense Is An Issue On Which Certiorari Should Be Granted

The “main and essential purpose” of the Sixth Amendment’s Confrontation Clause is to secure for the defendant the opportunity for cross-examination of the witnesses against him. Davis v. Alaska, 415 U.S. 308, 315-16 (1974). While courts necessarily have discretion to impose reasonable limits on cross-examination based on concerns such as harassment, confusion of the issues, repetition or relevance, a court may not, consistent with the Confrontation Clause, cut off all questioning on a matter relevant to the credibility of the witness. Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986).

That, of course, is precisely what occurred in this case. The trial judge precluded the defense from asking the sole witness against him on these charges – FBI Agent Burton – any questions about the content of his notes. Indeed, the district judge sustained objection to a question that dramatically demonstrates the power such a cross-examination could have had. After Burton testified that, as reflected in his 302 and as alleged in the indictment, Mr. Brown stated during the interview that he had not discussed with Edwin Edwards what it would take to settle the Cascade case, defense counsel asked him whether the notes he took at the time of the interview reflected such a statement. (See supra, p. 8.) A true answer, as we now know, would have been “No. They do not show that.” But the jury

never heard the answer, or saw the notes. Nor did it hear any other evidence of what the notes contained, other than a statement by the trial judge that she had reviewed the notes and found they supported the accuracy of the 302. The court's actions denied petitioner his right under the Confrontation Clause more seriously than the limitations on cross-examination as to one source of possible bias found to have been constitutional violations in Davis v. Alaska and Delaware v. Van Arsdall, *supra*.

The opinion of the court of appeals in this case found no violation of the Sixth Amendment because, it said, petitioner was able to and did question Agent Burton about his "note-taking procedures and report preparation." App. 27a, *infra*. It is unclear why the court of appeals felt such cross-examination, which was undertaken without benefit of the notes themselves or any ability to compare them to the 302, was a substitute for cross-examination about the content of the notes. It is as if, in Delaware v. Van Arsdall, the judge had allowed the defendant to question the witness about police procedures for dismissing public drunkenness charges, but precluded questioning as to whether such a charge had been dismissed as to the defendant.

The D.C. Circuit decision in United States v. Stock, 948 F.2d 1299, 1301-02 (D.C. Cir. 1991), squarely conflicts with the decision in this case. There, the police officer testified at trial that the defendant stated "I don't have anything" at

the time of arrest. The defendant sought to bring out that the police report contained no such statement, but the trial court sustained an objection to this line of questioning. The court of appeals found a violation of the Confrontation Clause and reversed, without stopping to consider whether the defendant had an opportunity to question the police officer about his procedures for preparing reports. In the present case, the constitutional violation is similar to, but even more clear than the violation in Stock: the petitioner was wholly precluded from asking Agent Burton whether a statement he testified the defendant made was contained in his notes.

The court of appeals also found, elsewhere in its opinion (App. 24a, infra), that forbidding petitioner from questioning Agent Burton about the content of his notes was “harmless.” That finding – which was addressed specifically to a particular count – was contrary to the record,⁸ but that is not its only fault. When a violation of the Confrontation Clause is found, it may be deemed harmless only where “assuming that the damaging potential of the cross-examination were fully

⁸The court stated that according to his testimony, Brown’s defense on Count 50 was not that he never made the charged statement to Burton, but that the statement was true. But Brown was not asked – either by the defense or the prosecution – whether he made the statement attributed to him by Burton. He was asked, on direct examination, whether he had discussed the “settlement issues” with Edwin Edwards, and testified he had not. (Tr. 2550.) He was then asked about the allegation that he had denied – as Burton claimed – discussing with Edwards “what it would take to settle the matter,” and his answer directly contradicted Burton’s testimony: “Mr. Burton’s focus was the settlement, the final settlement. That’s how I always understood Mr. Burton’s questions to be directed to me for, the final settlement.” (Id.)

realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt.” Delaware v. Van Arsdall, 475 U.S. 673 (1986). The panel did not apply the standard of constitutional harmless error, nor may harmless ness fairly be found in this case.

C. Whether or When An Anonymous Jury Satisfies the Sixth Amendment Is An Important Issue That Should Be Decided By This Court

This Court has several times denied petitions for certiorari challenging the use of anonymous juries. But it has never ruled on the issue, and the increasing frequency with which anonymous juries are being used in district courts makes plain that it is “an important question of federal law that has not been, but should be, settled by [the Supreme] Court.” S.Ct. Rule 10(c).

During a recent six-week period, four Circuits (including the Fifth) have addressed anonymous juries. In United States v. Mansoori, 304 F.3d 635 (7th Cir. 2002), the court found the empaneling of an anonymous jury was an abuse of discretion, even though the case involved organized crime. In United States v. Carneglia, 2002 WL 31097569 (2d Cir. Sept. 19, 2002), and United States v. Bowman, 302 F.3d 1228 (11th Cir. 2002), the courts found no abuse of discretion, but each case involved violent criminal organizations that had engaged in murders, kidnapping and (in Carneglia) jury tampering. The cases in which other Circuits

have upheld anonymous juries all have had an element of concrete threats to juror safety that were not present in petitioner's case.

The decision of the court of appeals in this case is thus in conflict with the decisions of those other Circuits. Indeed, until the Fifth Circuit's decisions the same day in this case and in United States v. Edwards, 303 F.3d 606 (5th Cir. 2002), an anonymous jury had never been upheld in a case where the showing of a defendant's threat to the integrity of the judicial process was so unconvincing that defendants were freed on personal recognizance during the proceedings.

The district court's decision to empanel an anonymous jury in this case demonstrates how quickly the lower courts now impose what was once considered a "drastic measure" and "device of last resort." Krout, 66 F.3d at 1427. In doing so, those courts have strayed from the original purpose of the anonymous jury: protecting jurors from serious threats of harm by violent criminal defendants. See, e.g., United States v. Barnes, 604 F.2d 121 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980). The Fifth Circuit's ruling in this case means that the use of anonymous juries threatens to become no longer "drastic" but routine. That is demonstrated by the factors found by the court below to support the empaneling of an anonymous jury. The first factor cited by the court – that the defendants posed a threat to the integrity of the judicial system – finds no support in the record. The court of appeals relied on the fact that two alleged co-conspirators pleaded guilty to

witness tampering, but that charge consisted merely of a theory that the defendants induced a contingency fee lawyer to settle a case rather than file it. There was no evidence of actual witness tampering, much less any threat to the safety of a witness.

The second factor was the possibility of a lengthy prison sentence, but that factor carries no weight in a case such as this one, in which the defendants posed no threat of violence and were, in fact, released on personal recognizance throughout the proceedings in the district court.

The third factor was the presence of intense media interest, and consequent threat to the privacy interests of jurors. Again, this was not truly at issue. In opposing an anonymous jury, the defendants specifically suggested an order allowing the defendants to know the identity of prospective jurors, but to order those identities not be disclosed to the press or public. Such a solution would have fully protected juror privacy without impairing the defendants' rights to a fair trial. The Sixth Amendment presumes that a defendant is entitled to a trial by "known individuals" and a verdict that is "both personalized and personified." United States v. Sanchez, 74 F.3d 562, 565 (5th Cir. 1996). Before that constitutional right is limited, the court has an obligation to explore less restrictive means. See Oses v. Massachusetts, 775 F. Supp. 443, 460 (D. Mass. 1991), aff'd, 961 F.2d 985 (1st Cir.), cert. denied, 506 U.S. 954 (1992) (order placing defendant in gag and

shackles denied him Sixth Amendment right to fair trial; trial court erred in failing to consider less-restrictive means of controlling defendant in courtroom). Limiting disclosure of juror identities to the parties and counsel was a readily available means that would not have interfered with the defendants' Sixth Amendment right to a public trial.

In addition, as the Fifth Circuit itself has held, “[n]ot all celebrated trials merit an anonymous jury.” United States v. Branch, 91 F.3d 699, 724 (5th Cir. 1996), rev'd on other grounds sub nom. Castillo v. United States, 530 U.S. 120 (2000). While it is true that a case that “arouse[s] deep passions” could have “potentially disruptive effects . . . on the trial in general and on the jurors in particular,” id., this case – charging that a potential civil lawsuit was settled for less than it was worth – does not come close to arousing such passions. Nor does it pose such a significant risk to jurors' privacy as to warrant an intrusion on a criminal defendant's Sixth Amendment rights. The Fifth Circuit's approval of an anonymous jury in this case as a practical matter holds that anonymous juries may be used in any publicized cases. This Court should now decide that important question presented under the Sixth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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