UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-30173

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

JAMES HARVEY BROWN,
Defendant-Appellant

On Appeal from the United States District
Court for the Middle District of Louisiana
Crim. Docket No. 99-151-B-M2

STATEMENT OF JURISDICTION

This is an appeal from a judgment of criminal conviction entered by the United States District Court for the Middle District of Louisiana. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether a defendant accused of making false statements to an FBI agent in an unrecorded interview is entitled to disclosure of the agent's contemporaneous notes of the interview under Rule 16(a)(1)(A), F.R. Crim. P.

2. Whether a defendant accused of making false statements to an FBI agent in an unrecorded interview is entitled to production of the agent's contemporaneous notes of the interview under the Jencks Act, 18 U.S.C. § 3500, when the agent testifies as a government witness at trial.

3. Whether a defendant accused of making false statements to an FBI agent in an unrecorded interview, who denies making the statements alleged, is denied due process under the doctrine of Brady v. Maryland by nondisclosure of the agent's contemporaneous notes of the interview, which nowhere reflect key statements the agent testified were made by the defendant.

4. Whether the defendant in this case was denied his Sixth Amendment right to confront witnesses, and his right to a fair trial on charges that he made false statements to an FBI agent, by reason of the government's actions and the district court's rulings which:

a) refused to disclose the agent's contemporaneous notes of the interview;

b) precluded defense counsel from cross-examining the agent about the content of the notes; and

c) instructed the jury that the court had determined that the undisclosed notes supported the testimony of the agent.

5. Whether the district court abused its discretion in excluding testimony by a defense witness offered to impeach the testimony of the government agent regarding the accuracy of his 302 memorandum.

6. Whether the district court erred in denying a motion for judgment of acquittal as to Count 51 when the government failed to present proof of materiality, as required by 18 U.S.C. § 1001.

7. Whether an anonymous jury is permissible when no factors demonstrated a threat to the safety or integrity of jurors, on the ground that the defendants were public figures and the case attracted media attention.

8. Whether the defendant was entitled to a Franks hearing on his motion to suppress tapes that were the product of court-authorized electronic surveillance on the home telephone and office of Edwin Edwards, on the grounds of government misconduct in the applications for and administration of the surveillance.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below

The government placed a wiretap on the home telephone of former Louisiana governor Edwin Edwards in October 1996, and a microphone in his law office in mid-December 1996. During the course of this surveillance, which was authorized based on affidavits regarding unrelated criminal activity, the FBI picked up some 71 conversations by Edwards relating to his representation of David Disiere, a Shreveport businessman who at one time owned a number of small insurance companies. Nine of the telephone conversations, and one meeting in Edward's office, were between Edwards and Jim Brown, who has served since December 1991 as Louisiana's elected Insurance Commissioner.

Based largely upon the wiretap tapes, the government obtained an indictment against Edwards, Brown, Disiere, former state district judge "Foxy" Sanders, and two other defendants. Sanders, Disiere, and Robert Bourgeois pled guilty to reduced charges.
After the Honorable Frank J. Polozola and the other judges in the Middle District of Louisiana disqualified themselves (R. 1419-24), the case was reassigned by Chief Judge King to the Honorable Edith Brown Clement. Trial of Edwards, Brown and Shreveport attorney Ron Weems commenced September 18, 2000.

After 11 days of testimony and 4 days of deliberations, the jury acquitted all defendants on all counts charging conspiracy, mail fraud, wire fraud, insurance fraud and witness-tampering. (RE 109-115.) However, the jury convicted Jim Brown on 7 of 13 false statement counts against him, all of which arose from a single interview by FBI agents. (RE 115.) Mr. Brown moved for a judgment of acquittal under Rule 29, F.R. Crim. P., and for a new trial. The court granted a judgment of acquittal on two counts, and denied the motion for a new trial on the remaining counts. (RE 148.)

Mr. Brown was sentenced to six months' imprisonment, a fine of $50,000, and two years' probation. (RE 058.) The district court denied a motion for release pending appeal on the ground that the appeal did not present substantial issues. (Tr. 1-31-01, pp. 22-23.). This Court, however, granted release pending appeal by order dated February 26, 2001.

B. Statement of Facts

1. Summary of the Evidence on Counts 1-43

Counts 1-40 of the indictment (RE 061) charged that the defendants conspired to and did defraud the estate of a failed insurance company, Cascade, by effecting a "sham settlement" of a threatened lawsuit by the Receiver of the estate against the company's former owner, David Disiere. Counts 42 and 43 charged the defendants with insurance fraud, 18 U.S.C. § 1033(a)(1) and (d), in connection with the same settlement. Count 41 charged witness tampering, alleging that the defendants engineered a change in the compensation arrangement of "Special Master" Ed Gonzales from an hourly rate to a contingency fee in order to induce him not to make referrals on Disiere to law enforcement authorities.

A central figure in the case was former 19th Judicial District Judge A. Foster "Foxy" Sanders, who testified for the government at trial. At the time of the settlement, Sanders controlled all aspects of insurance company receiverships through his position as "insurance duty judge." (Tr. 1727.) In early 1996, Sanders had publicly questioned why a lawsuit had not been filed by the Cascade estate against Disiere, and directed one of his appointees to prepare a report. (Tr. 592, 2459.) The report, which was highly critical of Disiere and of the Insurance Department's failure to sue him, was released to the press. During the following weeks, Disiere and Sanders engaged in an escalating legal and public relations battle that included a civil rights lawsuit by Disiere against Sanders and Ed Gonzales, a contempt citation by Sanders against Disiere's lawyer Ron Weems, and a motion to recuse Sanders. (Tr. 2021-22.)

In August 1996, Disiere retained Edwin Edwards (whose last term as Governor had ended in January) to serve as an intermediary, in an effort to cease hostilities and bring the parties to the bargaining table. (Tr. 2035, 2043-44.) During the ensuing three months, Edwards met and spoke with Sanders and with Disiere's attorneys numerous times, and also called upon Jim Brown for advice and assistance in resolving the matter. Sanders testified at trial that Edwards offered him bribes to get the Disiere matter settled (Tr. 667-68, 671), including but not limited to an offer to use his claimed friendship with U.S. Attorney L. J. Hymel to end a federal grand jury investigation of Sanders.[1] Edwards denied those allegations and the recorded

[1] The investigation was related to Sanders' role in the sale of property by the estate of Arist Insurance Company to Sanders' friend and business partner, Vernon Ellerbe. Sanders testified that he believed Edwards and Brown initiated the investigation and used it to pressure Sanders to resolve the Disiere matter. (Tr. 665, 675.) The FBI agent originally in charge of the Arist investigation testified as a defense witness that Sanders' allegation was baseless. (Tr. 2296.) As part of his agreement to cooperate in this case, Sanders received immunity from prosecution on the Arist matter. (Tr. 792.)

conversations contradicted them.[2] There was no evidence that Brown had knowledge of any attempts to bribe Sanders, even if they occurred.

The evidence showed that neither Edwards nor Brown participated in negotiation of the settlement. It was reached in a meeting between Disiere and Bourgeois, the Receiver appointed by Sanders, during the second day of acrimonious negotiations between the lawyers and principals in December 1996, and was submitted to and approved by Judge Saia of the district court a week later. (Tr. 2119-26.) Sanders conceded on cross-examination that the only instruction he gave to Bourgeois before the settlement negotiations was to "hammer Disiere" and to file suit before the end of the year if a fair settlement could not be reached. (Tr. 925, 927.) He also conceded that Bourgeois and Gonzales told him, after the settlement, that they believed it was a good one for the estate. (Tr. 927.) The government did not call Disiere or Bourgeois to testify, even though both had pled guilty to reduced charges and agreed to cooperate with the government.

As for the contingency fee contract, the evidence at trial established that it was Sanders' idea and was agreed upon by Gonzales, Bourgeois, and the Louisiana Attorney General's office (which was required to approve all such contracts) before Edwards or Brown learned anything about it. (Tr. 1005-07.) Brown testified that he did not approve of the contract, and thought it "stunk to high heaven." (Tr. 2559-60.) Gonzales, a former Assistant U.S. Attorney who had worked closely with FBI Agent Harry Burton and who Sanders conceded did not like Jim Brown (Tr. 1675, 2506, GX 552 p.7), cooperated with the government and was not prosecuted, but the government decided not to call him as a witness at trial either.

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[2] Sanders attempted to explain the contradiction between his testimony and the words on the tapes as follows: "But when you talk on the phone, sometimes you say . . . the exact opposite of what you mean." (Tr. 675.)

Because the jury acquitted all defendants of the charges in counts 1-43, a further explanation of the evidence on those counts is unnecessary. However, the role of Jim Brown in the matter, and the facts concerning the actual settlement negotiated in December 1996, are important to an understanding of the issues presented to the jury on the false statement counts.

2. Jim Brown's Role in Receiverships

After attending the University of North Carolina, Cambridge University and Tulane Law School, and competing as a member of the United States' international track team, Jim Brown began a career of public service in 1971. (Tr. 2428-29.) He served eight years as a State Senator, eight years as Secretary of State, and has been elected three times as Insurance Commissioner. When Brown was first elected in 1991, the Louisiana Department of Insurance was not even accredited by the National Association of Insurance Commissioners, but Brown greatly strengthened the department during his early years in office and obtained accreditation, as well as the respect of regulators and insurance companies throughout the country. (Tr. 2415, 2423-24, 2434-36.)

When Brown took office, a number of insurance companies in Louisiana had been placed in receivership because of poor management or fraud or both, and others were allowed to operate even though they were insolvent. (Tr. 2423, 2440). Under Brown, those companies were shut down, and the department made criminal referrals and pursued civil lawsuits against persons and firms legally responsible for the losses. (Tr. 2440-41.) With a calculated insolvency of around $4 million, Cascade was one of the smaller companies that were shut down during this time. (DX 315; Tr. 2442.) In 1994, the Insurance Department directed its contract attorneys and investigators to determine whether a lawsuit should be filed against David Disiere seeking to recover money for the estate. (Tr. 2272-77.) Two law firms and two investigators reviewed the

matter and recommended against a lawsuit. (Id.) Brown was not personally involved in this decision. (Tr. 2277, 2358.)

Judge Sanders became the "insurance duty judge" in early 1995. His regime was marked by headline-making controversies which, from Mr. Brown's point of view, appeared to be created by Sanders to embarrass Brown and his appointees and to benefit Sanders' friends and political ambitions. (Tr. 2094-95, 2445-50.) Sanders, on the other hand, took the position that he was seeking only to eliminate patronage and mismanagement in receiverships under Brown and his predecessors. (Tr. 572-76.) In October 1995, Sanders successfully pressured Brown to cede his authority to an independent Receiver who would report solely to Sanders. (Tr. 2452-55.) Less than a year later, Sanders replaced this Receiver with his personal friend and campaign manager, Bob Bourgeois. (Tr. 1004-05.) In practice, Sanders assumed and exercised full control of receiverships, including decisions regarding what professionals would be hired by the estates, what claims would be settled, and what property should be sold and to whom. (Tr. 1727-32.) From October 1995 until well after Sanders retired from the bench on the last day of 1996, Brown had no authority over these matters. (Tr. 1727, 2456-57.)

The indictment did not allege and the government did not contend that Brown was offered or received any financial or other personal benefit in connection with the offenses alleged. The government's theory was that Brown wanted Sanders to return authority over receiverships to him, so that he would again have opportunities for "patronage" that control of receiverships allegedly afforded, and that he cooperated with Edwards and Sanders to "fix" the Disiere case so as to help regain that authority. (Tr. 446, 464, 2968-69.) Nothing on the tapes proved such a "quid pro quo," nor did Sanders or anyone else testify to such a thing. In fact,

Sanders left the bench on January 1, 1997, without ever returning the authority over receiverships to Brown. (Tr. 2531-32.)

3. Brown's Dealings with Edwards and Sanders Regarding Cascade

There were a number of conversations between Brown and Edwards beginning in August 1996, in which Edwards sought Brown's assistance in getting Bourgeois and Judge Sanders to consider a "global settlement offer" by Disiere of all claims in the Cascade case. Brown also discussed the matter on several occasions with Disiere's attorney Ron Weems[3] and with Judge Sanders, and helped arrange a November 19 meeting between the parties at which Bourgeois and his attorneys promised Weems that they would prepare a list of issues and give Disiere an opportunity to respond. (Tr. 2099.)

During Brown's conversations with Edwards, the amount being offered by Disiere ($250,000 in cash and a promise to assist in reinsurance collections of $2 million) as well as amounts being sought by Sanders (initially around $2.5 million cash, and later $4 million), were discussed. (See GX 503, 516, 532.) Brown also discussed with Edwards his effort to obtain an order from Sanders, before his planned retirement at the end of 1996, returning authority over receiverships to the Commissioner, and Sanders' effort to ensure that when that happened, Brown would retain Bourgeois and other receivership employees whom Sanders had placed on the payroll. (See GX 516, pp. 4-6; GX 540, p.4.)

Discussions of Disiere's "global settlement offer" ended when, on December 7, 1996, Sanders presented Edwards with a draft civil RICO complaint against Disiere seeking $9 million (trebled to $27 million) for alleged fraud in the operation of Cascade during 1989-91.

[3] Weems wanted the Insurance Department, as well as Bourgeois and Sanders, to sign off on any settlement, because he was concerned that Sanders' October 1995 order removing the Commissioner's authority over receiverships was unlawful. (Tr. 1318, 2075, 2473.)

(See GX 547.) Edwards informed Brown of this development three days later. (GX 552.) The following day, Sanders informed Brown that he was giving Ed Gonzales and another Baton Rouge lawyer, Wade Shows, a contingency fee contract to handle the RICO case against Disiere. According to Sanders, this would give Gonzales an economic incentive to settle the case quickly. (GX 555, pp. 7-8.) Sanders asked Brown to tell Weems that he needed to come to Baton Rouge and meet with Bourgeois and Gonzales, and that they would be willing to settle the matter for $4 million. Brown did so. (GX 555, pp. 3-4.) Brown did not, however, participate in any meetings or negotiations of the settlement, and apart from a recap of events in the Disiere matter during a visit with Edwards at his office on December 17, (GX 555), Brown had no further conversations with anyone about Cascade or Disiere until after a settlement had been concluded by the parties. (Tr. 2521.)

4. <u>The Cascade Settlement</u>

Negotiation of the settlement took place on December 18 and 19, 1996, at Bourgeois's office. (Tr. 2334.) In attendance were the principals, Bourgeois and Disiere, and two or three lawyers from each side. After a day and a half of discussion, the parties remained far apart. (Tr. 2120-22.) Finally, Disiere asked to visit with Bourgeois "businessperson to businessperson," and the two of them reached a settlement that would make the Louisiana Insurance Guaranty Association ("LIGA") whole. (Tr. 1323, 2124.) The lawyers worked over the following week to negotiate and prepare the final documents, which were presented to and approved by District Judge Saia on December 27, 1996. (Tr. 1348-50.)

The settlement terms were complex, and were embodied in lengthy documents. (GX 130.) Essentially, Disiere agreed to pay $250,000 immediately and to make payments of $25,000 a month for the following eleven months. (Tr. 2141.) He also guaranteed that these

payments, together with collections of reinsurance that he would assist the Receiver in obtaining, would cover all expenditures by LIGA on behalf of the Cascade estate, including claims as well as attorney's fees and other expenses — an amount estimated at the time to be around $3 million. (Tr. 2123.) The agreement also guaranteed that this "LIGA amount" would be no less than $2.5 million and no more than $6 million. (Tr. 1458-59, 2148-49.) Other provisions of the settlement, reflected in over 100 pages of documents, related to security given by Disiere for his agreements benefiting estates of two other failed insurance companies, and provisions obligating Disiere to pay $6 million in event of a default. The government contended at trial that the settlement was insufficient because it would not enable the estate to pay a handful of claims by auto accident victims that exceeded LIGA's "cap" of $250,000 per claim. (Tr. 1490-92, 3134.) A number of witnesses testified, however, that they knew of no other settlement in the history of Louisiana receiverships that resulted in paying 100% of LIGA's obligations. (Tr. 1032, 1414, 2380, 2945.)

Neither Brown nor anyone else from the Department of Insurance was present at or involved in the negotiation of the settlement. (Tr. 2521.) Brown did not see the settlement papers, did not know their terms, and apart from authorizing his deputy to inform the court that the Insurance Department had no objection to the settlement, he played no role in it. (Tr. 2187-88, 2521-22.)

5. <u>The FBI Interview of Jim Brown</u>

Within days after the Edwards wiretap was terminated but before it was publicly disclosed (Tr. 1548), FBI agent Harry Burton scheduled an appointment with Mr. Brown. (Tr. 1549.) The meeting, which occurred May 2, 1997, was also attended by another FBI agent, David Lyons, and Brown's attorney Bradley Myers. Burton advised Brown that the subject

matter of the interview was David Disiere's role in the operation of Cascade Insurance Company. (Tr. 1611.) He proceeded, however, to ask primarily about the 1996 settlement and Brown's conversations with others about it.

Brown was not told he was a subject or target of an investigation. (Tr. 2539.) He was not placed under oath. The interview was not tape-recorded. For the most part, Burton's questions called for information already known to the FBI as a result of the wiretaps, including the date, time and content of Brown's discussions with Edwin Edwards and others about Cascade. The existence of the wiretaps, however, was not disclosed to Brown, nor did Burton make any effort to remind Brown of any meetings or conversations reflected on the tapes. (Tr. 1597-98, 2541.) For his part, Brown did not review any documents or obtain other information to refresh his recollection prior to the interview. (Tr. 2540.)

A central issue at trial was whether certain questions and answers during the interview referred to the terms of the actual settlement that was reached, or instead to discussions about resolving the Disiere matter that preceded the December 1996 settlement negotiations. Burton testified that Brown denied discussing with Edwards, Sanders, or Weems "settlement issues" or amounts being offered or demanded by the opposing sides at any time to settle the matter. (Tr. 1577, 1578-79, 1582-83.) Brown, however, testified that Burton's questions were directed to the actual settlement of the matter, and that he told Burton — truthfully — that he had not read the settlement, did not know its terms, did not participate in the negotiations, and did not discuss specifics of the settlement with Edwards, Sanders, Weems, or anyone else. (Tr. 2521-22, 2547, 2550.) While the jury acquitted Brown on 6 of the 13 false statement counts, it convicted him on each count alleging a denial that he had discussed "a" settlement or "settlement issues" or "what it would take to settle the matter" with Edwards, Sanders, or Weems at any time. These

allegations were based almost verbatim on an FBI 302 memorandum dictated by Burton three days after the interview. Because Brown denied making the statements alleged, the jury's verdict necessarily represented a choice to believe Burton's testimony over Brown's on what exactly occurred during the interviews.

6. The Unsuccessful Efforts of the Defense To Obtain Agent Burton's Notes

After arraignment, the government produced to Brown a copy of the 302 upon which the indictment was based, but it refused to produce Burton's contemporaneous notes. Brown accordingly moved to compel under Rule 16(a)(1)(A). (R. 255.) The government opposed, arguing that the "defendant simply cannot properly impeach the agent with his field notes and thereby create a false impression to the jury that the agent manufactured or left out information." (R. 0330.) At the same time, the government offered the notes for in camera review to prove "the field notes are accurate and provide the basis for the completed memorandum . . . " (Id.) The district court (Polozola, C.J.) denied the motion. (RE 116.)

On the Friday before trial, the government produced Jencks material on its witnesses. The government delivered to the defendant Ron Weems the notes taken by Burton during his telephone interview of Weems,[4] but it did not produce Burton's notes of Brown's interview. Brown requested a ruling by the court and filed a written memorandum (R. 2098), which renewed his request for production under Rule 16(a)(1)(A), and also argued that disclosure was required under the Jencks Act and Rule 16(a)(1)(C). Although Brown did not request that it do so, the court obtained Burton's notes for review in camera. The court denied

[4] See RE 221. The prosecutors initially explained they had done this because of a typographical error in the Weems 302 (RE 222), but later represented that disclosure to Weems was "inadvertent." (Tr. 1684.)

Mr. Brown's request in a minute entry on the fourth day of trial (RE 125), relying on Judge Polozola's earlier ruling and further reciting that "because the 302 accurately reflects the information contained in the handwritten notes, the Court finds that their disclosure will not enable Mr. Brown to significantly alter the quantum of proof in his favor." (RE 126.)

In his opening statement, defense counsel emphasized that the May 2 interview was not tape-recorded, and that the defense would attack the credibility of Agent Burton's testimony regarding what was actually said by Brown. (Tr. 477.) Apparently in an effort to undermine that defense, the prosecution in its direct examination of Burton twice elicited testimony that while he had not used a tape recorder, he had "recorded" the interview by taking notes — the same notes that the government refused to disclose to the defense. (RE 204, 206.) On cross-examination, Brown's counsel sought to question Burton about this testimony, and asked "where are the notes?" (RE 211-12.) The government objected and the Court ruled "I have determined that it's not something this jury needs to discuss." Counsel for Mr. Brown thereupon requested a bench conference, at which he stated (RE 212-13):

> MR. JEFFRESS: Now, I have never been given those notes, I have never seen those notes, and yet the jury is being led to believe that those notes record the interview actually. How can I cross-examine that statement if I have never seen the notes?
>
> THE COURT: You are not entitled to the notes. I reviewed the notes in camera. The notes contain the information that has been presented to you in this 302.

7. The Court Instructs The Jury That The Undisclosed Notes Support The 302

Following this ruling, counsel requested the Court to inform the jury that the defense did not have the notes, in order to prevent the jury from drawing any inference from the fact that the notes were not used in cross-examination. (RE 213-15.) When the bench

conference ended, the Court told the jury that under the law, the defense does not get "handwritten notes that are recorded contemporaneously with the F.B.I. interview," but rather only "the finished product, the typed product." (RE 216.) The Court then said to the jury as follows (RE 216-17):

> In some cases the Court is asked to determine whether the typed, finished product is accurate based on the handwritten notes, and that procedure was followed before this trial. The notes were never made available to the defense counsel, so he cannot present them to you or use them to cross-examine this witness with. He asked me to explain that procedure to you.

At the next break, Mr. Brown moved for a mistrial based upon the Court's instruction to the jury that the Court had determined the 302 was accurate based upon the notes. (RE 220-21.) The Court denied the motion and offered a curative instruction that it did not mean to say that the Court had made a determination that the notes supported the content of the 302. (RE 223-24.) The Court thereupon further instructed the jury, but rather than withdrawing the statement that the 302 was accurate based upon the notes, the instruction told the jury only that the Court's determination was "totally irrelevant" because it is the jury's province "to determine the credibility of the witness . . . " (RE 224.)

8. Cross-Examination On The Content of The Notes Is Denied To Mr. Brown, But Permitted To Codefendant Weems

The subject of the notes came up a final time when Mr. Brown's counsel, attempting to impeach Burton's key testimony that Brown had denied discussing with Edwards "what it would take to settle the case," asked Burton on cross-examination: "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 — ."[5] The prosecutor interrupted with an objection, saying the issue had already been 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." (RE 226-27.) The Court responded, "I think that's correct. Stick to the 302." In light of that instruction, counsel asked no further questions as to whether Burton's testimony was consistent with his contemporaneous notes.

The district court made an altogether different ruling with respect to Burton's handwritten notes of the Weems interview. The prosecutor objected to any cross-examination using those notes, arguing that their disclosure was "inadvertent" (Tr. 1684). The Court overruled the objection, observing, "If the notes are consistent with the 302, what's the harm?" Id. Thereafter, Weems' counsel effectively used the handwritten notes in cross-examination covering three transcript pages. (Tr. 1705-07.) Among other things, Burton was forced to acknowledge that although his 302 nowhere reflects that Weems said Edwin Edwards was hired to "mediate" the dispute between Disiere and Sanders — a key point in the defense of Edwards and Weems — the notes reflect that Weems made that statement twice during the interview. No explanation was given to the jury as to why Weems, but not Brown, was given Burton's notes and allowed to cross-examine him about them.

9. Portions of the Notes Are Disclosed After Trial And Reveal Highly Exculpatory Discrepancies

Mr. Brown moved for a new trial based in part on nondisclosure of Burton's notes. He also moved separately for post-trial disclosure of the notes, in order fully to argue the question of prejudice. (R. 2246.) The district court denied the motion for disclosure of the notes

[5] The notes reveal that a true answer by Burton to counsel's question would have been: "No, my notes do not say that."

(RE 162), but in its written ruling denying the request for a new trial, the court concluded there were "no discrepancies" between the notes and the 302 "that would have aided Mr. Brown's defense" (RE 162), despite the fact that among other major discrepancies, the key statements attributed to Brown in the 302 and in the indictment — alleged denials that he discussed "settlement issues" or "what it would take to settle the case" with Edwards, Weems, or Sanders — appear nowhere in the contemporaneous notes. Because the defense had no knowledge of the content of the notes prior to its ruling, the district court did not consider any arguments by Brown on how the notes would actually have been used to cross-examine and impeach Burton at trial. By order of this Court, the notes have now been disclosed to Mr. Brown.

SUMMARY OF ARGUMENT

This is the first reported case in which a person charged with making false statements in an unrecorded interview was denied access to the FBI agent's contemporaneous notes of that interview. It is also the first reported case where a defendant, seeking to challenge the agent's testimony that a particular statement was made, was forbidden to ask whether the agent's contemporaneous notes reflected the alleged statement. And it is the first reported case where a court instructed the jury that its own review of notes — which were never disclosed to the defendant or the jury — supported the agent's testimony.

The government's conduct and the court's rulings rendered the trial fundamentally unfair to Mr. Brown. The government was required to produce the notes under Rule 16(a)(1)(A), F.R. Crim. P., because they constitute a "written record" reflecting the "substance" of oral statements by the defendant. It was also required to produce the notes under the Jencks Act as a "statement" of Agent Burton; under Rule 16 (a)(1)(C) as a document material to preparation of the defense; and as a matter of due process under the doctrine of Brady v.

Maryland, 373 U.S. 83 (1963). Further, the restriction on cross-examination and the court's instruction to the jury were not only erroneous under the rules of evidence and highly prejudicial, but also denied Mr. Brown his Sixth Amendment right to confront witnesses against him.

The district court also erred by excluding testimony of a witness proffered by the defense on a material issue the government had introduced into the case — namely, Agent Burton's claimed practice of producing accurate interview memoranda. It also erred in denying Mr. Brown's motion for judgment of acquittal on Count 51, because the evidence failed to prove materiality as to that count.

Further, the district court should not have imposed an anonymous jury. There was no basis to find that anonymity — and the consequent prejudice to Mr. Brown's Sixth Amendment right to a fair and public trial — was necessary to forestall any threat to jurors or to the integrity of the trial, and the public interest in the case was not a ground upon which a jury may be kept anonymous from the parties. Finally, in conducting the electronic surveillance of co-defendant Edwin Edwards' home and office, the government failed to minimize intrusions on privacy as required by 18 U.S.C. § 2515 and the district court erred in denying a Franks hearing on Mr. Brown's motion to suppress the fruits of that unlawful surveillance.

ARGUMENT

I

NONDISCLOSURE OF AGENT BURTON'S NOTES WAS UNLAWFUL AND DENIED MR. BROWN A FAIR TRIAL

A. Standard of Review

A court of appeals reviews *de novo* a district court's interpretation of Rule 16(a)(1). See United States v. Hoffman, 794 F.2d 1429, 1431 (9th Cir. 1986) (interpretation of

Rule 16(a)(1)(A)); United States v. Bryan, 868 F.2d 1032, 1035 (9th Cir. 1989) (interpretation of Rule 16(a)(1)(C)). If the district court's interpretation of the rule is correct, then the court of appeals reviews the application of the rule for abuse of discretion, and will reverse if the defendant's substantial rights have been prejudiced. See United States v. Mora, 994 F.2d 1129, 1138 (5th Cir. 1993).

With respect to a district court's determination that an FBI 302 is not a "statement" for purposes of the Jencks Act, the court of appeals reviews for clear error. United States v. Martinez, 87 F.3d 731, 734 (5th Cir. 1996). Challenges to a conviction based upon a violation of Brady v. Maryland, 373 U.S. 83 (1963), are reviewed de novo. East v. Johnson, 123 F.3d 235, 237 (5th Cir. 1997).

B. Mr. Brown Was Entitled to the Notes As A Matter of Law

1. Rule 16(a)(1)(A) Required the Government To Produce the Notes.

Under Rule 16(a)(1)(A), "the government must disclose to the defendant and make available for inspection, copying, or photographing: * * * 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." (Emphasis added). By its plain terms, Rule 16(a)(1)(A) is not discretionary. When the rule was amended in 1991 to include the "any written record" language, the Advisory Committee Notes emphasized its mandatory nature: "The rule now requires the prosecution, upon request, to disclose any written record which contains reference to a relevant oral statement by the defendant which was in response to interrogation, without regard to whether the prosecution intends to use the statement at trial."

The rule contains no limitation on the types of written records that must be disclosed. It is well-established that, in the absence of 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, 118 S. Ct. 469, 473 (1997); United States v. James, 478 U.S. 597, 604 (1986); Lyes v. City of Riviera Beach, 166 F.3d 1332, 1337 (11th Cir. 1999) ("Congress did not add any language limiting the breadth of that word, so 'any' means 'all'") (internal quotations omitted); Rekant v. Desser, 425 F.2d 872, 880 n.15 (5th Cir. 1970).

The Advisory Committee Note to the 1991 amendment underscores the fact that the rule contains no limitation on the types of written records that must be produced:

> The 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.

(Emphasis added). It is clear that, to be discoverable under this rule, the written record need not be what the district court in this case referred to as a "typed, finished product." (RE 216.) As long as the record contains "some written reference" to a statement by the defendant, then the government has an obligation to turn it over.

The solid weight of case law since the 1991 amendment of Rule 16(a)(1)(A) holds that the government was required to disclose Agent Burton's interview notes, in addition to the 302. The "unambiguous and unequivocal language of Rule 16(a)(1)(A)," United States v. Carucci, 183 F.R.D. 614, 615 (S.D.N.Y. 1999), requires production of "a Government agent's notes of statements made . . . during a pre-prosecution interview." Id. at 614; see also United States v. Molina-Guevara, 96 F.3d 698, 705 (3d Cir. 1996) (ordering disclosure on remand of government agent's handwritten notes of interview with defendant from which agent's final report was prepared); United States v. Wright, 2001 WL 523394 (D. Kan. 2001) (ordering

production of government agent's field notes taken during interviews of defendants); United States v. Griggs, 111 F. Supp. 2d 551, 555 (M.D. Pa. 2000) (ordering disclosure of rough notes taken by state 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).[6]

In its two orders denying pre-trial disclosure of the notes, the district court did not engage in any analysis of Rule 16(a)(1)(A). Instead, the court relied entirely on a two-page order by the Hon. Morey L. Sear in United States v. Boyd, Civ. No. 91-534. (RE 116, 126.) Judge Sear's analysis of Rule 16(a)(1)(A), however, is demonstrably erroneous. He noted that, prior to the 1991 amendment, Rule 16(a)(1)(A) required the government to produce the substance of any oral statement "which the government intends to offer into evidence," and concluded that the sole purpose of the amendment was to eliminate "the requirement that the government must intend to use the defendant's statement in order for its substance to be discoverable." (RE 118.) That analysis overlooks the fact that the second sentence of the amended rule preserves the requirement that the government intend to use the statement at trial, where oral statements are not contained in a writing or recording. The major change wrought by the 1991 amendment was to add a right of the defendant to disclosure of "any written record" of his relevant oral statements. There was no such right in the prior rule, whether or not the government intended to use the statement at trial.

[6] In United States v. Service Deli, Inc., 151 F.3d 938 (9th Cir. 1998), the court reversed because the government, even though it produced a typewritten summary of an interview, did not produce the handwritten notes on which the summary was based. The defendant contended that nondisclosure violated Rule 16(a)(1)(A), but because the witness was a former officer of the defendant who was adverse to it at the time of trial, the court rested its ruling on Brady rather than Rule 16. The court made plain in a footnote, however, that had the witness been the defendant, nondisclosure of the notes would have violated Rule 16(a)(1)(A). See 151 F.3d at 943 n.4.

The handful of post-1991 decisions stating that rough notes need not be produced where the government has produced a final memorandum of interview cite exclusively pre-amendment authority for support and never consider the 1991 revised language of Rule 16(a)(1)(A). See United States v. Mango, 1997 U.S. Dist. LEXIS 6145, *66-67 (N.D.N.Y. May 1, 1997) (Munson, S.D.J.); United States v. Walker, 922 F. Supp. 732, 744 (N.D.N.Y. 1996) (Munson, S.D.J.); United States v. Mebust, 857 F. Supp. 609, 615 (N.D. Ill. 1994). Similarly, the cases on which the district court relied in its order denying Mr. Brown's renewed motion for disclosure of Agent Burton's notes are inapposite. United States v. Muhammad, 120 F.3d 688, 699 (7th Cir. 1997), ignores the text of the rule and relies exclusively on pre-1991 authority. United States v. Coe, 220 F.3d 573, 583 (7th Cir. 2000), merely cites to Muhammad and does not discuss the text of the rule itself.

It is impossible to square the language of the rule with Judge Sear's statement in Boyd that the 1991 amendment "does not require the prosecution to produce all written records containing the substance of a defendant's statement, where more than one written record conveying the same substance of a defendant's statement exists." (RE 118.) The rule does not require production of "some" written record — it requires production of "any" written record, and in this context, "any" means "all."[7] The reading of amended Rule 16(a)(1)(A) in Boyd is thus clearly erroneous and conflicts with the decisions of all other courts that have considered the language of the 1991 amendment.

[7] Rule 16(a)(1)(A) uses the word "any" not once, but several times, and in each instance it plainly means "all," not "one." If that were not so, then the reference to "any relevant oral statement" would mean that when the defendant has made several relevant oral statements, the government may disclose one of them and withhold the others.

2. Rule 16(a)(1)(C) Required the Government To Produce the Notes.

The district court also erred in denying disclosure of Agent Burton's notes under Rule 16(a)(1)(C). That rule entitles the defendant to production of documents that are "material to the preparation of the defendant's defense." A document is "material" "where "there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal." United States v. Marshall, 132 F.3d 63, 68 (D.C. Cir. 1998) (quoting United States v. Lloyd, 992 F.2d 348, 351 (D.C. Cir. 1993)); see also United States v. Murdock, 548 F.2d 599, 600 (5th Cir. 1977).

There can be no doubt that Agent Burton's notes were "material to the preparation of [Mr. Brown's] defense." The notes are a contemporaneous record by the FBI of what was said during the May 2 interview — which, in turn, is the basis for all the false statement counts against Mr. Brown. It is the document in which Agent Burton claimed, during direct examination, to have "recorded" the interview. (RE 204, 206.) That the notes would play an important role in assisting impeachment of Agent Burton is self-evident. Thus, the notes should have been disclosed under Rule 16(a)(1)(C).

3. The Jencks Act Required the Government To Produce the Notes.

The Jencks Act requires the government to produce "any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified," including "a written statement made by said witness and signed or otherwise adopted or approved by him . . . " 18 U.S.C. § 3500(e)(1). The Act entitles the defendant to "relevant and competent reports and statements in the possession of the Government touching the events and activities to which a Government agent has testified at the

trial." Goldberg v. United States, 425 U.S. 94, 104 (1976) (quoting S. Rep. No. 981, 85th Cong. 3 (1957)). The Act is "designed to further the fair and just administration of criminal justice" by requiring the disclosure of all statements useful in impeaching witnesses. Campbell v. United States, 373 U.S. 487, 495-96 (1963); United States v. Holton, 116 F.3d 1536, 1546 (D.C. Cir. 1997). To that end, the Act defines "statement" in a "broad and inclusive" manner (Goldberg, 425 U.S. at 105), and courts should err, if at all, in favor of disclosure.

Courts have repeatedly stated that handwritten interview notes should be produced under the Jencks Act as the statement of the agent who took the notes, when that agent testifies about the interview. As this Court has observed, "[u]nder the Jencks Act, a defendant is entitled to a witness' notes after he has testified, so that the notes may be used in cross-examination." United States v. Martin, 565 F.2d 362, 363 (5th Cir. 1978); see also United States v. Thomas, 12 F.3d 1350, 1365 n.25 (5th Cir. 1994) ("Notes taken by an agent during witness interviews can constitute statements of the agent under the Jencks Act, even if the notes do not constitute statements of the witnesses"); United States v. Wables, 731 F.2d 440, 445 (7th Cir. 1984) (government agents' notes are Jencks Act "statements"); Walker, 922 F. Supp. at 744 (Jencks Act requires disclosure of "any written statement of the witness in the government's possession, including handwritten notes") (emphasis added); Mango, 1997 U.S. Dist. LEXIS 6145, *66-67 (although government already produced 302, Jencks Act mandates that "defendants are entitled to examine any notes by a government witness after that witness has testified at trial") (emphasis added); Mebust, 857 F. Supp. at 615 (although government had already produced agents' 302s, defendant entitled to their handwritten notes under Jencks Act.)

Courts have occasionally found that notes of a testifying agent were not Jencks material on the ground that the notes were so abbreviated or scattered that they did not qualify as

a "statement" of the agent.[8] None involved a false statement case, such as this one, where the events recorded by the notes were the very subject of the prosecution, as well as of the agent's testimony. All such cases are, in any event, inapplicable here because Agent Burton's notes are far from the kinds of abbreviated notations that might take them out of the category of "statements." Significantly, the district court nowhere made any finding that the notes were not a "statement" under the Jencks Act because of any roughness or abbreviation of their content. The notes, comprising 12 pages, are very detailed, often record complete sentences, and even contain phrases in quotation marks. Further, at trial, the government elicited testimony from Agent Burton that he "recorded" the interview in his notes, which certainly amounts to "adopting" them as his own statement about what he claims Mr. Brown said during the interview. Thus, the notes were required to be produced regardless of anyone's assessment of their usefulness to the defense.

Although Brown explicitly sought the notes under the Jencks Act and briefed the issue (R. 2094-97), the district court's ruling (RE 125-26) did not address the Jencks Act. Rather, the court stated only that the notes were not producible under Rule 16(a)(1)(A), and that its in camera review indicated disclosure of the notes would not enable Brown "to significantly alter the quantum of proof in his favor." (RE 126.) In its post-trial opinion, the district court simply stated that it would "not revisit its prior ruling on this issue with respect to the legal rules

[8] See, e.g., United States v. Mora, 994 F.2d 1129, 1139 (5th Cir. 1993) (notes are "scattered jottings" consisting of "names of persons provided by [a witness]"); United States v. Ramirez, 954 F.2d 1035, 1038 (5th Cir. 1992) ("scattered notes" "consisted of odd pieces of paper on which [the agent] jotted down names, addresses, and license plate numbers"); United States v. Roemer, 703 F.2d 805, 807 (5th Cir. 1983) (trial court's finding that notes were not a statement because of their "roughness and abbreviations" not clearly erroneous); United States v. Cole, 634 F.2d 866, 867 (5th Cir. 1981) (trial court's finding that notes were not "statement" because they contained only "phrases or isolated sentences" not clearly erroneous).

involved," except to add the Court's "understanding" that the "standard practice in this Circuit" is not to disclose an agent's rough notes to the defense "unless there is a meaningful discrepancy between the notes and the 302." (RE 157).[9]

For purposes of the Jencks Act, it is irrelevant whether the statement contains a "discrepancy" or is otherwise helpful to the defense. See United States v. Beasley, 576 F.2d 626, 629 (5th Cir. 1978); United States v. Rosario-Peralta, 175 F.3d 48, 53 (1st Cir. 1999); United States v. Stern, 13 F.3d 489, 494 (1st Cir. 1994). Thus, it is unclear what basis the district court relied upon to conclude that Agent Burton's notes were not subject to the Jencks Act. One fact, however, is clear: the court nowhere found that the notes were so scattered or abbreviated as to remove them from the definition of a "statement" of the testifying agent under the Jencks Act.

4. Suppression of the Notes Denied Mr. Brown Due Process of Law.

Entirely apart from violating obligations under Rule 16 and the Jencks Act, nondisclosure of the notes violated the Due Process Clause under the doctrine of Brady v. Maryland, 373 U.S. 83 (1963). Such a violation is established where the prosecution withholds evidence that is (1) favorable to the defense and (2) material to guilt or punishment. See East v. Johnson, 123 F.3d 235, 237 (5th Cir. 1997). Materiality is present "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985). The

[9] The court cited no cases to support this "standard practice," and it is noteworthy that in this very case, the supposed "standard practice" was not followed in the case of codefendant Weems. It is possible that the Court, in referring to a "standard practice," was thinking of the practice with regard to a nontestifying agent's notes of an interview with a testifying government witness. In such a case, the notes are producible only if they have been "adopted" by the witness, which is seldom true. See United States v. Cole, 617 F.2d 151, 153 (5th Cir. 1980) (remanding for determination, inter alia, whether witness "adopted" notes); accord United States v. North American Reporting, Inc., 740 F.2d 50, 54 n.6 (D.C. Cir. 1984).

"reasonable probability" test, in turn, is satisfied when suppression of the evidence "undermines confidence in the outcome of the trial." Id. at 678. As explained by the Court in Kyles v. Whitley, 514 U.S. 419, 434 (1995): "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence."

The government's position, upheld by the district court after in camera review of the notes, was that there were no significant differences between Burton's notes and the 302 that would have assisted the defense. An identical claim was made by the government, and upheld by the district court after in camera review, in United States v. Service Deli, Inc., 151 F.3d 938 (9th Cir. 1998), where the government produced a typewritten memorandum of an interview with its key witness, but not the contemporaneous notes of that interview. The court of appeals reversed, finding three key pieces of information contained in the notes that were not reflected in the typewritten summary. Id. at 943. Because "the foundation of the government's entire case" rested upon the testimony of the witness in question, id., the court held that nondisclosure of the impeachment material violated Brady and required a new trial.

Burton's notes leave no doubt that they would have provided a powerful basis to impeach his testimony and the 302 on which that testimony was based. We discuss why that is so in the following section of this brief. Because the government's entire proof of what Brown said during the interview consisted of Burton's testimony, the suppression of the notes at trial was a violation of Mr. Brown's right to due process of law under the Brady doctrine.

C. Nondisclosure of the Notes Deprived Brown of a Fair Trial

The district court stated in its post-trial opinion that "because the notes are substantially identical to the 302, they could not have aided [Brown's] defense at all." (RE 173.)

The notes themselves demonstrate that the opposite is true. The district court's finding was made without benefit of argument by the defense, which had no access to the notes before the court's ruling, and is clearly erroneous. We discuss below a number of the ways in which access to the notes would have enabled the defense effectively to impeach Burton's credibility, and correspondingly to bolster Brown's.

Count 50 charged Mr. Brown with stating to Agent Burton that he had not discussed with Edwin Edwards "settlement issues or what it would take to settle the matter." Burton swore at trial that Brown made precisely this statement, and further testified it was "contradictory to his own words on the tape and represents another false statement." (Tr. 1578-79.) Similar allegations were made, and testimony given by Burton, regarding Count 48 (no discussion with Ron Weems of "settlement issues"), Count 54 (alleging Brown "well knew" he had conversations with several people "about what it would take to settle the matter"), and Count 55 (no discussion with Judge Sanders of "specifics of a settlement"). These were the most difficult of all charges for the defense. As Weems and other witnesses testified at trial, Brown did not participate in the negotiations to settle the Cascade-Disiere matter which occurred December 18-26, 1996, he was not informed what happened during those negotiations, and he was not told the terms or amount of the settlement reached by the parties. But Brown did, on several occasions prior to those negotiations, discuss with Edwards, Sanders, and Weems amounts being demanded by Sanders and Gonzales, and amounts Disiere might be willing to pay. If Brown did tell Burton that he never discussed "what it would take to settle the matter" or "settlement issues" with Edwards, Sanders or Weems, the jury could find he lied. Brown's defense was that he did not say that to Burton.

What neither the defense nor the jury was told at trial is that Burton's contemporaneous notes do not reflect the alleged statements.[10] Indeed, the phrase "settlement issues" — which Burton insisted was used by Brown during the interview (Tr. 1637, 1642-43, 1651) — appears nowhere in the notes, even though it appears four times in the 302 (RE 231, 233, 235). That glaring discrepancy between the notes and Burton's testimony would have been devastating not only to the government's case on these counts, but also to the credibility of Agent Burton and his 302 generally. Based on this discrepancy alone, the trial court's statement that "the rough notes are identical to the 302 in the several aspects that Brown finds critical" (RE 162), and its further opinion that the notes "could not have aided [Brown's] defense at all," are obviously incorrect. But there is much more.

As to Count 51, the district court wrote that the notes were not important because Brown "admitted making" the statement charged, and that he "implicitly vouched for the accuracy of the words Burton recorded in his 302" with respect to that count. (RE 169-70.) That is not a correct statement. Brown testified that until seeing a surveillance transcript after he was indicted, he would have sworn the only thing discussed with Edwards at his office on December 17 was Brown's hope to be appointed to the U.S. Senate (Tr. 2554; see GX 555), but he was never asked at trial what was said by Burton or by him on this subject during the interview.

Burton testified that "I think I specifically asked him if his conversations [at Edwards' office] related to Cascade and he said, 'No.'" (RE 227.) The notes give a quite

[10] The notes relevant specifically to Count 50 are quoted at RE 158-60. According to those notes, Brown told Burton that Edwards had been retained to try to resolve the matter; that Edwards called him on several occasions; that they discussed "Background — re case," the "lawsuit" and "confrontation with Weems," and that Brown told Edwards that Judge Sanders, not Brown, would make the decision. Neither the statement in the 302 — "there was never any discussion with EDWARDS concerning settlement issues or what it would take to settle the matter" (RE 159) — nor anything similar to it appears in Burton's notes.

different version. They do not reflect any denial by Brown of discussing Cascade while at Edwards' office. They reveal that Brown said he visited Edwards when going out to his wife's restaurant, that Edwards had asked for some type of "form," that the subject was "Leadership challenge — but nothing to do with this matter," and that he couldn't recall the nature of the form but it was "'somewhat innocuous.'" (RE 161.) In the 302, these notes became a statement by Brown that he visited Edwards' office on "one occasion" and that the "conversation" had "nothing to do with Cascade Insurance Company or David Disiere." (RE 235.)[11] Had the notes been available to the defense, they would have provided a basis that did not otherwise exist to impeach Burton's testimony on Count 51, and would likely have led to Brown's acquittal on that charge.

With respect to Count 55, the notes reflect a statement by Brown that he did not discuss "the specifics of the settlement" with Sanders (emphasis added) — an entry strongly corroborating Brown's defense that his answers to Burton concerned only the settlement that actually occurred. In its post-trial opinion, the district court conceded that this entry provided material for a "blistering attack" (RE 163), but reasoned that the unavailability of the notes was harmless because the same entry appeared in the 302 and could have been used by the defense.

[11] The only visit by Brown to Edwards' office that was captured on tape occurred on December 17, 1996. (GX 555.) The purpose of that visit was to discuss with Edwards a strategy whereby, if U.S. Senator John Breaux were appointed Ambassador to France, Brown might be appointed by Governor Foster to fill out his unexpired term. (Tr. 2552-54.) The government argued at trial that because fully half the time on December 17 was spent talking about Sanders and Disiere, Brown lied when he said — according to Burton's testimony and his 302 — that the "conversation" had nothing to do with Disiere or Cascade. But Burton's notes do not reflect that Brown was even asked about the subject matter of the conversation, only about the purpose of the visit and the nature of a "form" requested by Edwards. Nor do they reflect or suggest that Brown said he visited Edwards only on "one occasion," as the 302 recites. Brown testified that he visited Edwards' office on "several occasions" (Tr. 2554), but the December 17 visit is apparently the only one that was captured on tape.

The court overlooked the fact that on the very next page, the 302 recites that Brown told the agents "he never met with or discussed with SANDERS the matter of David Disiere," which made the 302 useless for cross-examination in this respect. (RE 237.) The notes, however, again are materially different from the 302. The notes record a statement that Brown "never met with Sanders re Disiere" (emphasis added),[12] and nowhere reflect any denial that he discussed Disiere with Sanders. What the court's opinion regarding Count 55 clearly demonstrates is that "[w]hat appears to be harmless to a district judge may be prejudicial if seen in light of a defense counsel's special familiarity with a given prosecution." United States v. Fowlie, 24 F.3d 1059, 1066 (9th Cir. 1994); see also Beasley, 576 F.2d at 629 ("courts should be hesitant to take it upon themselves to decide that the defense could not have effectively utilized a producible statement").

Impeachment of Burton's testimony on specific counts of the indictment is not the only way in which disclosure of the notes could well have changed the outcome of the trial. As the district court pointed out (RE 191), the jury was also called upon to assess Brown's credibility. This was the kind of case as to which the Supreme Court has observed: "Since equally honest witnesses may well have different recollections of the same event, we cannot reject as wholly unreasonable the notion that a conviction for perjury ought not to rest entirely upon 'an oath against an oath.'" Weiler v. United States, 323 U.S. 606, 609 (1945). Yet this case did turn on Burton's oath against Brown's, and had the defense been permitted to impeach Burton's credibility adequately, it would necessarily have bolstered Brown's, not only on the particular count in question, but generally.

[12] This entry is not quoted in the district court's opinion, but is found in Burton's notes disclosed to the defense by order of this Court, and now filed in the record under seal (hereinafter referred to as "Burton notes").

Three features of the notes, not mentioned in the district court's opinion, vividly demonstrate the role they could have played in undermining Burton's credibility and bolstering Brown's. First, Burton testified (in accordance with Count 53 and the 302), that "Brown stated that he had not directed Robert Bourgeois to settle the Cascade Insurance matter." (Tr. 1581.) The notes, however, record a very different statement by Brown: "Never directed Bourgeois to settle the matter for a specific amount." (Burton notes, p.8; emphasis added.) This was a dramatic contradiction of Burton's testimony and his 302; the government had evidence from which to argue that Brown directed Bourgeois to settle the matter, but no evidence whatsoever that he directed Bourgeois to settle "for a specific amount." With the notes, the defense would have proved that both the charge, the 302, and Burton's testimony were false.

Second, Burton testified as alleged in Count 44 that Brown stated he was only "vaguely familiar with the Cascade Insurance Company," adding: "He was not telling me the truth." (Tr. 1574.) Burton's notes, however, reflect no such statement by Brown or anything remotely like it. Similary, Burton testified (as alleged in Count 46) that Brown said he "was not aware of any federal civil action that had been contemplated against David Disiere in December of 1996," and added "he lied." (Tr. 1575.) The notes, however, reflect that Brown said only that he had never seen the draft RICO suit. (Burton notes, p.6.) That is exactly what Brown testified he told Burton (Tr. 2544), and it is incontrovertibly true. Thus, as to Burton's testimony on Counts 44, 46 and 53, his testimony on the counts of which Mr. Brown was convicted, and his testimony regarding the care and accuracy of his 302, what the notes contained and did not contain was highly exculpatory, and the jury should have been told of it. The government's

failure to produce the notes as Brady material was indefensible, and the prejudice to the defense is manifest.[13]

Last but not least, lack of the notes undermined a central theory of the defense, which was that Burton, knowing exactly what was contained on the tapes and having a bias against Jim Brown, deliberately crafted his 302 in order to assist a false statement prosecution. Counsel for Mr. Brown said in opening statement: "After the interview, Mr. Burton twisted and misrepresented practically everything Jim Brown said in that interview in an effort to prosecute this offense called false statements." (Tr. 477.) Because the defense never got Burton's notes, and was not even allowed to question him about their content (see infra, pp. 35-38), the defense had little to support this contention when it came time for closing argument. If the defense had been able to prove that the most damaging statements in the 302 were not contained in the notes, and that other statements in the notes had been significantly altered in the 302, the argument would have had powerful evidentiary support.

The importance of contemporaneous handwritten notes to the truth-finding process cannot be overstated. Recent history is replete with celebrated examples of the importance the prosecution attaches to handwritten notes of meetings and interviews, from the indictment of a former Secretary of Defense for withholding such notes,[14] to the recent jailing of a Texas journalist for refusing to produce notes to a grand jury,[15] to the insistence of a Special

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[13] Because the jury acquitted Brown on Count 53 and the court granted a post-verdict judgement of acquittal on Counts 44 and 46, Burton's notes relevant to those counts were not disclosed in the district court's post-trial opinion. These notes sharply contradict the court's statement that the notes are "substantially identical [to the 302] in all other respects." (RE 162.)

[14] See Bob Woodward, Shadow: Five Presidents and the Legacy of Watergate, at 198-200 (Simon & Schuster 1999).

[15] In re Grand Jury Subpoena, No. 01-20745 (5th Cir. Aug. 17, 2001).

Prosecutor on receiving the actual handwritten diary entries of President Reagan rather than the typed excerpts.[16] The importance of contemporaneous notes to effective cross-examination and impeachment is further illustrated by the numerous cases in which they have been used, as discussed in the next section of this brief.

II

FORBIDDING CROSS-EXAMINATION OF AGENT BURTON ON THE CONTENT OF HIS NOTES WAS ERRONEOUS AND A VIOLATION OF THE SIXTH AMENDMENT

A. Standard of Review

The court of appeals reviews the district court's evidentiary rulings for abuse of discretion. United States v. Alexius, 76 F.3d 642, 644 (5th Cir. 1996). Discretion does not come into play, however, until the defendant has had an opportunity to engage in cross-examination that is sufficient under the Sixth Amendment. See United States v. Landerman, 109 F.3d 1053, 1061 (5th Cir. 1997).

B. Counsel's Attempts To Cross-Examine Agent Burton Regarding the Notes

During his direct testimony, Agent Burton twice testified that he "recorded" the May 2 interview by taking contemporaneous notes. (RE 204, 206; see supra p.14.) This testimony was obviously calculated to deal with Brown's argument, outlined in opening statement, that the interview was not tape-recorded and Burton's testimony three years later would not be reliable. (See Tr. 477, 499.) When defense counsel sought to cross-examine Burton about those notes, however, the court sustained an objection by the government and stated "I have determined that it's not something this jury needs to discuss." (RE 212). Counsel

[16] Shadow at 157.

requested a bench conference, explained that the jury was "being led to believe that those notes record the interview actually," and asked "How can I cross-examine that statement if I have never seen the notes?" (RE 212-13.) The court nonetheless adhered to its ruling.

Later in the cross-examination, defense counsel asked Agent Burton whether his contemporaneous notes reflected, as Burton had testified, that Brown had denied discussing with Edwin Edwards "what it would take to settle the Cascade matter." The notes in fact do not reflect any such statement, but the jury never learned that. Instead, it heard the following colloquy (RE 226-27) (emphasis added):

> MR. 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.

Having been instructed to "[s]tick to the 302," and having been admonished for trying to "mislead" the jury with questions about Burton's notes, the defense refrained from further cross-examination on the subject.

C. The District Court's Ruling Violated Mr. Brown's Confrontation Clause Rights.

The denial of the right to cross-examine Agent Burton on the content of his notes was not only error, but also a violation of Mr. Brown's rights under the Confrontation Clause. The "main and essential purpose" of the Confrontation Clause "is to secure for the opponent the opportunity of cross-examination." Davis v. Alaska, 415 U.S. 308, 315-16 (1974) (emphasis in original) (quoting 5 J. Wigmore, Evidence § 1395, at 123 (3d ed. 1940)). The Confrontation Clause is "satisfied where defense counsel has been permitted to expose to the jury the facts from

which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." United States v. Landerman, 109 F.3d 1053, 1061 (5th Cir. 1997) (internal quotations omitted). The scope of cross-examination should be particularly broad "when the witness is critical to the prosecution's case." Id. at 1063 (internal quotations omitted).

In addition, the defendant must be permitted an opportunity to "make a record from which to argue why" the witness's testimony was untrustworthy and should not be credited. Wilkerson v. Cain, 233 F.3d 886, 891 (5th Cir. 2000) (citing Davis). If the court denies the defendant such an opportunity, then it has essentially forced him into a situation in which the jury will infer "that defense counsel merely was engaged in a speculative and baseless line of attack" — which constitutes an impermissible restriction on the defendant's Confrontation Clause rights. Id. In Wilkerson, for example, the defendant was allowed to impeach the government's main witness (and eyewitness to the crime) by attempting to elicit testimony that he had a deal with the prosecution, but did not permit the defendant to confront the witness with letters he had written to prison administrators seeking a transfer in exchange for his testimony. This Court found a violation of the Sixth Amendment and reversed.

Like the testimony of the witness in Wilkerson, Agent Burton's testimony was at the center of the government's case. He was not only the government's star witness, but its only witness as to what statements were made, and "[t]he Supreme Court has recognized that where the government's case in a criminal prosecution may stand or fall on the jury's belief or disbelief of one witness, that witness's credibility is subject to close scrutiny." United States v. Partin, 493 F.2d 750, 760 (5th Cir. 1974) (citing Gordon v. United States, 344 U.S. 414 (1953); accord United States v. Alexius, 76 F.3d 642, 647 (5th Cir. 1996); Greene v. Wainwright, 634 F.2d 272,

275 (5th Cir. 1981). It was absolutely essential for Brown to challenge the accuracy of Burton's claim that he accurately "recorded" the interview, as well as the veracity of his testimony as to what statements Brown made. Yet Brown was denied the right to confront Burton with his own contemporaneous "record" of the interview, and thereby was denied his Sixth Amendment right.

There is no question that Burton's rough notes were a proper subject for cross-examination and impeachment. Courts routinely permit the use of rough notes for that purpose. See e.g., United States v. Torres-Galindo, 206 F.3d 136, 143 (1st Cir. 2000) (defense cross-examined agent about discrepancies between rough notes and 302); United States v. Diaz, 26 F.3d 1533, 1539 (11th Cir. 1994) (agent cross-examined with rough notes); Cowan v. Arutz, 1996 WL 631726, *13 (S.D.N.Y. Oct. 24, 1996) ("defense counsel was free" to cross-examine police officer with his handwritten notes); United States v. Machor, 879 F.2d 945, 954 (1st Cir. 1989) (district court permitted agents to be cross-examined using their notes); Unites States v. Andrade, 788 F.2d 521, 532-33 (8th Cir. 1986) (agent's handwritten notes used for cross-examination regarding what defendant said during interview). Far from "misleading" the jury, as the government argued, confronting Burton with his contemporaneous notes would have made quite clear to the jury that his testimony was not supported by the very notes through which he claimed to have "recorded" the interview.

D. The Court's Instruction to the Jury That the 302 Was Accurate Based Upon the Notes Was Prejudicial and Violated Brown's Right to Confront the Witness.

Mr. Brown's inability to confront Burton with his notes was likely fatal to his defense, but it was made even more prejudicial when the court told the jury that it had determined the 302 was "accurate based on the handwritten notes." (RE 216; see supra p.15.) Since Burton testified largely from the 302 (see Tr. 1590-91; RE 218, 220), this instruction was

tantamount to telling the jury that the notes corroborated Burton's testimony. The court's instruction would have been reversible error even if it were only a comment on evidence that was before the jury, but it was more serious than that: it was a comment on evidence that had not been admitted, and that had been concealed from the defense. It is difficult to imagine a more clear and serious infringement of a defendant's right under the Confrontation Clause.

In its post-trial opinion, the court wrote that in giving this instruction, it "felt that it had simply complied with defense counsel's request to inform the jury about its ruling . . . " (RE 181.) But counsel did not request that the court inform the jury of the basis for its ruling, much less about its in camera review of the notes.[17] The court also wrote that after denying Brown's motion for a mistrial, it gave a "curative" instruction sufficient to remove the prejudice. (RE 181-82.) On the contrary, the court did not tell the jury — as requested by counsel (RE 223-24) — that it had made no determination that the notes supported the 302. Nor did the court in any other fashion withdraw its statement that it had determined the 302 "is accurate based on the handwritten notes." The court merely stated that its determination was "totally irrelevant" and was not evidence; that the credibility of a witness is entirely within the province of the jury; and "[t]o the extent that I told you anything contradictory to your job, please ignore that." (RE 224.)

Because the jury did not have the notes or know what they actually contained, it could not do its "job" of determining whether they supported or contradicted the credibility of the witness. The district court's "curative" instruction was wholly inadequate to "remove the taint and adequately abate the damage" caused by its instruction on the content of the notes. United States v. Frascone, 747 F.2d 953, 958 (5th Cir. 1984). This Court has held that judges'

[17] Counsel's suggested instruction, following the court's ruling that he could not see the notes, was very clear: "Mr. Jeffress does not have the notes. I have ruled he is not entitled to the notes." (RE 215.)

comments that appear to express an opinion on a jury question are prejudicial error, notwithstanding curative instructions. Thus, a judge's instruction to disregard an exhibit not admitted at trial but accidentally submitted to the jury was ineffective where the judge also commented that the chart had been "supported by the evidence . . . to a great extent or perhaps completely." United States v. Luffred, 911 F.2d 1011, 1014-15 (5th Cir. 1990); see also United States v. Davis, 496 F.2d 1026, 1031 (5th Cir. 1974) (judge's comment about defendant's competency were "incapable of being cured" by instruction to disregard); Newman v. A.E. Staley Mfg. Co., 648 F.2d 330, 336 (5th Cir. 1981).

III

THE DISTRICT COURT ERRED IN EXCLUDING TESTIMONY RELATING TO A MATERIAL ISSUE IN THE CASE

A. Standard of Review

The district court improperly cut off the defense from another effective avenue of attacking the accuracy of Agent Burton's testimony, by excluding the testimony of C.J. Blache offered to challenge Burton's testimony that his practice was accurately to reflect an interviewee's statements in a Form 302. The court of appeals reviews the district court's exclusion of material evidence for abuse of discretion. Carson v. Polley, 689 F.2d 562, 572 (5th Cir. 1982).

B. The Proffered Testimony of C.J. Blache

C.J. Blache was a witness for the government in the earlier trial of Edwin Edwards relating to riverboat gaming, and was offered by the defense to impeach Burton's claim that his practice was to prepare 302s carefully and accurately. The government objected to the testimony as irrelevant, and counsel made a proffer (RE 127):[18]

> MR. JEFFRESS: In the riverboat trial 302 — it was a witness for the government who was shown his 302 before the trial and went nuts. They had to do another 302. This is one Mr. Burton signed. They had Joe Delpit when they meant Greg Tarver. They had to do another 302 because there were 16 things wrong with the 302. I want to call Mr. Blache to establish that.

The government responded that the 302 had been prepared from the handwritten notes of another agent, and because Burton only signed the 302, it would be misleading to call Blache. The court sustained the objection. Id.

[18] This transcript appears in the Second Supplemental Record.

Defense counsel's proffer[19] demonstrated that Blache's testimony was not, as the district court stated, "purely impeachment." Id. It would have rebutted Agent Burton's testimony that placed in issue his ability to produce accurate 302s of witness interviews. In discussing the procedure for conducting an interview, Agent Burton testified that his signature on a 302 was a certification that it would be an accurate statement of what was said during that particular interview (RE 205-06). Burton went on to state that the second agent present at the interview must make the same certification (id.):

> The other agent will also review and examine that 302. If that person agrees this is what transpired during the course of the interview, this is the statement or statements of the person that was interviewed as to what transpired, then he or she will certify to that 302 by so affixing their initials to the 302.

The prosecution attempted to create an impression that Agent Burton had a perfect track record in preparing and approving 302s. For example, the government elicited the following testimony (Tr. 1538):

> Q: Have you ever been disciplined while in the collection of evidence, including making memorandums of 302 interviews?
>
> A: Never.[20]

The government was fully aware that Burton's testimony had put at issue his ability to produce accurate 302s and that it was a material issue in the case. At a bench conference during Burton's testimony, the prosecutor stated that Agent Burton "has put his character at issue in this trial, whether or not he could write a competent interview." (Tr. at 1561.) The testimony of Mr.

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[19] Although the transcript reflects a statement by counsel that a further, written proffer would be submitted as to Mr. Blache's testimony (RE 128), the oral proffer was the only one actually made.

[20] The prosecution also attempted to create the same impression by eliciting from Burton that he had instructed other FBI agents "on how to record and interview" witnesses. (Tr. 1530.)

Blache would have directly contradicted Burton's testimony regarding the question whether a 302 drafted or approved by Burton was likely a "true and correct statement of what was said during the course of th[e] interview." It would also have directly contradicted the suggestion that Agent Burton's record regarding 302s was unblemished.

C. The Court Erred in Excluding the Testimony.

It is well-established that a defendant is not barred from presenting extrinsic evidence of the conduct of a witness when such testimony is relevant to "a material issue of the case." United States v. Blake, 941 F.2d 334, 338 (5th Cir. 1991); United States v. Opager, 589 F.2d 799, 803 (5th Cir. 1979); United States v. Smith Grading & Paving, Inc., 760 F.2d 527, 531 (4th Cir. 1985). "Such evidence aids the jury in determining" whether a witness engaged in the conduct he or she has testified to on direct. Blake, 941 F.2d at 339. Such evidence also may have the effect of impeaching the witness, but as this Court has held, "[t]o exclude [such evidence] under Rule 608(b) . . . as the government would have us do today, would completely divorce legal proceedings from the truth seeking process." Opager, 589 F.2d at 803. Thus, such evidence "should be admitted . . . where it is introduced to disprove a specific fact material to" a party's case. United States v. Calle, 822 F.2d 1016, 1021 (11th Cir. 1987).

In Carson v. Polley, this Court held that the district court committed reversible error in excluding, under Fed. R. Evid. 608(b), a performance report showing that the defendant police officer had had problems controlling his temper in the past, which would have contradicted the officer's testimony that he did not lose his temper in arresting the plaintiff. See 689 F.2d at 575. Similarly in Opager, the Court held that it was an abuse of discretion for the trial court to exclude, on the basis of Rule 608(b), certain business records that would tend to show that the defendant was not employed at a particular hair salon at the same time as the

government's witness. See 589 F.2d at 801-02. The evidence would have contradicted the witness's testimony that he had seen the defendant engage in drug transactions at that salon. Id.

The testimony of Mr. Blache would have directly contradicted Agent Burton's testimony on the material issue of whether a 302 is a "true and correct statement of what was said during the course of [an] interview." (RE 206.) It would also have contradicted the impression left by Burton's testimony that he had never been "disciplined while . . . making memorandums of 302 interviews." (Tr. 1538.) Blache would have testified that a 302 initialed by Agent Burton in a separate prosecution contained so many factual errors — sixteen errors, according to defense counsel's proffer — that the FBI was required to scrap that 302 and draft an entirely new version.

As the government itself recognized, whether or not Agent Burton was able to produce "competent" 302s was undoubtedly a "material issue of the case" (Blake, 941 F.2d at 338). It was certainly an element of Mr. Brown's defense. Thus, Blache's testimony "should [have been] admitted" because it was "introduced to disprove a fact" (United States v. Costa, 947 F.2d 919, 925 (11th Cir. 1991)) that was material to the case.

IV

THE EVIDENCE ON COUNT 51 WAS INSUFFICIENT TO PROVE MATERIALITY

A. Introduction and Standard of Review

With respect to Count 51, Agent Burton testified that Mr. Brown stated in the May 2 interview that he had gone to Edwin Edwards' office to drop off a form and to discuss "political matters," but that he denied discussing Cascade in that meeting. (Tr. 1656.) As Burton was well aware prior to and during the interview, a surveillance tape (GX 555) reflected that on

December 17, 1996, Brown visited Edwards' office to discuss a political matter, but Edwards brought up the Cascade matter and the two of them discussed it for about 10 minutes. Assuming the evidence was otherwise sufficient to sustain a conviction,[21] it wholly failed to establish that the statement alleged in Count 51 was material, and for that reason a judgment of acquittal should have been granted.

In reviewing a determination regarding sufficiency of the evidence, the court of appeals must determine "whether 'a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt.'" See United States v. Davis, 752 F.2d 963, 968 (5th Cir. 1985). "[T]he appropriate question as to sufficiency of the evidence is to ask merely whether there exists in the record substantial evidence in support of the jury's finding." Id.

B. The Government Failed To Present Proof Of Materiality As To Count 51.

There is no evidence in the record to support a finding of materiality as to Count 51. Brown's answer was immaterial because the alleged question was not whether Mr. Brown discussed Cascade with Edwards (he admitted during the interview that he had done so on several occasions), but only whether such a conversation took place (as Burton already knew) in Edwards' office. The government produced no evidence to support the court's conclusion that the answer to that question was material to any decision of the FBI.

As the Supreme Court noted in United States v. Gaudin, 515 U.S. 506, 509 (1995), "'materiality' is an element of the offense that the Government must prove." When the element of materiality is not fully supported by the evidence at trial, a conviction under 18

[21] In fact, Burton's notes on this subject suggest that Brown indicated only that a "form" he took to Edwards did not relate to Cascade, and nowhere reflect a denial that Cascade was discussed at Edwards' office on any occasion. See p.30, supra.

U.S.C. § 1001 must be reversed, no matter how strong the proof of falsity. See United States v. Ismail, 97 F.3d 50, 62 (4th Cir. 1996) (reversing conviction for false name and social security number on bank signature card because the government "failed to present any evidence as to materiality" to any decision of the FDIC).

The only evidence presented as to materiality was Agent Burton's statement on direct examination that the purpose of the interview was to obtain "testimonial evidence" as to "what his involvement was with David Disiere, Cascade Insurance Company, Foxy Sanders, Mr. Edwards, Mr. Weems, Mr. Disiere, in the settlement of the Cascade matter." (Tr. 1550.) Burton did not address, in any manner, why it was important to the FBI to know whether a conversation about Cascade took place in a particular office, as opposed to anywhere else. Nor did he attempt to explain how an answer to such a question was capable of influencing any decision of the FBI.

In its ruling on Brown's motion for judgment of acquittal on Count 51, the district court addressed the materiality issue only by stating that it "cannot accept Mr. Brown's contention that the focus of Agent Burton's question" was the place of the conversation rather than its substance. (RE 152.) With respect, that was not just Brown's "contention," it was the evidence. Burton conceded that Brown told him he had discussed Cascade and Disiere with Edwards, but testified that Brown stated he had not done so at Edwards' office. (Tr. 1579; see also Tr. 1652-53.) Regardless of whether the jury could fairly find that Brown intentionally lied, the materiality of the question must be judged independently, and the proof failed in that respect.

There is a special reason why a court should be careful to insist on proof of materiality in a prosecution for false unsworn statements to criminal investigators. Two Justices of the Supreme Court have noted the "extraordinary authority Congress, perhaps unwittingly, has conferred on prosecutors to manufacture crimes" under Section 1001. Brogan v. United States,

118 S. Ct. 805, 812 (1998) (Ginsburg and Souter, JJ., concurring). The opinion quotes a passage from a law review note that applies with full force to this case:

> Since agents may often expect a suspect to respond falsely to their questions, the statute is a powerful instrument with which to trap a potential defendant. Investigators need only informally approach the suspect and elicit a false reply and they are assured of a conviction with a harsh penalty even if they are unable to prove the underlying substantive crime.

Id. at 812 n.1 (quoting Note, Fairness in Criminal Investigations Under the Federal False Statement Statute, 77 Colum. L. Rev. 316, 325-26 (1977)).

Justices Ginsburg and Souter noted that the materiality requirement, among other possible defenses, might put something of a brake on the unrestrained and unfair application of the statute. 118 S. Ct. at 815. Although the Court in Brogan rejected the "exculpatory no" exception that most courts had grafted upon the statute, the "core concern persists: '[t]he function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime.'" Id. at 814 (quoting Sherman v. United States, 356 U.S. 369, 372 (1958)). Materiality is an element of an offense under Section 1001 that must be proved beyond a reasonable doubt like any other element. The government failed in its proof here, and the court below erred in denying a judgment of acquittal on Count 51.

V

THE DISTRICT COURT ERRED IN ORDERING AN ANONYMOUS JURY

A. Standard of Review

Although the court of appeals reviews a district court's decision to empanel an anonymous jury for abuse of discretion, United States v. Sanchez, 74 F.3d 562, 564 (5th Cir. 1996), the review is de novo when constitutional questions or other questions of law are

presented. See United States v. Brown, 250 F.3d 907, 913 (5th Cir. 2001). In cases where an anonymous jury is clearly unwarranted, the court need not engage in harmless error analysis. See Sanchez, 74 F.3d at 565.

B. The Court Erred in Empaneling an Anonymous Jury.

The district court's order imposing an anonymous jury (RE 119) was based on this Court's opinion in United States v. Krout, 66 F.3d 1420, 1427 (5th Cir. 1995), which set forth five factors courts to be used in determining whether an anonymous jury is warranted:

> (1) the defendant's involvement in organized crime; (2) the defendant's participation in a group with the capacity to harm jurors; (3) the defendant's past attempts to interfere with the judicial process or witnesses; (4) the potential that, if convicted, the defendant will suffer a lengthy incarceration and substantial monetary penalties; and (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation and harassment.

(RE 120-21.) According to the district court, three of the five factors were present in this case. First, the court found that, because the Superseding Indictment contained allegations of witness tampering, of attempting to bribe a judge, and of "influencing a court-appointed special master," it "suggest[s] the defendants may be willing and able to interfere with the judicial process." (RE 121.) The court also found it persuasive that two of alleged co-conspirators, Bourgeois and Sanders, pleaded guilty to a conspiracy that included witness tampering in connection with the Cascade matter. (Id.) Second, the court found that the defendants faced lengthy sentences if convicted. (RE 122.) And third, the court found that the intense media interest in the case posed a risk of harassment and intimidation of jurors. (Id.)[22]

[22] Various members of the news media sought leave to intervene and for reconsideration of the district court's order to the extent that the order specifically restricted their newsgathering activities. The district court denied the motion for reconsideration, but this Court reversed in

The court below was too quick to find circumstances justifying an anonymous jury, and its error warrants reversal. As this Court has explained, the empanelment of an anonymous jury is a "drastic measure, which should be undertaken only in limited and carefully delineated circumstances." Krout, 66 F.3d at 1427. Because an anonymous jury undercuts a defendant's due process right to the presumption of innocence, depersonalizes the jurors, and interferes with meaningful voir dire, it is a "device of last resort," to be used when there is a "serious threat to juror safety." Id. Moreover, the district court must "base its decision on more than mere allegations or inferences of potential risk." Id.

None of the three reasons given by the district court for empaneling an anonymous jury can withstand serious scrutiny. The court's conclusion that the defendants posed a threat to the integrity of the judicial system, for example, simply finds no support in the record. Even if it is true that the indictment contained "allegations that suggest the defendants may be willing and able to interfere with the judicial process" (RE 121), the court itself recognized that the mere allegation of witness tampering — which consisted of a theory that the defendants induced a contingency fee lawyer to settle a case rather than file it — was insufficient to support the imposition of an anonymous jury. See RE 120-21; see generally Krout, 66 F.3d at 1427 (court must "base its decision on more than mere allegations or inferences of potential risk"). Likewise, the fact that two co-defendants pleaded guilty could give rise to nothing more than an "inference[] of potential risk." Finally, the court's reliance on the fact that Edwards had been convicted of interfering with state licensing of riverboat casinos fails to support anonymity. Equating such conduct with disregard of "the judicial process" would permit anonymous juries in

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part, holding that the district court's restraint on the press swept too broadly. See Brown, 250 F.3d at 917-18. The opinion in that appeal did not address "the substantive merit of the anonymous jury order." Id. at 911.

all official corruption cases. The exceptions would swallow the rule, and anonymous juries would no longer be a "drastic measure" but an everyday occurrence.

The court's second reason — that the defendants faced lengthy sentences if convicted — is similarly unpersuasive. It is difficult to see how Mr. Brown's potential sentence could affect the integrity of the system or render him a "serious threat to juror safety." Krout, 66 F.3d at 1427. Even the court itself appeared to be unpersuaded by this factor. Unlike every case in which this court had previously upheld an anonymous jury, no defendant here was deemed a sufficient risk to be incarcerated pretrial or even to post a substantial release bond.

In fact, only the court's third reason, the potential for juror harassment by the news media, was plausible. The public interest in this case was certainly high and the names of jurors would likely have been reported in the media. As this Court has stated, however, "[n]ot all celebrated trials merit an anonymous jury." United States v. Branch, 91 F.3d 699, 724 (5th Cir. 1996). The Court in Branch upheld the use of an anonymous jury only because the Branch Davidian case "aroused deep passions" that could have had "potentially disruptive effects . . . on the trial in general and on the jurors in particular." Id. This case does not come close to being in that category. Charging that a potential civil lawsuit was settled for less than it was worth is hardly the kind of case likely to stir the "deep passions" of the Waco disaster. The extensive publicity that the case received is attributable solely to the fact that the defendants include former Governor Edwards and former Insurance Commissioner Brown. Many public officials in Louisiana and elsewhere have been tried on criminal charges generating extensive publicity without the "drastic measure" of an anonymous jury, and nothing about this case warranted the prejudice to defendants that is the inevitable product of such a measure.

To the extent media exposure of jurors' identities was a valid concern, the district court could have cured it, as defendants suggested below (R. 0777), by withholding the jurors' names and employers from the public record and ordering the parties and counsel not to disclose that information to the news media. 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." Sanchez, 74 F.3d at 565. 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) (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 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, and that measure — not an anonymous jury — should have been taken. The Court's ruling was erroneous and requires a new trial.

VI

THE ELECTRONIC SURVEILLANCE ON EDWARDS' HOME TELEPHONE AND OFFICE WERE UNLAWFUL AND THE DEFENDANTS' MOTION FOR A FRANKS HEARING SHOULD HAVE BEEN GRANTED

A. Introduction and Standard of Review

The evidence upon which the government relied at trial to prove the falsity of Brown's alleged statements consisted primarily of tapes of intercepted conversations between Brown and Edwards. One of these conversations (the subject of Count 51) was recorded on a microphone installed in Edwards' law office pursuant to authorization granted by Judge Parker

on December 16, 1996. The remaining conversations were recorded on a wiretap of Edwards' home telephone authorized by Judge Parker on October 18, 1996. (See RE 130.)

The defendants jointly moved to suppress the fruits of this surveillance based upon (1) misrepresentations and material omissions in the affidavits supporting the applications under Title III, and (2) violation of the statutory duty to minimize interceptions, 18 U.S.C. § 2515. (R. 524.) The first challenge was identical to the motion filed by defendants in United States v. Edwards, No. 98-165-B-M2 (M.D. La.), and was denied by the district court based upon (and incorporating by reference) the ruling of Judge Polozola in that case. (RE 134.) The second ground presented issues unique to this case and was the subject of a lengthy opinion by the district court, also denying the motion without a Franks hearing. (RE 129-45.) This Court reviews de novo the denial of a Franks hearing. United States v. Bankston, 182 F.3d 296, 305 (5th Cir. 1999).

Because the issues relating to the government's conduct in obtaining the surveillance warrants was extensively briefed below and is a primary subject of appeals in the related Edwards case (No. 01-30036), those issues will be discussed only briefly here. We then discuss, at greater length, the manner in which the government conducted the wiretap so as to listen in on conversations by Edwards with a judge, a U.S. Attorney, an Insurance Commissioner, and two lawyers working with Edwards on a legal matter, all totally unrelated to any scheme mentioned in the wiretap application, and all in wholesale violation of the government's duties to minimize intrusions on privacy under 18 U.S.C. § 2515.

B. A *Franks* Hearing Was Required On The Question Of Probable Cause and Government Misconduct.

Title III and the Fourth Amendment protect privacy by placing federal judges in the position of deciding whether the government has "probable cause" to justify the intrusion

before wiretapping or other forms of surveillance may commence. See U.S. Const. amend. IV; 18 U.S.C. § 2518(3). In this case, government agents embarked on a course of expansive wire, oral, electronic and video surveillance through circumvention of the judicial gatekeeping function. Specifically, government agents procured judicial authorization based upon a story told by a "confidential witness" whom government agents knew at the time to be a notorious liar and on "interpretations" of consensual recordings, by supplying the court with affidavits that portrayed the witness as reliable and depicted "statements" obtained via consensual recordings not as "interpretations" but as cold, hard fact. This demonstrated circumvention of the judicial function to determine probable cause warranted outright suppression of the fruits of the illegal surveillance or, at a minimum, a Franks hearing to determine whether the government intentionally or recklessly misled the court.

It is undisputed here that the government agents and prosecutor knew that their source for all of the allegations of "criminality" said to justify the Title III surveillance was among "the most manipulative con men probably on the face of the world" and a person whose word had to be treated as a "lie" unless independently corroborated. See Exh. 2, In re Graham, Sept. 16, 1996, Tr. at 42, 30.[23] But the judges whose duty it was to make a credibility determination in respect to the Title III application were never told that. It is further clear that the government agents provided the court with their "interpretations" of recorded conversations between the manipulative con man and an associate of Edwards, but did not tell the court that it was receiving a recitation of what the conversations might mean as opposed to the actual substance of the words used. Thus, for example, when the government agent swore in his affidavit that an audio tape revealed an admission by the associate of Edwards that Edwards was

[23] Exhibits to the suppression motion are contained in a separate, bound volume in the record.

receiving a pay-off, the judge would rightfully have believed that the recording contained such an admission. Instead, the tape reveals an outright denial of that fact. Exh. 7, Govt. Tr. May 8, 1996 at 3 ("[Edwards] doesn't get any [money]. I get it all.").

In denying the motion to suppress, the district court found that the interpretations of the consensual recordings that the government submitted in support of its application were "plausible." (RE 135.) The substantial record compiled by the defendants strongly refutes that conclusion, but that is, in the first instance, beside the point. It was the function of the court that was asked to issue the Title III orders to make a credibility determination — both with respect to the "confidential witness" and in regard to the "plausibility" of the government's conclusory interpretations of the consensual recordings — before authorizing surveillance to proceed. Here, the agents effectively usurped the court's ability to perform its vital role by withholding critical facts and, indeed, by concealing the very need to make such assessments. Such conduct amounts to a per se violation of the Fourth Amendment and Title III. See Illinois v. Gates, 462 U.S. 213, 241-42 (1983); Watts v. Kroczynski, 636 F. Supp. 792, 798 (W.D. La. 1986).

Moreover, even if this conduct did not justify outright suppression, the defendants more than satisfied their burden for a hearing under Franks v. Delaware, 438 U.S. 154 (1978). Mere "plausibility" of the government's representations to a court in support of a Title III application is not a justification to deny a hearing under Franks. Where, as here, the defendants produced substantial evidence of intentional or reckless falsehoods and material omissions with respect to virtually every paragraph of the affidavit in support of Title III surveillance, see R. 0430-0524, the defendants were entitled to a hearing, after which the district court could make findings of fact in regard to plausibility. The denial of the Franks hearing on this record constituted legal error.

C. The Government Engaged In Clear Violations Of The Statutory Duty To Minimize Intrusion.

A Title III authorization is not a license for the government to conduct an investigatory fishing expedition. Federal law "requir[es] electronic surveillance to 'be conducted in such a way as to minimize the interception of communications not otherwise subject to interception.'" Bankston, 182 F. 3d at 307. The government's efforts to minimize interception of non-pertinent conversations "must be 'objectively reasonable' in light of the circumstances confronting the interceptor." Id.; Scott v. United States, 436 U.S. 128, 136-43 (1978). This Court has set forth three factors to consider in deciding whether the government's minimization efforts meet this standard: "(1) the 'nature and scope of the criminal enterprise under investigation;' (2) the 'Government's reasonable inferences of the character of a conversation from the parties to it;' and (3) the 'extent of judicial supervision.'" Bankston, 182 F.3d at 307 (quoting United States v. Hyde, 574 F.2d 856, 869 (5th Cir. 1978)). None of these factors support the government's conduct in this case.

1. The Intercepted Conversations Had No Possible Relationship to the Scope of the Investigation For Which Wiretapping Was Authorized.

The government began tapping Edwards' telephone on Friday, October 18, 1996. The first Cascade-related conversation (a call by Edwards to Insurance Duty Judge Sanders) was intercepted Monday, October 21. (GX 501.) Of the next 14 Cascade- or Sanders-related conversations, three were with the United States Attorney or his office (GX 502, 506, 509); two were with attorney Ron Weems concerning their mutual client David Disiere (GX 504, 505); eight were with Judge Sanders or his office (GX 507, 508, 510, 511, 512, 513, 514, 515); and one was with Commissioner Brown (GX 503). No effort was made to minimize interception of any of these calls. The nature and scope of the criminal investigation disclosed to the court at that time provided no justification whatever to eavesdrop on Edwards' conversations relating to

legal work on insurance matters, much less conversations with a judge, a U.S. Attorney and an Insurance Commissioner.

The government sought permission to tap Edwards' phones based on allegations of two distinct bribery (or extortion) schemes. The primary allegation was that Edwards was receiving pay-offs from Texas businessmen who wanted to build and operate a juvenile detention facility in Jena, Louisiana. The named interceptees in connection with this alleged scheme were Edwards, his long-time associate Cecil Brown, Kenneth Pitre, and Richard L. Stalder (then Secretary of Louisiana's Department of Corrections). The secondary allegation was that Edwards had received bribes from other Texas businessmen who sought approval to develop waste disposal facilities in Louisiana. Guy Thompson, one of the owners of the Texas business, was a named interceptee in connection with this alleged scheme, in addition to Edwards, Cecil Brown, and Pitre.

Nothing about these two alleged schemes supported eavesdropping on conversations such as those involved here. Bribery allegations like these are, by their very nature, confined in scope to givers, receivers and go-betweens. Unlike a narcotics distribution conspiracy, where people from all walks of life can potentially be involved, see, e.g., United States v. Chavez, 533 F.2d 491, 493-94 (9th Cir. 1976), the universe of persons who can even potentially be complicit in the bribery necessarily is circumscribed by the purpose of the bribe. In the context of the allegations here, governmental officials who could make decisions with respect to juvenile detention facility operation or waste management projects would fall within that circle. Insurance commissioners, state insurance duty judges and U.S. Attorneys plainly would not.

The Title III Order itself explicitly limited its scope to "communications . . . concerning the above described offenses." Exh. 10-C, Authorization Order, Oct. 18, 1996 at 3. Moreover, the government agent who submitted the affidavit in support of the order swore that the "interception will be suspended immediately when it is established . . . that none of the subjects of the subject of this investigation . . . are participants in the conversations." Exh. 10-B, Santini Aff., Oct. 18, 1996 at ¶ 161. Yet the government agents flagrantly and repeatedly violated these limitations as they intercepted, in their entirety, communications that had nothing whatsoever to do with the matters under investigation.

The district court noted that the government is given somewhat greater latitude "during the initial phase of the surveillance" to monitor calls involving "offenses not specified in the order" (RE 137), but that leeway is not unbounded. It was not objectively reasonable for the government agents to intercept, in their entirety, communications between Edwards and persons who had no realistic possibility of being implicated in the offenses for which the wiretaps were authorized. Nor is it reasonable to believe, as the district court's opinion suggests, that the government agents monitored conversations between Edwards and Sanders, for example, for the purpose of gathering a "complete picture" of the schemes that were under investigation. Rather, the monitoring of Edwards' conversations with Sanders, Weems and Brown about insurance matters that the government clearly knew were beyond the bounds of anything authorized by the court were nothing short of a "general search" which Title III and the Fourth Amendment forbid.

2. The Character of the Cascade-Related Conversations Did Not Support An Inferred Connection To The Investigation.

Apart from the fact that the parties to the conversations (other than Edwards) were in no way linked to the matters under investigation, the subject matter of the conversations clearly related to matters that the Title III Order gave the agents no right to hear. All of the

conversations were about insurance-related issues that were not under investigation and were not otherwise inherently criminal in nature. Many of the conversations also involved attorney-client discussions that the government agents knew they were not supposed to intercept, see 7 The Department of Justice Manual, ¶ 9-7A.000, at p. 9-226.17, particularly where the subject matter of the privileged conversation was so plainly beyond the scope of the Order.

The first three intercepted calls relating to Sanders or Cascade occurred on October 21, 1996. (GX 501, 502, 503.) In all three conversations, every participant was identified by name within seconds, and in one the state judge explicitly told Edwards he wanted to "talk to [him] about some of the matters you represent me in." (GX 501 at 2.) None of the participants had ever surfaced in connection with the waste disposal and juvenile detention facility investigation — nor could anyone reasonably suspect that the Insurance Commissioner, Insurance Duty Judge and U.S. Attorney were involved in either of the alleged schemes under investigation.

The next day, the government intercepted a lengthy conversation between Edwards and Ron Weems — whose name, like the others, had never come up during the waste disposal or juvenile detention facility investigations. Within the first minute, Weems identified himself, indicated he was calling about "the hearing for tomorrow" before Judge Saia, and mentioned "our mutual client." (GX 504.) This introduction made clear that the conversation was not related to the matters under investigation, but the government continued to eavesdrop for another 8 transcribed pages. Later that day, the government intercepted another call to the U.S. Attorney's office and another lengthy call to Judge Sanders. (GX 506, 507.) Over the next two days, agents intercepted in full several additional calls from Judge Sanders and one lengthy call from the sitting U.S. Attorney. (GX 508-515.) In each instance, every participant was identified

by name within seconds, and in the call to the U.S. Attorney, Edwards indicated that he represented Sanders "as a lawyer" (GX 509 at 2) and was calling about subpoenas that had been issued concerning an investigation of an insurance matter. The character of these calls clearly signaled to the government agents that these parties would not discuss any matters under investigation. Nonetheless, the eavesdropping continued.

In ruling that the interception was "objectively reasonable," the district court downplayed the lawyer-client aspects of the intercepted calls as well as the fact that the calls were unrelated to the schemes under investigation. (RE 139). While it may be true that "it would be unreasonable to expect agents to ignore completely any call to an attorney [because] doctors and lawyers have been known to commit crimes," id. (quoting Hyde, 574 F.2d at 870) it was entirely reasonable to expect the government to minimize these calls involving these lawyers regarding legal matters that were wholly unrelated to the criminal investigation. Likewise, the fact that investigators "may intercept calls involving persons not named in the wiretap application in order to determine the identity of all participants in the alleged crime" (RE 137) does not serve to justify continued monitoring of the entirety of every conversation with every individual even after it has been determined that they are not associated with the crimes under investigation. The district court's reasoning would give government agents carte blanche to monitor every conversation about every topic, privileged or not, even where the objective facts show that the participants and topics of conversation are irrelevant to the investigation that gave rise to the Title III authorization in the first instance. Title III and the Fourth Amendment do not permit such intrusions.

The scope of the interception in this case reveals that the government was doing precisely what Title III and the Fourth Amendment forbid: using a facially plausible allegation

of criminality as a basis to wiretap with the hope of uncovering evidence of some crime, any crime. The government believed that Edwards was a criminal and, thus, intercepted the entirety of every conversation that had even a remote possibility of providing evidence of criminal activity, even though the topics of conversation had nothing to do with waste management or juvenile detention projects that were purportedly under investigation. Wholly apart from the Cascade-related calls, the government intercepted dozens of calls by or to Edwards, on personal, legal and business matters. See R. 460-62.

The government did not meet its statutory and constitutional burden by minimizing a few calls (often for only a few seconds at a time) that had no meaningful possibility of revealing evidence of Edwards' business, financial and professional dealings. The test is whether the government did an objectively reasonable job of limiting interception to calls relevant to the crimes under investigation. It is clear that the government made no bona fide attempt to do so in this case. Because the "character of the [intercepted] conversation[s]" (Bankston, 182 F.3d at 307) clearly evidenced no connection to the juvenile detention or waste disposal schemes for which the wiretaps were authorized, the district court erred in denying the motion to suppress.

3. The Extent of Judicial Supervision Did Not Justify The Interception.

Finally, the district court's reliance on the fact that Judge Parker received 10-day reports about the surveillance as a justification for the government's lack of effort to minimize the interception is misplaced. In considering this factor, the Court must keep in mind that the minimization requirement exists because, without pre-imposed limits, a warrant for a search and seizure of private communications becomes the equivalent of the "general warrants" which prompted the Fourth Amendment and partly motivated our Declaration of Independence. See

Berger v. New York, 388 U.S. 41, 58 (1967). The post hoc submission of a 10-day report that merely includes names of non-suspects whose conversations were monitored, or scanty descriptions of conversations that fall outside the scope of the investigation, cannot cure a general warrant or legitimate a search that exceeded a warrant's particularized scope. There is no room under Title III or the Fourth Amendment for what the district court called "implicit" judicial permission to search. Nor is there any indication that Judge Parker explicitly authorized the government agents to extend the scope of the Title III order to cover Cascade-related conversation until several months of unauthorized surveillance had already occurred. (See RE 142.) Accordingly, the district court erred in denying the defendants' motion to suppress the evidence obtained by the government as the result of the illegal search.

CONCLUSION

For the foregoing reasons, this Court should reverse the conviction, enter a judgment of acquittal on Count 51, order a new trial on the remaining four counts, and order that the fruits of unlawful surveillance be suppressed.

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