UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-30173

UNITED STATES OF AMERICA,
Appellee

v.

JAMES HARVEY BROWN, also known as Jim Brown,
Defendant-Appellant

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

APPELLANT'S PETITION FOR PANEL REHEARING

Appellant James Harvey Brown hereby petitions pursuant to Rule 40, FRAP, for rehearing of the decision entered August 23, 2002. Appellant is simultaneously filing a petition for rehearing en banc, and a copy of the panel's opinion is attached to that petition. See 5th Cir. Rule 40.1.

The issues on which rehearing is sought are limited to those concerning Mr. Brown's inability to see Agent Burton's contemporaneous notes, or to confront him with them, or to ask him on cross-examination whether the notes contained the statements in his 302, or to confront the trial Court's instruction to the jury that she

had determined the 302 "is accurate based on the handwritten notes," or – through these methods – to help prove his defense that Agent Burton, in his 302, twisted and misrepresented what Mr. Brown actually said in the interview. We respectfully submit that the Court overlooked or misapprehended the degree to which the notes differ from the 302, the manner in which those differences would have assisted the defense, and certain legal principles regarding Rule 16(a)(1)(A) and the Confrontation Clause.

1. **The Confrontation Clause**

The Court's conclusion that Mr. Brown's inability to cross-examine Agent Burton about the content of his contemporaneous notes, or to confront him with those notes, did not violate the Confrontation Clause overlooks facts in the record that are difficult to reconcile with that conclusion. First, Agent Burton on direct examination told the jury that he "recorded the interview" by taking contemporaneous notes. (RE 204, 206.) The Court's opinion does not mention that fact. It was obviously critical for Brown to impeach that testimony, but to do so required confronting Burton with the notes described. If there is a lawful basis for a trial court to allow the government to bolster its witness's credibility by reference to the fact that he took contemporaneous notes, but to deny the defendant the ability to confront the witness with those notes, the Court's opinion does not say what that basis is.

Second, when counsel asked Burton whether a particularly incriminating statement attributed to Brown in his 302 and repeated in his testimony was reflected in Burton's contemporaneous notes, the true answer – had the trial court not sustained the government's objection – would have been "no, it is not." (RE 226-27.) The Court's opinion does not mention that fact. Nor does it explain how, consistent with the Confrontation Clause, a defendant may lawfully be precluded from eliciting such highly exculpatory testimony from the government's key witness. We respectfully submit that the Court's conclusion cannot be squared with Wilkerson v. Cain, 233 F.3d 886 (5th Cir. 2000), or United States v. Landerman, 109 F.3d 1053 (5th Cir. 1997), where other panels of this Court found Confrontation Clause violations based upon much less egregious limitations on cross-examination. Neither case is cited in the Court's opinion.

Third, the Court's statement that the notes are "virtually identical" to the 302 also overlooks the clear difference between the notes and the 302 on the statement charged in Count 51. Attached to this Petition as Appendix A is a side-by side comparison of the 302 and the notes demonstrating that the statement alleged in Count 51, placed by Agent Burton in his 302, does not appear in the notes. Like the other discrepancies described herein and in our briefs, the entries corresponding to Count 51 help demonstrate how Burton improved the

prosecution's case by his 302, in ways difficult to square with what he wrote down (and failed to write down) during the interview.

Fourth, the notes do not reflect at all the key statement Burton claimed Brown made as charged in Count 44. Fifth, the notes actually contradict the key statement Burton claimed Brown made in Count 46. See Brief for Appellant, pp. 42-43. The Court's opinion overlooks both of these facts. That the trial judge granted a post-trial judgment of acquittal on Counts 44 and 46 is beside the point: the heart of Brown's defense, as the jury was explicitly told in opening statement, was that Burton wrote his 302 to set up a prosecution for false statements. Brown obviously had the right to show the jury that the 302 varied from the contemporaneous notes, whether on a particular count of conviction or not. He was denied that right.

Sixth, a key controversy at trial was whether Brown denied discussing "settlement issues" with others; the phrase is used six times in the indictment (Counts 47, 48, 50) and four times in Burton's 302 (RE 231, 233, 235.) The phrase does not appear at all in the notes. The Court's opinion does not mention this fact. We respectfully submit that this and all the other discrepancies described above do not fairly permit a description of the notes as "virtually identical [to the] 302." Slip op. at 20.

Seventh, in holding any error by the district court was harmless, the Court stated with respect to Count 50 that "Brown's defense was not that he never made this statement to Agent Burton," but rather that his answer to Burton's question was true. Slip op. at 25. Respectfully, that is simply not so. Brown's central defense, as the Court accurately noted at page 14 of the opinion, was that "Burton manufactured the false statement charges against him." The defense argued that Burton "twisted and misrepresented practically everything Jim Brown said in that interview in an effort to prosecute this offense called false statements." Tr. 477. See also Tr. 3043 ("[H]e got it wrong, and he got it bad wrong in some instances"); Tr. 3047 ("[Burton] just got it wrong. He just got it wrong.")

In his trial testimony, Brown did not exempt Count 50 from his theory of defense, as the Court's opinion seems to suggest. Brown was not asked – either by the defense or the prosecution – whether he made the statement attributed to him by Burton.[1] He was asked, on direct examination, whether he had discussed the "settlement issues" with Edwin Edwards, and testified he had not. (Tr. 2550.) He was then asked about the allegation that he had denied – as Burton claimed – discussing with Edwards "what it would take to settle the matter," and his answer

[1] Because Brown was testifying about a 30-minute unrecorded interview that occurred over 3 years before trial, it is not surprising that to a great extent he was unable to say exactly what was said in the interview. Burton had the same problem: without reading from the indictment or his 302, he was largely unable to testify about exactly what was said in the interview. See, e.g., Tr. 1591, 1618, 1619, 1628, 1642.)

directly contradicted Burton' testimony: "Mr. Burton's focus was the settlement, the final settlement. That's how I always understood Mr. Burton's questions to be directed to me for, the final settlement." (Id.)

The Court acknowledged that Burton's notes do not reflect the statements charged in Count 50; only his 302 does so. With respect, the conclusion that depriving Mr. Brown of the ability to impeach Burton by those notes was harmless misapprehends the record and is a misapplication of the harmless error doctrine.

2. Rule 16(a)(1)(A)

The Court's opinion in this case is the first ever to hold that Rule 16(a)(1)(A)'s command to disclose "any written record" of an oral statement of the defendant does not reach contemporaneous notes of the interviewing agent, if the court finds "the content of those notes has been accurately captured in a typewritten report" that is disclosed. Slip op. at 8. Thus, what one court has found to be an "unambiguous and unequivocal command" of the 1991 amendment to Rule 16(a)(1)(A), United States v. Carucci, 183 F.R.D. 614, 615 (SNDY 1999), this Court finds to be a highly equivocal rule requiring a Brady – type analysis, presumably including in camera review of notes by a district judge and line-by-line comparison with a 302, before the question of producibility may be determined. And if this Court's test for nondisclosure – that "the content of those notes have

been accurately captured in a typewritten report" – is satisfied where the contemporaneous notes uncontrovertibly do not reflect at all numerous statements contained in the typewritten report, that are directly at issue in the indictment, then the test will surely prove troubling to district courts attempting to apply it.

The Court relied upon United States v. Muhammad, 120 F.3d 688, 699 (7th Cir. 1997), a decision which did not even cite Rule 16(a)(1)(A), much less the 1991 amendment to that rule, and instead cited pre-1991 decisions under the Jencks Act and the confrontation clause. As amended in 1991,[2] Rule 16 does not condition the right to production upon materiality, or exculpatory value, or any other judgment by a court about the content of the writing: it mandates disclosure of "any written record" of a defendant's oral statement in the possession of the government. This Court's conclusion that the purpose of the 1991 amendment was "merely to require full disclosure of every statement of the defendant, regardless of whether the government intended to use the statement at trial" (emphasis in original) is contradicted by the clear language of the amended Rule. Under the amended rule, disclosure of oral statements not captured in a written record

[2] The Court's discussion in footnote 18 of the slip opinion reflects a clear misapprehension of appellant's argument. We did not contend that the 1991 amendment to Rule 16(a)(1)(A) "bolsters" the argument that Burton's notes were required to be disclosed. Rather, Mr. Brown argued that the 1991 amendment for the first time required production of such "written records" of a defendant's statement. (See Brief of Appellant at 28: "There was no such right in the prior rule, whether or not the government intended to use the statement at trial.")

continues to be conditioned on the government's intent to use the statement at trial. 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.

We respectfully submit that the Court's interpretation of the amended Rule 16(a)(1)(A) is at odds with its plain language, is based on a conclusion about its "purpose" that cannot be squared with the Rule, and directly conflicts with the Third Circuit's decision in United States v. Molina-Guerara, 96 F.3d 698 (3rd Cir. 1996), where the government actually conceded the issue and the court agreed.

3. Jencks Act

With regard to the Jencks Act, this Court did not actually decide whether a testifying agent's contemporaneous notes of the interview to which he testifies are producible under the Act. It did, however, express the view that a prior decision[3] holding that a failure to preserve interview notes does not violate the Jencks Act "likely extends to the present case..." (Slip op. at 13.) That conclusion will undoubtedly encourage the government to withhold agent's notes, and district courts to refuse requests for production, in criminal cases throughout this Circuit, and thus foster troublesome litigation in the district courts and claims of reversible error in this Court. The Court's statement also directly conflicts with the Martin

[3] United States v. Martin, 565 F.2d 362 (5th Cir. 1978).

court's own statement that where notes are "in the possession of the government" at the time of trial as specified in the Jencks Act, 18 U.S.C. §3500(b), "a defendant is entitled to a witness's notes after he has testified, so that the notes may be used in cross-examination." 565 F.2d at 363.

Whether Brown was entitled to Agent Burton's notes under the Jencks Act is a particularly important issue because once a Jencks Act violation is established, appellate courts considering a claim by the government of harmless error "should be hesitant to take it upon themselves to decide that the defense could not have effectively utilized a producible statement." United States v. Beasley, 576 F.2d 626, 629 (5th Cir. 1978). Unlike the Brady rule, and unlike this panel's interpretation of Rule 16(a)(1)(A) in this case, the Jencks Act requires production of a statement regardless of whether the Court feels there is any "discrepancy" between the statement and the testimony. Id.; accord, United States v. Rosario-Perolta, 175 F.3d 48, 53 (1st Cir. 1999).

4. The Trial Court's Instruction

With regard to the trial court's instruction, this Court's opinion states that it "accurately described the disclosure process, as Brown requested, and did not vouch for the accuracy of the 302." (Slip op. at 28-29.) The record reflects absolutely no request by Brown for the Court to "describe the disclosure process."

More important, the question is not whether the trial judge "vouch[ed] for the accuracy of the 302." What the court did was vouch for the identity between the notes and the 302, by saying she had determined the 302 "was accurate based on the handwritten notes." Since Brown was never allowed to see the notes or confront Burton with them, the Court's instruction squarely violated the Confrontation Clause. The trial court's "curative" instruction was not curative at all: it simply told the jury that her determination was "irrelevant" and that the jury was the judge of the facts. With respect, the Court in its opinion overlooks the inability of the jury, which was deprived of the facts, to perform that duty. And it upholds a criminal conviction in a case where the defendant was deprived of his Constitutional right to have the jury make that decision.

Conclusion

For the reasons stated herein, the Court should reconsider its decision of April 23, 2002, and reverse the convictions.

Respectfully submitted,

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