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 REHEARING EN BANC

Appellant James Harvey Brown hereby petitions pursuant to Rule 35, FRAP, for rehearing en banc of the panel decision filed August 23, 2002.

Issues Presented For En Banc Rehearing

1. Whether a defendant is denied his right under the Confrontation Clause of the Sixth Amendment when

   - he is denied access to the agent's contemporaneous notes of the oral statements the agent accuses him of making;

- the agent testifies he recorded the interview by taking those notes;
- the defendant is prohibited from asking the agent whether the notes contain the statements the agent accuses him of making; and
- the judge instructs the jury that she has determined that the undisclosed notes support the agent's typewritten 302 and, in effect, his testimony.

2. Whether the command of Rule 16(a)(1)(A), FRCrimP, that the government disclose "any written record" of the defendant's relevant statements to law enforcement agents, permits the government to refuse disclosure of an FBI agent's contemporaneous notes of defendant's statements.

3. Whether, for purposes of disclosure under Rule 16(a)(1)(A), Rule 16(a)(1)(C), the Jencks Act, the Confrontation Clause, and the Brady rule, and for purposes of the harmless error doctrine, contemporaneous notes of an FBI agent are "substantially identical" to the agent's 302 memorandum when the notes do not contain at all several of the key statements the defendant is charged with making, and the 302 "improves" the notes in favor of the prosecution on each and every count of conviction.

4. Whether, under the Jencks Act, the defendant is entitled to an agent's contemporaneous notes of the defendant's statement when the agent is called as a government witness at trial.

Course Of Proceedings And Disposition Of The Case

Appellant was convicted under 18 U.S.C. §1001 on five counts of false statements to an FBI agent in an unsworn, unrecorded interview. He was acquitted on all charges of misconduct in connection with the subject matter on which he was interviewed. A panel of this Court affirmed the convictions in all respects in an opinion filed August 23, 2002. (Appendix A.)

Statement Of Facts

Jim Brown served as Louisiana's elected Insurance Commissioner from 1991 until his conviction in October 2000. In the fall of 1996, the government installed wiretaps on the telephone of former Governor Edwin Edwards and a bug in his law office. Although the basis for the wiretaps had nothing to do with Jim Brown or insurance companies, the FBI recorded numerous conversations between Edwards and others, including Jim Brown, concerning attempts to resolve a controversy between Edwards' client David Disiere on the one hand and the "insurance duty judge," A. Foster Sanders, and his appointees on the other. The controversy was the subject of a settlement between Disiere and the court-appointed Receiver of Cascade Insurance Company in December 1996. In 1999, the government brought an indictment containing numerous counts charging, in essence, that the settlement was "fixed" and was a "sham." The jury acquitted Mr.

Brown, as well as his codefendants Edwin Edwards and attorney Ron Weems, of all such charges.

In May of 1997, FBI agent Harry Burton interviewed Brown regarding the Cascade settlement. Burton was familiar with the wiretap tapes but did not inform Brown of them. Most of Burton's questions concerned what he already knew from the tapes – including what Brown had discussed with whom, when and where. Burton took 11 pages of detailed notes during the 45-minute interview. Three days later he prepared a typewritten Form 302 memorandum purporting to summarize the interview. That 302 formed the basis of 13 false statement charges against Brown.

Brown's defense at trial was that Burton manufactured the false statement charges by "twist[ing] and misrepresent[ing] practically everything Jim Brown said in that interview." Tr. 477. To support that defense, Brown sought disclosure of Burton's contemporaneous notes under Rule 16(a)(1)(A), Rule 16 (a)(1)(C), the Jencks Act, and the Brady doctrine. Although the government produced to codefendant Weems the contemporaneous notes of Burton's interview of Weems, it refused to disclose the notes of Brown's interview, and the district court denied requests for disclosure pretrial, during trial, and after trial. [1]

[1] The notes were disclosed to the defense by order of this Court on appeal.

Burton was the sole witness called by the prosecution regarding the interview, and (to rebut Brown's argument that the interview was not tape-recorded) he claimed on direct examination that he had "recorded the interview" by taking contemporaneous notes. (RE 204, 206). The trial judge nevertheless sustained objections to all questions by Brown asking whether the notes reflected statements recited in the 302 and charged in the indictment. When Brown requested the Court to advise the jury that Mr. Brown did not have the notes,[2] the Court told the jury inter alia that it had determined the 302 was "accurate based on the handwritten notes" (RE 216-17). A motion for mistrial based on this instruction was denied, and when asked to give a corrective instruction the Court said only that its determination was "irrelevant" because it was the jury's province to determine credibility of the witness. (RE 224.)

All counts upon which Mr. Brown was ultimately convicted involved alleged denials by him of having discussed "settlement issues" or "what it would take to settle the matter" with Edwards, Weems, or anyone else, or (in Count 55) a denial of discussing "specifics of a settlement" with Judge Sanders. In contrast to the 302, Burton's handwritten notes reflect no denial of discussing "settlement

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

issues" or "what it would take to settle the matter," and the notes reflect a denial of discussing with Sanders "specifics of the settlement" -- corroborating Brown's trial testimony that Burton asked him only about the actual settlement. The evidence established that Brown did not participate in, did not see, and did not discuss with Sanders the settlement reached by the parties.

Argument

There has never been a reported case when a defendant accused of false statements was denied access to the FBI's contemporaneous record of the alleged false statements, much less a case where the defendant was denied the opportunity to confront the testifying agent with his own notes, or to ask him any questions about the content of those notes. The panel has decided that Jim Brown received a fair trial under these circumstances.

In reaching its conclusion, the panel announced three rulings that are of exceptional importance to the administration of criminal justice in this Circuit. En banc reconsideration of two of those issues is necessary to maintain uniformity of this Court's decisions; the third issue (interpretation of Rule 16(a)(1)(A) as amended) is an issue of first impression in this Circuit, but the panel's decision creates a rule that is contrary to conclusions of district courts that have considered the matter, that is contrary to the plain meaning of the amended Rule, and that is

certain to cause confusion and complicate criminal discovery in district courts throughout this Circuit.

Throughout the panel's discussion of the issues, there are statements that the undisclosed notes and the disclosed 302 are "virtually identical," or "completely consistent." We recognize that even if wrong, a panel's conclusion on a factual matter does not ordinarily warrant en banc review. But if the facts of this case – both those published in the panel's opinion, and others it does not recite – permit a court to make such a finding, then the words "virtually identical" and "completely consistent" have little meaning, as explained below. The parties, the courts and the public accordingly will surely be confused as to when, if ever, a defendant is entitled to notes containing material discrepancies from the 302.

If Mr. Brown had been able to confront Burton with his contemporaneous notes, he would have established at least the following:

- The statement alleged in Count 44 and contained in the 302 -- that Brown was only "vaguely aware" of Cascade Insurance Company – is nowhere reflected in the notes.

- The statement alleged in Count 46 and contained in the 302 is contradicted by the notes, which state – exactly as Brown testified at trial

– that he denied having seen a draft RICO suit, not having been aware of it.

- The statements alleged in Count 50 and contained in the 302 – that Brown denied discussing with Edwards "settlement issues" or "what it would take to settle the case" – are reflected nowhere in the notes.

- The key statement contained in the 302 regarding Count 51 – that a conversation in Edwards' office "related to political matters" and "had nothing to do with Cascade Insurance Company or David Disiere" – is not contained in the notes.

- The key phrase "settlement issues," contained four times in the 302 and six times in the indictment (Counts 47, 48 and 50), appears nowhere in the notes.

- While Count 55 of the indictment alleges that Brown denied discussing with Judge Sanders "a settlement," the notes reflect only a statement that he denied discussing "the" settlement – corroborating Brown's testimony

at trial that "Mr. Burton's focus was the settlement, the final settlement," which Brown undisputably did not discuss with Sanders.[3]

In a case where, as the panel at one point observed, Brown's central defense theory was that Burton "manufactured the false statement charges against him," the foregoing ways in which the 302 "improved" the contemporaneous notes from a prosecution point of view were unquestionably relevant and exculpatory. The issues discussed below cannot be sidestepped by a finding of immateriality or harmless error.

A. The Panel's Holding That Rule 16(a)(1)(A) Does Not Require Disclosure of Contemporaneous Notes of the Defendant's Statement "In Every Case" Is An Important Ruling That Deserves En Banc Reconsideration

The panel'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. That is a very significant ruling that will undoubtedly affect discovery practices in criminal cases inside and possibly outside this Circuit. It conflicts with the Third Circuit's ruling in United

[3]While the 302 also reflects that Brown's statement to Burton concerned "the settlement," the 302 was useless for cross-examination in this respect because it also contained a statement that Brown never "discussed with Sanders the matter of David Disiere." That entry in the 302 is not

States v. Molina-Guevara, 96 F.3d 698, 705 (3d Cir. 1996) (where the government actually conceded the issue), and with decisions of numerous district courts.[4] 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. at 615, the panel 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 the panel'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 and charged in the indictment, then the test will surely prove troubling to district courts attempting to apply it.

The panel 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

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reflected in the notes, and is inconsistent with other entries both in the notes and 302 showing that Brown did admit discussing Disiere with Sanders.

[4] See United States v. Carucci, 183 F.R.D. 614, 615 (S.D.N.Y. 1999); United States v. Wright, 2001 WL 523394 (D. Kan. Apr. 26, 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).

Jencks Act and the Confrontation Clause. As amended in 1991,[5] Rule 16(a)(1)(A) does not condition the right to disclosure 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. The panel'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 clearly erroneous. Under the amended rule, disclosure of oral statements not captured in a written record 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, a right that did not exist prior to 1991.

We respectfully submit that the panel's interpretation of the amended Rule 16(a)(1)(A) is at odds with its plain language and is based on a conclusion about its "purpose" that cannot be squared with the Rule. Further, it conflicts with decisions

[5] The panel's discussion in footnote 18 of the slip opinion reflects an apparent 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, we 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.")

of numerous courts that have applied the amended rule to require disclosure of notes of the defendant's interview without any Brady – type analysis, and is an important question frequently arising in district courts that should be settled by this Court en banc.

B. The Panel's Holding That the Trial Court's Order Forbidding Cross-Examination Regarding Content of the Notes, and Its Instruction That the 302 Was Accurate Based on the Notes, Did Not Violate the Confrontation Clause Warrants En Banc Reconsideration

Although Brown was denied access to the notes, he nevertheless attempted to elicit from Burton on cross-examination that particular statements he claimed Brown made were not recorded in those notes. Had the question been allowed, Burton would have been forced to admit that the statements were not in his notes, and further to admit that the 302 added to and changed the notes in numerous ways favorable to the prosecution case. Brown was precluded from any such cross-examination or confrontation. Other panels of this Court have ruled that where a witness is "critical to the prosecution's case, "as Burton surely was, denial of a defendant's ability to confront the witness with facts material to his credibility is a violation of the Confrontation Clause. Wilkerson v. Cain, 233 F.3d 886, 891 (5th Cir. 2000); United States v. Landerman, 109 F.3d 1053, 1063-64 (5th Cir. 1997). The panel's decision in this case conflicts with those decisions. Further, the panel's harmless-error analysis is inapplicable to a violation of the Confrontation

Clause. Where such a violation has occurred, it may be deemed harmless only where "assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." Delaware v. Van Arsdall, 475 U.S. 673 (1986); supra, 109 F.3d at 1064. The panel did not apply the "harmless beyond a reasonable doubt" standard.

The panel concluded that the trial court's instruction, telling the jury that the Court had determined the 302 "is accurate based on the handwritten notes," did not "improperly vouch for the accuracy of the 302." (Slip op. at 29.) What the instruction did, however, was tell the jury the 302 accurately reflected the notes – a "fact" that Brown was utterly unable to confront, or have the jury determine for itself. The "curative" instruction told the jury only that the Court's determination was "irrelevant" and that the jury was the judge of the facts.[6] Respectfully, this Court should review en banc whether the panel's determination that Brown received a fair and constitutional trial should become the law in this Circuit, where Brown was unable to confront either the witness's testimony or the judge's instruction with undisclosed evidence described to the jury both by the witness and the judge.

[6] Because the jury did not have the notes, it was of course unable to decide for itself whether in fact they supported the 302.

C. The Panel's Ruling on the Jencks Act Will Unsettle the Law in This Court and Deserves En Banc Review

With regard to the Jencks Act, the panel 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 24-year-old decision[7] 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 opinion 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 further troublesome litigation in the district courts and claims of reversible error in this Court. The panel's statement also directly conflicts with the Martin court's own statement that "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. It was only where the notes have been destroyed – and thus no longer "in the possession of the government" at the time of trial as specified in the Jencks Act, 18 U.S.C. §3500 (b) – that the Martin court held no Jencks Act violation is established.

Whether Mr. Brown was entitled to Burton's notes under the Jencks Act is a particularly important issue because once a Jencks Act violation is established,

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

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 the panel's interpretation of Rule 16(a)(1)(A) in this case, the Jencks Act requires production of a statement regardless of whether a 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).

Conclusion

For the foregoing reasons, the Court should rehear the decision of the panel en banc.

Respectfully submitted,

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