10-20621

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee
v.
JAMES A. BROWN,
Defendant-Appellant

On Appeal From The United States District Court
For The Southern District Of Texas, Houston Division
No. CR H-03-363

BROWN'S OPPOSITION TO GOVERNMENT'S "MOTION FOR LEAVE TO FILE A CORRECTED BRIEF" OUT OF TIME AND TO DISCARD PRIOR FILING

PORTER & HEDGES LLP

DANIEL K. HEDGES
Texas Bar No. 09369500

1000 Main Street, 36th Fl.
Houston, TX 77002
Telephone: (713) 226-6000
Facsimile: (713) 228-1331

SIDNEY POWELL, P.C.

SIDNEY POWELL
Texas Bar No. 16209700

TORRENCE E. LEWIS
IL State Bar No. 222191

3831 Turtle Creek Blvd. #5B
Dallas, Texas 75214
Phone: (214) 653-3933
Fax: (214) 319-2502

ATTORNEYS FOR DEFENDANT-APPELLANT JAMES A. BROWN

BROWN'S OPPOSITION TO GOVERNMENT'S "MOTION FOR LEAVE TO FILE A CORRECTED BRIEF" OUT OF TIME AND TO DISCARD PRIOR FILING

Because of the government's numerous *Brady* violations and misrepresentations to the court and jury, Jim Brown, a former Merrill Lynch executive, seeks a new trial on his perjury and obstruction convictions. Brown timely filed his original brief on appeal on December 20, 2010. Brown agreed to the government's request for an extension of thirty (30) days in which to file its responsive brief, and on February 23, 2011 at approximately 10:00 a.m., the government filed its brief in opposition to Brown's request for a new trial.

The government's first substantive argument in its brief posits that this Court should not reach the merits of Brown's appeal because Brown had not timely filed his notice of appeal, and this Court therefore lacked jurisdiction.[1] Specifically, the government argued:

> But the Court should not exercise [it's] jurisdiction here, because Brown's notice of appeal was untimely. Rule 4 of the Federal Rules of Appellate Procedure provides in pertinent part that, '[i]n a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after *** the entry of *** the order being appealed.' Fed. R. App. P. 4(b)(1)(A)(i). And

[1] The government also writes: "And here the government invokes rather than waives the deadline.... Accordingly, dismissal is the appropriate course, at least where Brown does not allege, let alone show, excusable neglect." GBR at p. 3. Because of the implicit accusation of professional incompetence, the termination of Brown's appeal, and the serious ramifications both professionally and practically of such an argument, it was doubly imperative for the filers to have researched the issues and facts exhaustively before making such an argument.

> although Rule 26 directs the Court, when calculating timeliness, to 'exclude the day of the event that triggers the period' (Fed. R. App. P. 26(a)(1)(A))—here, Monday, August 23, 2010, the day the district court entered its order—it also requires 'count[ing] every day, including intermediate Saturdays, Sundays, and *** the last day of the period' (Fed. R. App. P. 26(a)(1)(B), (C)), which in this case was Monday, September 6, 2010. *See* Fed. R. App. P. 26, 2009 Adv. Comm. Notes ('The final day falls on the same day of the week as the event that triggered the period' such that 'the14th day after a Monday *** is a Monday'). Again, though, Brown filed his notice of appeal on Tuesday, September 7, 2010.

GBR at p. 2.

As the government now concedes, this argument was completely wrong, as even a cursory review of the Federal Rules of Appellate Procedure and a 2010 calendar establish. Brown's notice of appeal was timely filed because September 6, 2010 was Labor Day, a federal holiday, so Brown's brief was not due until the next day, September 7, 2010, when it was filed.

The government's brief elided over the crucial language and used asterisks in place of the words "legal holidays" in the portion of Rule 26 that it did quote. Although it cited subsection Rule 26(a)(1)(C), which provides for filing the day after a holiday, the government's brief omitted, without ellipsis, the language of the Rule that provides: "but if the last day is a Saturday, Sunday or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday or legal holiday." The government's brief also failed to note that September 6, 2010, was

Labor Day. *See* Rule 26(a)(6)(A) (defining legal holiday to include Labor Day). Thus, Brown's notice of appeal was timely filed, and the government's attempt to dismiss Brown's appeal lacked any basis in fact or law. Therefore, it was unreasonable and frivolous by definition, and may be sanctionable. *See* FED. R. APP. P. 46(c) (discipline against attorneys for "conduct unbecoming a member of the bar"); 5th Cir. I.O.P. - DISCIPLINARY ACTION (procedures "to invoke disciplinary action ... for failure to comply with the rules of this Court or for conduct unbecoming a member of the bar"). *Cf.* FED. R. CIV. P. 11(b)-(c); FED. R. APP. P. 26(a)(1)(B)-(C); *Ford v. Pennzoil*, 200 F.3d 816 (5th Cir.1999) (Barksdale, J., dissenting).

On February 23, 2011, before close of business on the day the brief was filed, Counsel for Brown promptly notified the government of this information.[2] To his credit, Mr. Oestreicher accepted responsibility within forty-five (45) minutes, and he made clear that the government would rectify its error.

---

[2] The government is confessing the error now, as opposed to being confronted with its blunder in Brown's reply and at oral argument, because the same day the brief was filed, Counsel for Brown alerted the prosecutors to their specious and untenable argument.

Moreover, Patrick Stokes, the Deputy Chief of The Fraud Section, was the attorney in charge of the prosecution in the court below. He specifically asked counsel for Brown in a telephone conference the week before Labor Day if Brown would be filing a notice of appeal and was informed that Brown would. He still directs this prosecution, and it is difficult to imagine why he allowed, much less joined, this argument.

After further research, at 5:44 a.m. on the February 24, 2011, Counsel for Brown informed the government that she believed a confession of error was the only appropriate procedure in these circumstances. When the government replied that it would file a motion to file a corrected brief, Counsel for Brown again advised that she believed a confession of error was required, and that she needed to see the motion and the new brief before she could respond. Without any further communication or consultation with Brown's counsel, the government filed its motion and a "Corrected Brief" a few hours later on February 24, 2011.

While Counsel for Brown accepts the personal representation of Mr. Oestreicher that the government's effort to dismiss Brown's appeal was an unintended oversight,[3] the government's proposed "Corrected Brief" amounts to more than a mere "correction" of typographical errors or administrative errors for which a corrected brief is usually accepted. Rather, the government's brief includes a series

[3] Ironically, in urging that Brown should not receive a new trial, the government's brief relies heavily on an email Brown hastily wrote fifteen (15) months after the barge transaction concerning an unrelated leasing transaction for the Continental Airlines Terminal at Houston Intercontinental Airport, suggesting a lawful approach to the newly-proposed leasing deal while referring (incorrectly) to the prior Enron transaction. That email contains language Brown has testified under oath was incorrect and a mistake–an email to which Brown expended far less thought and effort than did the government lawyers on the brief filed in this Court on February 23, 2011.

of substantive changes throughout, from the Recommendation on Oral Argument to the Conclusion.

Here, the government deletes from its recommendation on oral argument the sentence: "The government believes oral argument would be unnecessary if the Court were to conclude, as argued *infra* (pp. 1-4), that this appeal should be dismissed because Brown's notice of appeal was untimely." GBR at p. i. It deletes from its conclusion: "For the reasons explained in the jurisdictional statement (*supra* pp. 1-4), the Court should dismiss Brown's appeal as untimely." *Id*. at p. 55. As it admits in its motion, it has changed page references, tables, and the word count itself by more than 500 words. And, the government completely abandons its first argument and concedes that Brown's notice of appeal was timely filed, as if it had never argued otherwise.

Therefore, the government's new filing constitutes a substitute brief filed out of time with substantive changes. *See* FED. R. APP. P. 26(b) (out of time filing prohibited except for "good cause"); *see also* 5th Cir. R. 26.2, 27.1.4, 27.2.4, 27.2.9. This case does not involve a *pro se* advocate, to whom this Court often grants leeway in filing a "corrected" or substitute brief. Instead, the government's brief was filed by senior, experienced government lawyers, in a case already rife with government misrepresentations and misconduct. *See Haines v. Kerner*, 404 U.S. 519, 520-21, 92

S. Ct. 594, 596 (1972) ("we hold [pro se litigants] to less stringent standards than formal pleadings drafted by lawyers"); *see*, *e.g.*, *Byrd v. Adams*, 389 Fed. Appx. 411 (5th Cir. 2010) (motion by prisoner, filing pro se, to file substitute brief granted); *Robinson v. United States Federal Bureau of Investigation*, 185 Fed. Appx. 347 (5th Cir. 2006) (same). *But see Doolittle v. Holmes*, 306 Fed. Appx. 133, 135 (5th Cir. 2009) (Prisoner "moves for leave file a corrected brief in which he asserts that Sergeant [] violated his First Amendment rights. This claim was not raised below and will not be considered.").

Substantive changes of the magnitude made by the government should not be permitted once the brief has been filed and the due date has passed. Moreover, the government has no good cause for filing a substitute brief out of time. Its error, regardless of how unintended, could have only resulted from negligence, at best. FED. R. APP. P. 26(b) (movant must demonstrate "good cause" to justify late filing); 5th Cir. R. 26.2 (same).

The proposed changes are a confession of error. Brown's request is simply that they be denominated as such. The government should be required to file a confession of error to accompany its original brief. *See United States v. Smith-Baltiher*, 424 F.3d 913, 920 (9th Cir. 2005) (government's abandonment of substantive defense was, in substance and effect, a "confession of error"); *Reid v. United States I.N.S.*, 949 F.2d

287, 288 (9th Cir. 1991) ("The [government] was forthright in its confession of error as to the timeliness of [petitioner's] appeal. In this respect, counsel for the [government] has behaved as the counsel for the government should. Counsel for the government has an interest only in the law being observed, not in victory or defeat in any particular litigation."). Having confessed error, the government should not be entitled to file a new brief as if its significant error never happened.

Accordingly, Brown requests that the government's "Motion To File A Corrected Brief" be denied. Brown requests instead that the government be required to file a Confession of Error that acknowledges its mistake and concedes that Brown's notice of appeal was timely filed.

Dated: March1, 2011

Respectfully submitted,

PORTER & HEDGES LLP
DANIEL K. HEDGES
Texas Bar No. 09369500
1000 Main Street, 36th Fl.
Houston, TX 77002
Telephone: (713) 226-6000
Facsimile: (713) 228-1331

SIDNEY POWELL, P.C.

By: /s/ Sidney Powell
SIDNEY POWELL
Texas Bar No. 16209700

TORRENCE E. LEWIS
IL State Bar No. 222191
3831 Turtle Creek Blvd. #5B
Dallas, Texas 75214
Phone: (214) 653-3933
Fax: (214) 319-2502

ATTORNEYS FOR APPELLANT JAMES A. BROWN

CERTIFICATE OF SERVICE

I hereby certify that true and complete copies of Appellant's Response in Opposition to the Government's Motion For Leave to File a Corrected Brief was this day delivered by electronic case filing to the Clerk of the Court and to counsel for United States:

Stephan E. Oestreicher, Jr.
Attorney, Appellate Section
Criminal Division
United States Department of Justice
950 Pennsylvania Avenue, N.W.,
Room 1264
Washington, DC 20530

Patrick F. Stokes
Deputy Chief, Fraud Section
Criminal Division
United States Department of Justice
950 Pennsylvania Avenue, N.W.,
Room 1264
Washington, DC 20530

Dated: March 1, 2011

/s/ Sidney Powell
Sidney Powell