C.A. No. 15-10223

D. Ct. No. CR-13-8093-PCT-NVW

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

CALVERT LES WOODY,

Defendant-Appellee.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

APPELLANT'S REPLY BRIEF

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Coerced confessions are excluded from evidence because the methods used to extract them offend the principles of due process and protections against self-incrimination. A confession is coerced only if it is extracted by threats or violence, obtained by direct or implied promises, or acquired by the exertion of improper influence. Absent any finding of coercive police conduct, the district court suppressed Woody's statements based on generalizations regarding historical trauma and cultural differences among Native Americans, low average intelligence, and lack of a recording of the statements. Did the United States prove the voluntariness of Woody's statements by a preponderance of the evidence where the record shows that no threats or promises were made, and no improper influence was exerted, to obtain the statements?

IV. SUMMARY OF ARGUMENT

The district court did not properly consider the totality of the circumstances to weigh alleged unconstitutional pressure exerted by agents against Woody's individual power to resist. Instead, it relied on broad generalizations regarding historical trauma and cultural differences among Native Americans, low average intelligence, and the lack of a recording to justify suppression of Woody's statements.

Although coercive police activity is a necessary predicate to finding a confession involuntary, the district court did not find that agents engaged in coercive police activity here. Agents conducted the questioning in this case fairly, reasonably, and with full regard for Woody's rights, just as the Constitution requires. Any pressure Agent Fuller exerted in questioning Woody was minimal, at most, and did not tip the scales against Woody's individual power to resist that pressure. Instead, what tipped the scales in favor of suppression, despite the lack of any constitutional requirement that confessions be recorded, was that the district court improperly weighed the lack of a recording against the government's evidence. Because the United States proved by at least a preponderance of the evidence that Woody's statements were voluntary, this Court should reverse the suppression order.

V. ARGUMENT

A. The Lack of a Recording, Not Agent Fuller's Prior Testimony, Improperly Motivated the Suppression Order.

Woody attempts to inject into the district court's decision to suppress a lack of belief in Agent Fuller's testimony in a prior grand jury proceeding. He claims that Agent Fuller's prior testimony, not just the lack of a recording, persuaded the district court that his statements were involuntary. (Appellee's Brief, p. 26). He further claims that the district court found Agent Fuller's prior testimony to be "entirely inaccurate," and "completely inaccurate," when compared to the recording of an interview of the subject in that case. (Appellee's Brief, pp. 4, 29). These claims are simply untrue. Although the district court ruled that Woody may cross-examine Agent Fuller regarding one detail in his prior testimony, the court found that "[s]everal elements of Special Agent Fuller's grand jury testimony to which Miguel objected turned out to be entirely accurate…." (CR 128; SER 3.)[1]

If Agent Fuller's prior testimony truly played a role in the district court's decision, surely the court would have at least mentioned the prior testimony in the suppression order. Not only did the district court fail to mention the prior testimony in the order, but it specifically found that Agent Fuller did not offer "any

[1] "CR" refers to the Clerk's Record, followed by the document number(s). "RT" refers to the Reporter's Transcript, followed by a date and page number(s). "ER" refers to the Excerpts of Record, followed by the page number(s). "SER" refers to the Supplemental Excerpts of Record, followed by the relevant page number(s).

knowingly false testimony" at the suppression hearing in this case. (CR 130; ER 24.) In fact, the district court expressed no misgivings about the credibility of Agent Fuller's testimony at the suppression hearing, whether based on his prior testimony or otherwise.

The suppression order makes it clear that the lack of a recording played a central role in the district court's decision, not Agent Fuller's prior testimony. In fact, the district court never mentioned Agent Fuller's prior testimony in the suppression order; conversely, it repeatedly discussed the lack of a recording:

- "And yet, the only evidence the Government offers to prove voluntariness is the largely conclusory testimony of the FBI officer who interrogated Woody." (CR 130; ER 3.)
- "The Government could have avoided placing the court in this position had it recorded Woody's confession." (CR 130; ER 4.)
- "The Government's conscious choice not to preserve crucial evidence has thwarted the court's analysis of whether Woody's statements were voluntary." (CR 130; ER 4.)
- "The evidence the Government does present must be evaluated in light of the evidence it chooses to make unavailable." (CR 130; ER 4.)

- "Although the court does not independently consider them for their truth, Woody's statements show the gravity of the evidentiary vacuum the Government created and therefore bear on the weight to be given the incomplete evidence the Government does present." (CR 130; ER 19.)
- "Unfortunately, the court lacks this crucial evidence. Despite the presence of audio recording equipment at the Gallup FBI field office, Special Agent Fuller did not record the interview." (CR 130; ER 20.)
- "Absent a recording of Woody's statements, the court is left to reconstruct the December 2012 interview from Special Agent Fuller's account." (CR 130; ER 20.)
- "Taking Special Agent Fuller at his word that he views his techniques as non-coercive, the court still lacks an objective basis to determine that the interrogation was not perceived as coercive by Woody, whose cultural differences, low intelligence, and personal background may have collectively produced a different experience." (CR 130; ER 21-22.)
- "The court must take account of such 'characteristics of the accused,' but cannot do so if the Government fails to provide the evidence of

actual words, actions, and context necessary to determine Woody's perception and experience." (CR 130; ER 22.)

- "Special Agent Fuller's assessment and memory alone fail to persuade this trier of fact, given the crucial evidence the Government intentionally left behind that would make this task easier." (CR 130; ER 22.)
- "It is a secret why the Government purposely hamstrings courts in this way when recording equipment is available and only needs to be turned on." (CR 130; ER 22.)
- "In assessing whether this imbalance produced an involuntary confession, the court is deprived of the nuanced details and is left with the conclusions and memory of Special Agent Fuller." (CR 130; ER 22.)
- "Finding this testimony inadequate does not require imputing bad faith to Special Agent Fuller." (CR 130; ER 22-23.)
- "Electronic recording of the interrogation would have taken any unfair advantage away from the FBI and left neutral, accurate evidence in its place." (CR 130; ER 23.)
- "Whatever the reason, the FBI has made a deliberate choice in this case to deprive the court of superior evidence for assessing

voluntariness, hoping the court will rely instead on secondary evidence filtered through the FBI." (CR 130; ER 23.)

- "But this case is not about failure to obtain evidence for the defendant; it is about presenting incomplete, perhaps subconsciously biased evidence of a single event and leaving behind more clinical evidence of the same event that could aid the defendant, without any justification for doing so." (CR 130; ER 24.)
- "A knowing decision to leave no objective record of a suspect's interview may be relevant to voluntariness, depending on the specific facts." (CR 130; ER 24.)
- "The unavailability of better evidence can bear on how persuasive the available evidence is." (CR 130; ER 24.)
- "That the Government made this choice pursuant to an official policy in no way aids the Government. The Government cannot change the natural persuasive force of abandonment of evidence by engaging in it routinely." (CR 130; ER 25.)
- "On the facts of this case, in light of Woody's background and characteristics, the conscious choice to deny the court essential evidence weighs against the Government." (CR 130; ER 25.)

- "In an ordinary case against a suspect with average intelligence, cultural parity, personal confidence, and powers of resistance, the FBI's deliberate failure to preserve evidence of an interview intended to change a denial into a confession might be less important to determining voluntariness." (CR 130; ER 25.)
- "In this specific case, the objective evidence the FBI willfully failed to preserve could matter. When it does this, the Government runs the risk that the trier of fact may be less than persuaded by the secondary evidence the Government does put forward, which comes refracted through the subconscious of someone with much different education, acculturation, and expectations for an interview." (CR 130; ER 25.)
- "In light of the harm to the alleged victims, the importance of Woody's constitutional rights, his personal background and characteristics, and the mandatory minimum sentence of thirty years in prison, the FBI took a needless risk in not recording these statements." (CR 130; ER 3.)
- "The lack of potentially dispositive evidence for which the Government is responsible undermines the weight of the limited evidence the Government does present." (CR 130; ER 3.)

This Court has stated that Congress, not the courts, should determine whether a confession should be suppressed because the interrogation was not recorded. *United States v. Coades*, 549 F.2d 1303, 1305 (9th Cir. 1977). Yet Woody argues that the district court properly weighed the lack of a recording against the government to suppress his statements. (Appellee's Brief, p. 29). Woody bases his argument on *United States v. Wright*, 625 F.3d 583, 603, n.10 (9th Cir. 2010). But *Wright* does not stand for the proposition that a district court may weigh the lack of a recording against the government. Instead, it acknowledges that there is no "rule mandating the electronic recording of post-arrest statements," and states that the "district court may support any disbelief it has of any witness' testimony by noting the lack of a recording." *Id*. Here, although the district court expressed no disbelief in Agent Fuller's testimony, it not only noted the lack of a recording, but it went a step beyond by using the lack of a recording to undermine the government's evidence. In essence, the court found the opposite of Agent Fuller's testimony to be true because there was no recording of the interview.

This Court has, in certain restricted circumstances, such as where a witness' story is implausible, found that disbelief of the witness' testimony may provide a partial basis for a fact finder's conclusion that the opposite of the testimony is the truth. *United States v. Martinez*, 514 F.2d 334, 341 (9th Cir. 1975) (citation

omitted). But the Court further found that, in addition to disbelief in the testimony, there "must also be other objective evidence on the record which buttresses the fact finder's drawing of the opposite inference." *Martinez*, 514 F.2d at 341 (internal quotation marks and citation omitted).

Here, not only did the district court fail to express disbelief in Agent Fuller's testimony, but there is no other objective evidence on the record to buttress the court's drawing of the opposite inference. Moreover, "a trial judge's ability to find facts solely by discrediting contrary testimony is limited." *United States. v. Yunis*, 859 F.2d 953, 961 (D.C. Cir. 1988). Because there are limits "to a judge's prerogative to arrive at factual findings by simply discounting the testimony before him," *Id*. at 960-961, it was improper for the district court to discount Agent Fuller's testimony and weigh the lack of a recording against the government.

Woody argues that the American Polygraph Association's recommendations for recording in paired testing, post-conviction sex offender testing, and pre-employment testing situations, as well as the fact that some states have adopted statutory provisions requiring the recording of interviews, support the district court's decision to undermine the government's evidence due to the lack of a recording. But there is "no constitutional requirement that confessions be recorded by any particular means[,]" *Id*. at 961, and this Court has rejected the notion that the constitutional validity of a confession hangs on whether or not that confession

was recorded. *Coades*, 549 F.2d at 1305. Because the suppression order hangs on Woody's confession not being recorded, this Court should reverse that order.

B. The Totality of the Circumstances Shows That Woody's Statements Were Voluntary, Not the Product of Coercion.

Woody correctly sets forth the principles by which the voluntariness of a confession is to be determined. Where his analysis fails, however, is in the application of those principles to the facts of this case. To determine the voluntariness of a confession, "[t]he due process test takes into consideration 'the totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation.'" *Dickerson v. United States*, 530 U.S. 428, 434 (2000) (quoting *Schneckloth v. Bustamante*, 412 U.S. 218, 226 (1973)).

"Ultimately, the voluntariness determination depends upon a weighing of the circumstances of pressure against the power of resistance of the person confessing." *United States v. Preston*, 751 F.3d 1008, 1016 (9th Cir. 2014) (internal punctuation marks and citations omitted). "[T]he admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne." *Id*. at 1020 (emphasis in original) (internal quotation marks and citation omitted).

The techniques Agent Fuller used to obtain Woody's statements, as applied to Woody individually, are fully compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means. Woody argues that Agent Fuller became angry and raised his voice, that he stared at Woody, and that he used minimization.[2] (Appellee's Brief, pp. 24, 26). Additional circumstances that must be considered, however, when evaluating the totality of the circumstances, include that Woody voluntarily appeared at the FBI office for a polygraph examination after having several months to decide whether he wanted to participate in the examination. (RT 3/5/15 23-24, 63; ER 79-80, 119.) The setting was non-custodial in nature. (CR 130; ER 14.) Woody's stay at the FBI office was not lengthy; it lasted only two hours, and he was alone with Agent Fuller for only forty minutes. (RT 3/5/15 63, 78, 111; ER 119, 134, 167.) In addition, agents were dressed in plain clothes, with their badges and firearms concealed. (RT 3/5/15 36, 64-65; ER 92, 120-21.) They gave Woody a bottle of water and made sure he was comfortable. (RT 3/5/15 30, 79; ER 86, 135.) Agent Fuller fully advised Woody of his rights and obtained two signed waivers before asking him any questions. (RT 3/5/15 26-30; 67-70; ER 82-86, 123-26.)

Thus, even if Agent Fuller acted as alleged and became angry and raised his voice, stared at Woody, and used minimization, the alleged conduct, when weighed

[2] The district court did not consider Woody's statements for their truth. (CR 130; ER 19.)

against Woody's individual power to resist, is insufficient under the totality of the circumstances to demonstrate undue pressure. The pressure allegedly exerted by agents, which was minimal at most, did not overcome Woody's power to resist.

As for evidence of Woody's individual power to resist, Woody, like the district court, erroneously relies solely on Dr. McIntyre's written opinion, ignoring his testimony. Dr. McIntrye wrote that "[m]atters of low average intelligence, cognitive impairment, historical trauma, and the Native American cultural differences apply to Mr. Woody and may have contributed to Mr. Woody's will being overborne." (CR 130; ER 13, 25.) But he testified that Woody does not suffer from cognitive impairment and that he could not say that Woody, as opposed to Native Americans in general, holds different cultural views or suffers from historical trauma. (RT 3/5/15 167-68; RT 3/9/15 5-6, 9, 28-30; ER 223-24, 234-35, 237-38, 257-59.) Accordingly, Dr. McIntyre's testimony eliminated cognitive impairment, historical trauma, and cultural differences as being individual characteristics of Woody. The only individual characteristic remaining is low average intelligence.

Assuming that Dr. McIntyre correctly assessed Woody's low average intelligence, which the United States does not concede, this characteristic alone cannot render his statements involuntary. *United States v. Frank*, 956 F.2d 872, 875-78 (9th Cir. 1991). Although Woody tries to liken his level of intelligence to

that of the defendant in *Preston*, Dr. McIntyre's testimony definitively foreclosed that option. Unlike Preston, Woody not only has a rational factual understanding of the proceedings against him, but he also has sufficient reasoning and appreciation skills. (RT 3/9/15 6-7; ER 235-36.) Also unlike Preston, Woody has no serious intellectual disability and is not mentally retarded. (RT 3/9/15 16; ER 245.) In fact, Dr. McIntyre acknowledged the vast difference in intellectual functioning between Woody and Preston. (RT 3/9/15 16; ER 245.)

Woody refers to this Court's concerns with the Reid technique, and to a study of exonerations involving false confessions, to justify the suppression order. (Appellee's Brief, pp. 34-35.). But the concerns this Court expressed, and the studies this Court cited, in *Preston*, related to subjects who are intellectually disabled, or mentally retarded, making them highly susceptible to a number of law enforcement questioning techniques. *See Preston*, 751 F.3d at 1022-27. And the study Woody cites indicates that "juveniles, the mentally retarded, or those suffering from mental illness," as well as those who "have poor memory, anxiety, low intelligence, and deflated self-esteem," are more likely to falsely confess to a crime they did not commit. (Appellee's Brief, pp. 34-35.) Remarkably, the evidence before the district court shows that Woody possesses not a single of those characteristics. It follows that Woody's power to resist interrogation techniques is not similarly compromised. Because the minimal circumstances of pressure

allegedly exerted by the agents did not outweigh Woody's individual power to resist, this Court should reverse the suppression order.

VI. CONCLUSION

As Woody acknowledges, "coerced confessions are excluded because the methods used to extract them offend the underlying principles of due process and protections against self-incrimination." (Appelle's Brief, p. 21.) But "[t]here is no evidence in the record of police overreaching or oppressive conduct that caused [Woody] to confess involuntarily." *Frank*, 956 F.2d at 877. "Ultimately, the voluntariness determination depends upon a weighing of the circumstances of pressure against the power of resistance of the person confessing." *Preston*, 751 F.3d at 1016 (internal punctuation marks and citations omitted).

The record shows that any circumstances of pressure Agent Fuller exerted in questioning Woody were minimal, at most, and did not tip the scales against Woody's individual power to resist that pressure. Instead, what tipped the scales in favor of suppression was that the district court improperly weighed the lack of a recording against the government's evidence. That evidence showed that Woody's statements were the product of a free and rational will. The suppression order was not the result of a constitutional violation, but rather the result of the district court's displeasure with the FBI's failure to record Woody's statements. Because the

constitutionality of a confession does not hang on whether or not the confession was recorded, this Court should reverse the suppression order.

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VII. CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NO. 15-10223

I certify that: (check appropriate option(s))

☒ 1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

☒ Proportionately spaced, has a typeface of 14 points or more and contains 3,270 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words), or is

☐ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or ___ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

☐ 2. The attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

☐ This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

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December 9, 2015
Date

s/Bill C. Solomon
BILL C. SOLOMON
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VIII. CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of December, 2015, I electronically filed the Brief of Appellee with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Bill C. Solomon
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