No. 10-50856

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN THOMAS SHIPLEY,

Defendant-Appellant.

APPELLEE'S REPLY TO APPELLANT'S AMENDED RESPONSE TO APPELLEE'S MOTION FOR EXPEDITED LIMITED REMAND

As directed by this Court on April 16, 2012, Appellee United States of America, by and through its undersigned counsel, hereby responds to Appellant Shipley's March 29, 2012, amended opposing response to our March 21, 2012, motion under FED. R. APP. P. 10(e)(2) for an expedited limited remand to the district court to hold a record-reconstruction hearing and make findings thereon for this Court.

I. Introduction

Two claims animate Shipley's opposition (hereafter, "Resp.") to our instant motion (hereafter, "Motion") for a record-reconstruction remand: (1) untimeliness;

and (2) the futility of a record-reconstruction attempt. Neither claim withstands close scrutiny.

II. Timeliness

Shipley first contends, *see* Resp., 1-3, that the United States moved for "yet another" remand as a dilatory tactic because this Court denied it a brief-deadline extension. The premise underlying this assertion is inaccurate. Contrary to Shipley's repeated assertions, this Court has not remanded to the district court for any purpose in this case prior to the United States' instant motion.[1] Accordingly, should the Court grant our motion, it would be this case's first appellate remand.[2]

Shipley complains, without citation of any legal authority, that the instant motion comes too late. We are unaware of any time limit on when a party must move

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[1] On December 9, 2010, Shipley filed, along with his opposed motion for continued release pending appeal, an unopposed motion for a limited remand to determine whether a *verbatim* account of the one trial day's untranscribed proceedings could be recovered. *See* Motion, 8 n.2. By entry of December 10, 2010, this Court treated Shipley's filing as only an opposed motion for continued release pending appeal. Without need for a formal remand, the district court concluded, following the United States' extensive data-recovery procedures and a hearing in May 2011, that a *verbatim* transcript for the sole trial day in question could not be obtained, unless Shipley had information to the contrary (3 3rdSupp.R. 228). *See* Motion, 4-7, 10 n.7.

On October 7, 2011, Shipley filed an opposed motion for a summary remand for a new trial, which this Court denied in November 2011. *See* Motion, 10 n.7.

[2] At issue now is a remand's appropriateness, not how many preceded it. *See, e.g., United States v. Preciado-Cordobas*, 981 F.2d 1206, 1209-10, 1213-14 (11th Cir. 1993) (involving two record-reconstruction remands, as discussed at p.15 of our instant motion).

for, or when this Court may *sua sponte* order, a limited remand in an effort to remedy record omissions. In *United States v. Selva*, 546 F.2d 1173, 1174 (5th Cir. 1977), and as noted post-remand in *United States v. Selva*, 559 F.2d 1303, 1304 (5th Cir. 1977), this Court *sua sponte* ordered a Rule 10(e) remand after oral argument, when there had been no earlier attempt in the district court at nonverbatim record reconstruction.

In any event, the instant motion was not the product of the government's undue delay. The United States diligently pursued record reconstruction, filing the instant motion only after exhausting considerable efforts at recovering a verbatim transcript and attempting to secure Shipley's cooperation in commencing nonverbatim record reconstruction under Rule 10(c).[3] Motion, 4-12. In stark contrast, Shipley has understandably done *nothing* to advance record reconstruction simply because his

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[3] We acknowledge that, by its express terms, Rule 10(c) permits, and does not mandate, an appellant to initiate record reconstruction. *See* Resp., 6. But Shipley's failure to avail himself of that opportunity militates strongly in favor of a Rule 10(e) remand, where record reconstruction does not depend solely on the Appellant's initiative. The delay between the Appellant's trial and our proposed record-reconstruction remand–a shorter interval than that present in *Preciado-Cordobas*–is largely attributable to Shipley, who spurned his opportunity to commence record-reconstruction much earlier through Rule 10(c). *See Preciado-Cordobas*, 981 F.2d at 1213-14; *see also United States v. Guerrero*, No. 95-50140, 97-50401, 1997 WL 681229, at *12 n.3, 129 F.3d 611 (5th Cir. 1997) (unpublished) ("Upon learning of any omission, the Appellant may follow the procedures prescribed in FED. R.APP. PRO. 10(c) to attempt to reconstruct the record. This process was designed to prevent the situation presented here, in which these Appellants raise the issue of an incomplete record, considered on appeal *more than three years after the end of trial.*"); Motion, 1-2, 6-7, 12, 15-19.

chances for reversal are heightened if the current record omissions are not ameliorated.[4] Motion, 1-2, 7-8, 13, 18-19.

Shipley marks, *see* Resp., 1-3, the period of governmental delay respecting a Rule 10(e) remand as beginning with the date he filed his appellate brief on December 29, 2011.[5] Yet, the less than three months separating that date from the

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[4] Shipley's long-held complacency about the current state of the record is easily explained. By virtue of Shipley's decision to hire an appellate attorney who was not his trial counsel, *unremedied* omissions from the trial record that are significant and substantial compel reversal, without a requirement that he make a specific showing of prejudice or error. *See* Motion, 10 & n.9; Resp. 3-4.

[5] However, at page 7 of his response, Shipley conclusorily remarks that the United States "could have moved for another remand long before Appellant was ordered to write his brief. . .". That could not plausibly be the case because, prior to Shipley's filing his appellate brief, and the transmittal of the completed record to this office, the United States did not have an opportunity to review the appellate record. Moreover, as we stated in our instant motion, *see* Motion, 2, 6-19, and without rebuttal from Shipley, not until Shipley filed his appellate brief–identifying the particular issues and missing transcript portions–could the United States meaningfully assess the significance of the record omissions and conclude, following extensive legal research and consultations, that Rule 10(e) record-reconstruction was imperative.

Furthermore, Shipley has made no effort to counter numerous other reasons we advanced for not filing a Rule 10(e) remand motion *before* Shipley filed his appellate brief: (1) the Appellant's comments at the May 2011 hearing casting doubt on whether the issue of verbatim-transcript recovery had been completely settled; (2) the Appellant's comments at the May 2011 hearing suggesting disingenuously Shipley's amenability to Rule 10 reconstruction; (3) Shipley's failure to allege prior to the filing of his appellate brief any record deficiency or error respecting a jury-charge conference or jury instructions; (4) the Appellant's forecasting in bond-pending-appeal motions that he would raise certain issues on appeal that he never pressed; and (5) from December 2010 through October 2011, Shipley's providing the district court and this Court with affidavits and information about the nature of untranscribed proceedings that were conflicting, tentative, and sometimes incorrect. *See* Motion, 6-10 & nn. 3, 7.

instant motion's filing occupied a *shorter* interval than the three unopposed extensions Shipley secured from his original appellate-brief deadline of September 7, 2011.

As with Shipley's filing his 52-page, 10-issue appellate brief, our filing the instant 20-page motion–which thoroughly addresses an issue that may be case-dispositive–required time-consuming study, consultation, and writing. Before filing the instant motion–in a case certified by the district court as complex and unusual, *see* Motion, 2-3, even without the missing-transcript issue–the United States was obliged to do far more than simply read Shipley's lengthy appellate brief. *See* Motion, 2, 10-11, 19. Excluding the hundreds of trial exhibits consisting of thousands of pages of documents, *see* Motion, 3-4, we scoured the entire appellate record that encompassed more than 1,500 transcript pages. We painstakingly researched the missing-transcript cases that Shipley cited and those he did not cite; analyzed those authorities in light of the record and appeal issues raised by Shipley; consulted with and secured approval from persons within the Department of Justice who did not prepare the instant motion; and then carefully synthesized all of those considerations through our written pleading to this Court.

Shipley's currently expressed opposition on the basis of dilatory tactics by the United States masks the actual reason for his opposition: his uniform strategy, as

displayed before the district court and this Court dating back at least to May 2011, to steadfastly avoid record reconstruction. *See* Footnote 4, *infra*, and accompanying text; Motion, 1-2, 5-8, 17-19. Thus, the timing of the instant motion has neither affected Shipley's posture nor caused him any demonstrable prejudice. *See* Footnote 3, *infra*, and accompanying text.

Our filing the instant motion had nothing to do with whether this Court granted or denied an unopposed extension of our appellate-brief deadline. It had everything to do with attempting to avoid an unnecessary retrial, in the interest of justice, because the unavailability of a verbatim transcript for one trial day, through the fault of neither party, may be rectified via nonverbatim record reconstruction.

Irrespective of the parties' motions, "before passing on the merits of an appeal" when faced with transcription omissions, this Court has "deem[ed] it appropriate" to remand to the district court under Rule 10(e) for "remedial treatment" and "supplementing the record." *See Selva*, 559 F.2d at 1504. As in *Selva*, *id.*, there has been no prior attempt at Rule 10 nonverbatim record reconstruction in this case. Consequently, in this case, neither the United States' motion for such relief, nor this Court's *sua sponte* remand order, are untimely. *See id.*

III. Futility

Most of Shipley's remaining response, *see* Resp., 3-6, boils down to one indefensible proposition–that "[n]o one can rationally believe" that the missing one trial-day transcription can be adequately reconstructed. *See* Resp., 6. This stance, unadorned by any cited legal authority, ignores a significant body of law–examined at length in our instant motion, *see* Motion, 13-18–that a Rule 10(e) remand is not only a viable avenue for attempting to rehabilitate a record under circumstances similar to those present here, but it is the preferred course, and more often than not succeeds.

The issue this Court must ultimately determine–whether an omission from the original trial transcript is substantial and significant so as to require a new trial–"can be decided only *after* the district court has attempted to reconstruct those portions missing from the transcript." *See Preciado-Cordobas*, 981 F.2d at 1212 (emphasis added) (following Fifth Circuit precedent and relied upon in *United States v. Rivera*, No. 09-41082, 2011 WL 4840960, at *4 (5th Cir. 2011) (unpublished)); Motion, 14.

Even under *Selva*, the case upon which Shipley principally relies, *see* Resp., 3-5; Brief, 37-40, this Court insisted on a Rule 10(e) remand before deciding an appeal's merits. 559 F.2d at 1304. Shipley has not tried to distinguish this aspect of

Selva, or any of the several cases following Fifth Circuit precedent we have cited, *see* Motion, 13-18, that recognize and approve of this procedure.

Shipley's speculation about the outcome of an unaccomplished record-reconstruction attempt has no bearing on the appropriateness of a Rule 10(e) remand. Significantly, as in *Selva,* the decision to order a Rule 10(e) remand does not entail a prediction about the results of a nonverbatim record-reconstruction attempt. No one, including the Court, can *know* the outcome of a Rule 10(e) remand *before* the record-reconstruction attempt has been made.

In *Selva*, 546 F.2d at 1174-75, this Court faced the prospect that a verbatim transcript of closing arguments could not be obtained. This Court's insistence on a Rule 10(e) remand involved no prediction about the success of a reconstruction attempt. *Selva* made this clear when ordering the Rule 10(e) remand, *see id.* at 1175 n.3, by citing cases that reversed convictions when similar or worse record omissions were not remedied through attempted nonverbatim record reconstruction.[6] *See, e.g.*, *United States v. Garcia-Bonifascio*, 443 F.2d 914, 915 (5th Cir. 1971) (missing government's closing argument); *United States v. Upshaw*, 448 F.2d 1218, 122-24

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[6] One of the cases on which *Selva* relied in deciding the appeal's merits, 559 F.2d at 1306 n.5–*United States v. Gregory*, 472 F.2d 484, 486-85 (5th Cir. 1973)–did not rest its reversal on omitted transcriptions (jury voir dire, opening and closing statements), noting: "The government might, of course, be able to supply the missing portions of the transcript."

(5th Cir.1971) (missing defense opening and closing statements); *Stephens v. United States*, 289 F.2d 308, 309 (5th Cir. 1961) (missing jury voir dire and closing arguments); *Hardy v. United States*, 375 U.S. 277, 278 (1964) (missing transcript of entire defense case). The *Selva* Court nonetheless ordered a Rule 10(e) remand for the district judge to attempt to reconstruct the record using "his notes, the reporter's notes, and, of course, the testimony of witnesses, including the appellant's trial attorney." 546 F.2d at 1174.

Subsequent cases relying on Fifth Circuit precedent have affirmed convictions after record reconstruction–even if reversal would have been required in the absence of a Rule 10(e) remand. *See, e.g., Preciado-Cordobas*, 981 F.2d at 1210, 1214 (untranscribed closing arguments from prosecutor and four defense lawyers; Rule 10(e) remand afforded reconstruction through trial judge's and court reporter's notes, as well as witnesses including appellants' trial attorneys); *Rivera*, 2011 WL 4840960, at **3-5 (sufficient record reconstruction despite destruction of all defense exhibits); *United States v. Pace*, 10 F.3d 1106, 1125 (5th Cir. 1993) (lost jury charge; Rule 10(e) remand yielded testimony from court reporter, jury foreman, and defendant's trial counsel).

In the instant case, three of Shipley's 10 appeal issues are directly implicated by the missing verbatim transcription. *See* Motion, 11. The substance of the missing

transcription centers on matters certainly within the ken of the defense: part of Shipley's trial testimony, the proffer of his sole excluded character witness, and his own jury-instruction requests and objections. *See* Motion, 9-10. Rule 10 envisions that Shipley–together with the United States and the district court–may fill the gaps about which he complains on appeal through readily ascertainable sources, including these within his control and by subpoena: his own recollection, that of his excluded character witnesses, and/or that of his trial attorneys. *See* Motion, 6-7, 12, 16-17.

Record reconstruction is intended for, and has been productively used to remedy, transcript omissions like those present here. *See, e.g., United States v. Smaldone*, 583 F.2d 1129, 1133-34 (10th Cir. 1978) (missing testimony of three defense witnesses, including two defendants); FED. R. APP. P. 10(c) ("[T]he appellant may prepare a statement from the best available means, including the appellant's recollection.").

IV. Conclusion

Selva–Shipley's chief authority for gaining a retrial *without* a Rule 10(e) remand–nullifies his opposition to the instant motion. *Selva* teaches that an attempt at nonverbatim record reconstruction is timely and appropriate when not previously undertaken in the district court, prior to this Court's determination of the merits of an appeal, and without a prediction of the results of such an attempt.

The attempt may fail, as in *Selva*. Or it may succeed, as in *Preciado-Cordoba*, *Rivera*, and *Pace*. Either way, the attempt facilitates appellate review by this Court. We, therefore, request that the Court direct a Rule 10(e) remand, mindful that this Court remains the final arbiter of whether the reconstructed record suffices for effective appellate review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on April 18, 2012, this document was filed with the Fifth Circuit Court of Appeals using the CM/ECF filing system, which will cause a copy of the document to be delivered to counsel for the Appellant, Leon Schydlower.

/s/ Michael R. Hardy

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