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

PETITION FOR PANEL REHEARING OF DEFENDANT-APPELLANT JAMES A. BROWN

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to FIFTH CIRCUIT LOCAL RULE 28.2.1, the undersigned counsel for Defendant-Appellant, James A. Brown, certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made so that this Court may evaluate possible disqualification or recusal in this appeal, No. 10-20621.

1. United States of America, Plaintiff-Appellee;

2. Andrew Weissmann, Matthew W. Friedrich, Kathryn H. Ruemmler, John Hemann, Former Attorneys for Plaintiff-Appellee (Enron Task Force);

3. Stephan Oestreicher, Sangita K. Rao, Joseph Palmer, Arnold Spencer, Patrick Stokes, J. Douglas Wilson, Albert B. Stieglitz, Jr., Attorneys for Plaintiff-Appellee (Department of Justice);

4. James A. Brown, Defendant-Appellant;

5. Sidney Powell, P.C., Counsel for Appellant James A. Brown (Sidney Powell, Torrence E. Lewis, of counsel);

6. Porter & Hedges, Dan K. Hedges, Counsel for Appellant James A. Brown;

7. William Hodes, Of Counsel for Appellant James A. Brown;

8. Merrill Lynch & Co., Inc.;

9. Bank of America;

10. Enron Corp.

Respectfully submitted,

/s/ Sidney Powell
Sidney Powell

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BROWN'S PETITION FOR PANEL REHEARING

This petition focuses on significant factual errors that undermine the Panel's logic, the sufficiency of its review, and its ultimate decision even under the wrong standard of review–an issue which we address in our Petition for Rehearing *En Banc*. These errors, considered alone or cumulatively, require the Panel to reconsider, and to grant Brown's Motion for New Trial.

I. THE PANEL'S USE OF A "CLEARLY ERRONEOUS" STANDARD RELIES ON SERIOUS ERRORS OF FACT.

The Panel employed a "clear error" standard (Panel Op. at 1, 12, 16-17) in assessing the district court's determination that (1) Zrike's SEC and Grand Jury testimony, and (2) the raw notes from interviews with McMahon were not material for *Brady* purposes. Its application of this standard rests on serious factual errors. First, the government never gave the district court Zrike's SEC testimony. *See id*. at 12 (mistakenly asserting that "the court did review the McMahon notes and Zrike testimony pre-trial," and therefore, the Panel would review "its decision as to those items for clear error"). Second, the district court never conducted a full *Brady* review or actually made any *Brady* determination. *Brady v. Maryland*, 373 U.S. 83 (1963). Third, the Panel's statement that "the court did not find it necessary for the government to produce anything more than the summary letters," Panel Op. at 9,

ignores the fact that ordering summaries amounted to an order to disclose, and, more important, the district court never reviewed the adequacy of the summaries.

The facts differ significantly from *United States v. Skilling*, 554 F.3d 529, 578-79 (2009), *vacated in part on other grounds*, 130 S. Ct. 2896 (2010), which applied a "clear error" standard where the "district court [] reviewed potential *Brady* material *in camera* and ruled that the material was not discoverable." Instead, the only result of the district court's "review" of the highlighted evidence in this case was its order to provide summaries. *Cf*. Dkt.290. Although this order suggests that the documents originally submitted did contain *Brady* materials (hence the order to disclose), the court never reviewed, in the first instance, even all of the 1,005 pages of material that the government submitted.[1] Nor did the district court review the resulting court-ordered summaries to ensure they accurately and completely disclosed the exculpatory evidence. "Plainly," as the Panel itself observed, the summaries did not. Panel Op. at 16. In *Skilling*, Judge Lake entered no order of any kind that required

[1] Transcript of Pre-Trial Hearing, May 27, 2004, Dkt.234, at p. 49 (Court: "I'm going to ask the Government to supply to chambers under seal the material, documents, testimony, whatever, that leads the Government to the opinion that these witnesses may have exculpatory information of one or more of the Defendants and have that – and out of that material that is in the Government's possession have referenced or identified in some way that I can easily turn to it what portion of the testimony. In other words, if you've got a hundred pages of testimony and there are three pages that deal with one of the Defendants, then mark those pages, the pages that apply that lead you to the judgment that the witness may have exculpatory testimony to give regarding these persons to facilitate my examination of those materials."). The government did not even comply with these instructions. Far more pages contained significant exculpatory information.

disclosure. Accordingly, the Panel erred when it relied on *Skilling* to apply a clear error standard of review. The district court's ruling in *Brown* six years after trial is subject to a *de novo* standard of review, which requires reversal. *LaCaze v. Warden*, 645 F.3d 728, 736 (5th Cir. 2011); *United States v. Fernandez*, 559 F.3d 303, 319 (5th Cir. 2009); *United States v. Sipe,* 388 F.3d 471, 479 (5th Cir. 2004).

II. ZRIKE'S SEC TESTIMONY WAS NEVER SUBMITTED FOR *IN CAMERA* REVIEW AND ITS MATERIALITY SHOULD HAVE BEEN ASSESSED *DE NOVO*.

A. The Panel Erred When it Subjected Zrike's SEC Testimony to Clear Error Review.

The Panel mistakenly found that the district court "did review the . . . Zrike testimony pre-trial," and hence concluded that "we review its decision as to those items for clear error." Panel Op. at 12. *See id*. at 16, 18. However, the record establishes that the district court never reviewed these materials before trial. *Cf*. Dkts. 1157, at 3; 1217, at 1 n.1. *See* Dkt.1168, Ex. Y (Excerpts of Zrike SEC Testimony of October 29, and November 18, 2003). Therefore, the Panel erroneously subjected Zrike's SEC testimony to a clear error standard of review.

B. Zrike's SEC Testimony Contains Detailed Testimony that Supports Brown's Defense to Perjury And Obstruction and Undermines Confidence in the Convictions on Those Counts.

Zrike's SEC testimony contains copious detail about Zrike's role in the barges transaction, the nature of *Merrill's* understanding of the transaction, and Brown's

work with Zrike in the early stages of the transaction–all establishing that Zrike was clearly *not* "out of the loop" regarding the deal. Panel Op. at 18. The government's pre-trial summary as to Zrike did not mention "best efforts" or Brown's name. *Cf*. GRE 30. In contrast, Zrike's SEC testimony mentioned Brown 64 times and "best efforts" 16 times. Furthermore, Zrike's detailed SEC testimony regarding Brown's persistent opposition to the deal after the Trinkle call, would have undermined Trinkle's testimony and eroded her credibility as to Brown. Panel Op. at 4-5, 17-19.

Although the government strenuously argued that Zrike and other Merrill attorneys were cut out of the negotiations, the withheld evidence in Zrike's SEC testimony demonstrates the opposite. Dkt.1168, Ex. Y. Zrike was a crucial witness for Brown's defense whose credibility was essential. At trial, only the government knew that Zrike had testified to the SEC that she tried to insert a "best efforts clause into the deal" and that counsel for Enron rejected such a clause. *Id*. at 304-09. *See also id*. at 107-10. Additionally, Zrike's SEC testimony reveals that her opinion as Merrill counsel was consistent with Brown's and that the two of them agreed about the nature of the transaction *after* the Trinkle call–an event upon which the Panel placed great emphasis.

> We were making it clear to everybody [at DMCC and at Merrill], .., *both Jim Brown and I*, that this is an equity investment that we will own and that we have to have all the risks associated with that equity investment in order for

> them to take it as a sale and to book the gain or loss, whatever it happens to b – it happens to be gain in their case, on their financial statements. So for accounting purposes it had to be a true sale. *And there could be no mitigation of that status*.

Id. at 192 (emphasis added). *See also id*. at 196-207 (discussing thoroughness of the review in the DMCC meeting). The withheld materials also indicate that Zrike recognized the premise of the transaction, that "the whole sort of approach was we are not doing this to make any money. We are doing this to build a relationship." *Id*. at 87. *See id*. at 135-36.[2]

At trial, because Brown was unfairly deprived of this vital information, the government managed to discredit Zrike, portraying her as out of the loop, and argued that Brown was guilty on the basis of the Trinkle call. Tr. 6152-64, 6192-99, 6540.

The Panel misunderstood the importance of Zrike's SEC evidence to Brown's ability to rehabilitate Zrike's trial testimony. The withheld materials indicate that, instead of being shut out of the transaction, Zrike was charged with negotiating and finalizing the agreement long after Merrill executives had completed their roles. *Id*. at 107-10. She followed up on the Bayly-Fastow call and took over the transaction, playing a larger role than did the defendants. *Id*. at 273-74, 277-78, 284.

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[2] Indeed, Zrike testified she "had been personally involved in vetting this transaction at least three times, maybe even four times, and in front of senior management as to what the transaction was supposed to be, and what the nature of our engagement was and our commitment." *Id*. at 284.

Zrike's withheld testimony also directly contradicts several other government arguments. The prosecutors told the jury: "This is not the average business case. This is not a case where people are trying to put documents -- you know, put language into documents as some sort of good-faith negotiating process." Tr. 6494. In direct contradiction, Zrike testified that she and Merrill attorneys attempted to insert a best efforts clause and an indemnity provision, both of which were rejected by counsel for Enron. Dkt.1168, Ex. Y at 304-09.[3] *See also id*. at 107-10.

Because prosecutors suppressed these materials, they were able to argue that Zrike was marginalized , and that Brown's response during and after the Trinkle call was "nothing ... He doesn't say anything." Oral Argument. Zrike's SEC testimony conclusively demonstrates otherwise. Dkt.1168, Ex. Y at 192 ("We were making it clear to everybody [at DMCC and at Merrill], . . ., *both Jim Brown and I*, . . ."). The Panel's assertion that nothing in the suppressed evidence could have assisted Brown in challenging the government on this point is simply wrong. Panel Op. at 18.

Even under the Panel's improper clear error standard, Zrike's SEC testimony was favorable, suppressed, and material. *See Brady* 373 U.S. at 87, *Kyles v. Whitley*,

[3] Zrike specifically stated, "I thought it was a reasonable request or provision [best efforts] to put into the document, because *they had made the assurance to us and that was the basis upon which we agreed to do the transaction*..... The problem comes when you start to draft the language and that's where putting in best efforts to remarket the equity was taken in its most conservative, or, I guess, most aggressive, depending on how you look at it, stance, by the attorneys on the other side [Vinson & Elkins] and they just refused to consider it." Dkt.1168, Ex. Y, at 308-9 (emphasis added).

514 U.S. 419, 434, 437-40 (1995), *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Armed with this exculpatory information, Brown could have undermined Trinkle's testimony, rehabilitated Zrike, and corroborated Brown's defense concerning his understanding of the transaction.

III. THE PANEL OPINION FAILS TO ACCOUNT FOR THE EXTENT TO WHICH BROWN COULD HAVE USED THE SUPPRESSED MATERIALS TO CHALLENGE THE GOVERNMENT'S REPEATED JURY ARGUMENTS.

The Panel's opinion conceded or assumed *arguendo* that the Zrike and McMahon evidence was suppressed and favorable to Brown. Panel Op. at 16. Nevertheless, the Panel confined its *Brady* inquiry to whether this evidence could have been used to impeach only two Enron witnesses–Glisan and Kopper–on a few questions, without considering its impeachment value in terms of (1) all Enron witnesses, specifically the hearsay statements attributed to Fastow (by Boyt, Glisan, Kopper, Long and others),[4] and (2) Brown's ability to challenge the testimony of

[4] The Fastow raw notes also evidence that Fastow told the government that it was "McMahon [who] did [the] deal." Dkt.1168, Ex. B, at #000176. *Cf. id*. at #000260 (The barge transaction "was a Jeff McMahon deal."). *See id*. at #000267. And when Fastow wanted information related to the deal "he looked for [McMahon] to keep [him] appraised." *Id*. at #000177. In the materials disclosed before trial, the government represented that Fastow told them that McMahon "prepared Fastow for the [critical] phone call [with Bayly]." Dkt.1168, Ex. I, at pp. 4,6. Furthermore, Fastow, himself, testified after *Brown I* that Kopper's testimony at the Barge trial was contrary to his own "in many respects." Dkt.1168, Ex. J, *Newby*, at pp. 1532-33. And in *Skilling*, Fastow said that Glisan and Kopper's testimony in the Barge trial was "largely contradictory to my recollection of events." Dkt.1168, Ex. K, *Skilling*, at Tr. 7188-89. Given this record, it is hard to fathom how the Panel credited any Barge trial testimony from any Enron witnesses. Brown was entitled to all of this information before his trial so that *the jury* could decide whom to believe.

Trinkle. *Id*. at 17. At oral argument, the government again told this Court that the Tina Trinkle call was absolutely vital to its case against Brown. More important, the Panel completely ignored Brown's crucial argument that, had the government disclosed these materials before trial, the prosecutors would have a much weakened case. They could not have repeatedly made unchallenged representations to the jury that McMahon made the original guarantee which Fastow simply ratified. Tr. 402-404, 6144, 6159-60, 6168, 6217, 6218-19, 6510. *Cf. Lacaze*, 645 F.3d at 737 n.1, 738 (where government repeatedly "capitalizes" on its non-disclosure, in "opening statement, closing argument, and rebuttal," that itself establishes the materiality).

The Panel stated: "Even if the net result of disclosing the McMahon notes to Brown would have been that the government would not have asked Glisan or Kopper to testify at all about what McMahon told them, that would have had essentially no impact on the government's case." Panel Op. at 17. This assertion is inexplicable. The Panel ignored the government's central focus at trial (and even in the most recent oral argument), that "Mr. Fastow ratified the oral guarantee that Mr. McMahon had already given to Mr. Furst." Tr. 6168.[5] *See also supra* note 4 (Fastow confirming that

[5] The Task Force relied most heavily on Glisan's and Kopper's testimony as to McMahon in its closing arguments. *See*, *e.g.*, Tr. 6159 ("And during that conversation [between Glisan and McMahon], Mr. McMahon confirmed to Mr. Glisan that he had, in fact, given an oral guarantee to Merrill Lynch."); *cf*. Tr. 6158, 6160, 6218-19.

McMahon played key role in the transaction). This thesis of illegality was possible *only* because the government concealed McMahon's actual statements.

To bolster the testimony of Tina Trinkle, the only Merrill employee who testified for the government and the only witness who had any contact with Brown, the prosecutors repeated their central trope regarding McMahon:

> Now, let's go back to what Ms. Trinkle heard. She heard Mr. Furst or Mr. Tilney say, 'He gave me his word. He gave me his strongest verbal assurances. He told me we won't own these assets past June 30th.' And who was the 'he' he referred to in that call? Well, Ms. Trinkle didn't know. All she heard was 'he.' But you, ladies and gentlemen, do. You know who 'he' was. You know because you heard from Ben Glisan. And Mr. Glisan told you that 'he' was Jeff McMahon, the treasurer of Enron. Tr. 6157-58.
>
> ***So the key***, who Tina Trinkle heard Mr. Furst or Mr. Tilney discussing in that call, was Jeff McMahon. **You know that because you are putting the evidence together**. **You are taking what Ms. Trinkle said and you're putting the** [sic] **together with Mr. Glisan and you know that it was Jeff McMahon**. . . . **Ms. Trinkle and Mr. Glisan totally and completely corroborate each other**. Tr. 6159-60 (emphasis added).

The government's case turned on McMahon. He was "the key"–the only person the prosecution could use to paint an unlawful picture of Merrill's understanding of the transaction. The prosecutors, who referred to McMahon more than any other Enron employee in their closing arguments to the jury, could make this argument only because they had "plainly suppressed" what McMahon actually told them.

The Panel's finding that Brown's understanding of the transaction as a

"promise" was confirmed on the Trinkle call was based on McMahon's alleged guarantee (which McMahon denied making in evidence the government suppressed). Panel Op. at 4-5. Further, the Panel mistakenly asserted that Trinkle knew about Fastow's involvement and his having made "promise." *Id*. at 17. Trinkle admitted she had no information regarding what transpired *after* the "Trinkle call." Tr. 1050.

IV. THE PANEL OPINION MISSTATED THE CENTRAL INQUIRY ON THIS APPEAL: WHETHER THE SUPPRESSED EVIDENCE UNDERMINES CONFIDENCE IN A VERDICT PREMISED ON THE ALLEGED FALSITY OF BROWN'S UNDERSTANDING OF THE TRANSACTION.

The Panel repeatedly and mistakenly posited the central inquiry as whether "Enron executives orally promised Merrill Lynch that it or a third party would buy back the barges within six months." Panel Op. at 8. *Cf*. *id*. at 6-7, 14 at n.18. This articulation incorrectly focused on the nature of the deal rather than the nature of Brown's understanding and belief. The central inquiry for the remaining obstruction and perjury charges is whether Brown *believed* his testimony was true, and whether the suppressed evidence undermined confidence in the outcome of his trial on the perjury and obstruction counts alone. This error infected the entire opinion, allowing the Panel to focus erroneously on testimony regarding the nature of the transaction, rather than evidence supporting Brown's honest belief. *See*, *e.g.*, *id*. at 5-7, 18-19.[6]

[6] This also reveals another error in relying on *Skilling*–which the court stated posed an "identical" *Brady* claim. The panel confused the materiality of evidence by conflating the materiality

V. THE PANEL OPINION ERRED IN RELYING ON TESTIMONY THAT WOULD HAVE BEEN INADMISSIBLE AGAINST BROWN IN A DISCRETE TRIAL ON PERJURY AND OBSTRUCTION; THE PANEL ALSO FAILED TO ACCOUNT FOR THE PLETHORA OF ACQUITTAL EVIDENCE FROM *BROWN I*.

"To make the materiality determination, [a reviewing court] view[s] the suppressed evidence's significance *in relation to the record as a whole*. What might be considered insignificant evidence in a strong case might suffice to disturb an already questionable verdict." *United States v. Cooper*, — F.3d —, 2011 WL 3559929, *11 (10th Cir. 2011) (emphasis added) (citations omitted). *Cf. United States v. Agurs*, 427 U.S. 97, 112-13 (1976) ("omission must be evaluated in the context of the entire record"). The government never proved conspiracy or fraud; the original convictions were reversed, and the government declined to retry the case on remand. The Panel erred in assuming the existence of a conspiracy and failing to focus only on the remaining charges of perjury and obstruction. The Panel also ignored vital acquittal evidence from *Brown I*, which undercut any reliance on Trinkle's testimony.

Brown asks that the original record be assessed fairly in light of the crucial information wrongfully withheld by the prosecutors. First, much of the substantive

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question regarding the underlying subststantive counts (was there a deal) and the remaining perjury and obstruction counts against Brown (his sincere belief or understanding). The suppressed evidence–(1) McMahon's withheld evidence, and the repetition therein; (2) Zrike's SEC testimony regarding her shared understanding with Brown after the Trinkle call; and, (3) acquittal evidence from Fuhs documenting Brown's continuing belief that Merrill's investment was at risk–makes Brown's honest belief or understanding more likely and undermined his perjury and obstruction convictions on the discrete issue of Brown's belief.

evidence presented at *Brown I* would have been inadmissible at a trial for only the perjury and obstruction charges. The Panel erred when it failed to factor this into its evidentiary calculus. *See* Panel Op. at 5-7, 19 (Panel's virtually exclusive reliance on internal Enron evidence and testimony, double or triple hearsay from Hughes, Boyt, Long, Boyle, etc. to describe the "record" and to implicate Brown). Second, the only way the government even attempted to place Brown in a conspiracy was by his participation in the "Trinkle call." Tr. 1040, 1049, 6162, 6164, 6198-99. The suppressed evidence discussed above shows how any reliance on this call is misplaced. Third, the Panel's opinion repeatedly conflated the substantive fraud and conspiracy charge with the discrete perjury and obstruction charges. As to the perjury and obstruction charges, it does not matter whether there actually was a guaranteed take-out. The only relevant query is whether the suppressed evidence undermines confidence in the outcome of a trial premised exclusively on whether Brown in fact "*understood*" the transaction as containing something less than a legally enforceable take-out such that Merrill's investment was at risk. *Contra* Panel Op. at 19.

The Panel failed to consider the evidence from Brown's trial that undermined Trinkle's testimony and corroborated Brown's: (1) Bill Fuhs,[7] Brown's subordinate

[7] The Panel's use of emails between Brown and Fuhs to show Brown's guilty knowledge is perplexing in light of this Court's acquittal of Fuhs and treatment of his portion of the relevant email exchange as a "jocose reply." *United States v. Brown*, 459 F.3d 509, 523-25 (5th Cir. 2006), *cert.*

who was acquitted by this Court, testified that Merrill moved the deal out of Brown's unit because Brown opposed it; (2) when Brown saw an article on civil unrest in Nigeria in February or March 2000, months after the transaction was consummated, he expressed his concern for Merrill's $7 million investment. Tr. 4554 ("Jim Brown ... was concerned that [the destruction of the barges because of civil unrest] could mean our $7 million was -- investment was worthless."). Under Brown's direction, Fuhs then repeatedly called Enron to check on the status of the barges. Tr. 4554-55. This evidence demonstrates Brown's continued concern for Merrill's risk of loss, thus negating any knowledge of a guarantee.

VI. THE PANEL OPINION CONTAINS MULTIPLE FACTUAL ERRORS THAT CAST THE CENTRAL INQUIRY IN A COMPLETELY DIFFERENT LIGHT.

A. LJM2 was Irrelevant to Brown's Perjury and Obstruction Charges.

The Panel opinion mistakenly suggested that Brown's understood the transaction as a guaranteed take-out because Fastow supposedly referenced LJM2 in his conversation with Merrill personnel. Panel Op. at 7, 13, 15.[8] Indeed, the Panel

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denied, 127 S.Ct. 2249 (2007). Logic, if not the law of the case, surely dictates that this is error. Furthermore, the email actually supports Brown's opposition to the Barge deal and his continued concern for Merrill's possible loss because of the civil unrest.

[8] Yet, at the subsequent Lay-Skilling trial, Fastow admitted that he kept LJM2's outside investors, including Merrill and its senior employees "in the dark" regarding transactions with Enron. Dkt.1004, Ex. A, *Skilling* Transcript, at 6485-86, 6573, 6596-97. The suppressed evidence of Zrike proves that LJM2 was a valid third party at the time–as far as anyone at Merrill knew–and she "got comfortable with the fact that LJM2 bought it." Dkt.1168, Ex. F at 194-95. And as far as Merrill

went so far as to say that "Fastow did promise a buyback by LJM2." *Id*. at 14. *But see* Fastow Raw Notes, Dkt.1168, Ex. B, at #000262 (Fastow "thought LJM was technically [a] [third] party and so, [there was] not a problem" with its purchase of Merrill's equity interest.). LJM2 is not relevant to the perjury and obstruction charges as to Brown, and the Panel's reliance on LJM2 is undermined by record evidence it overlooked and by suppressed or newly discovered evidence from McMahon, Zrike and Fastow.[9]

B. The Engagement Letter was Rewritten and Approved by Merrill Counsel (as proven by evidence suppressed by the government).

The Panel failed to credit the suppressed evidence from Merrill counsel Dolan that it was *he* who rewrote the engagement letter because it was inconsistent with the transaction and could otherwise be viewed, based on that offending language, "as a parking transaction". This is crucial *Brady* evidence that the government yellow-highlighted, but only recently produced to Brown. The engagement letter on which

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knew, LJM2 *was* a valid third party–a separate accounting entity as confirmed by its separate auditors, KPMG, and its separate attorneys, Kirkland & Ellis. Dkt.1004, Ex. A, at 6897-98, 6951, 6920, 7218-29, 7234-36.

[9] Every call participant who testified on this subject–Bayly, Kelly Boots (who was in the room with Fastow, Dkt.1004, Ex. I, at 3; *cf*. Tr. 4961-62, 5021), McMahon, and Tilney–stated that *LJM2* was not mentioned on the phone call. In the suppressed notes, McMahon averred that he "[d]oesn't recall LJM being mentioned at all." Dkt.1217, Ex. B, at 000515 (two lines down from highlighted omission). *Id*. at 000530 (same); 000561 (same). Dan Boyle, another Enron employee on the call, never mentioned LJM2 as being part of the Bayly-Fastow call. In questioning him, prosecutors focused on whether *Enron* had promised to *buy back* Merrill's interest. *Cf*. Tr. 5087.

the Panel wrongly relied, was rewritten and approved by counsel to ensure the lawfulness of the transaction. Even *if* Brown had signed it, which, simply as a matter of truth and fact, he did not, it evidences nothing unlawful. Reliance on counsel supports an honest belief in the legality of the transaction.

C. The Panel Erred in Relying on *Skilling's Brady* Determination Regarding the Fastow Notes to Sustain Brown's Conviction.

The Panel erred when it relied on *Skilling* to dismiss Brown's *Brady* claim regarding the Fastow raw notes. While accusing Brown of "cherry-pick[ing]" portions of the Fastow notes, Panel Op. at 13, the Panel failed to acknowledge that Brown was entitled to all of the words that supported his understanding of the transaction. Fastow's "explanation," reflected only in the raw notes, tracked Brown's Grand Jury testimony virtually verbatim. Dkt.1217, Chart 8 (BRE9). Brown was entitled to know that *Fastow* had uttered these words. *Kyles*, 514 U.S. at 441 (1995); *Napue*, 360 U.S. at 269; *LaCaze*, 645 F.3d at 738.

CONCLUSION

For these reasons, and under any standard of review, the Panel should withdraw its opinion, hold the concealed evidence was material to Brown's defense, vacate his convictions, and award Brown a new trial.

Dated: August 31, 2011

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copies of Appellant's Petition for Rehearing *En Banc* was this day delivered by electronic case filing to the Clerk of the Court and to counsel for United States at the following address:

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Dated: August 31, 2011

/s/ Sidney Powell
Sidney Powell