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 REHEARING *EN BANC* 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 the judges of 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 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 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

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision conflicts with:

1. The decisions of the United States Supreme Court in:

Brady v. Maryland, 373 U.S. 83 (1963);

Dennis v. United States, 88 S. Ct 1840 (1966);

Giglio v. United States, 405 U.S. 150 (1972);

Kyles v. Whitley, 514 U.S. 419 (1995);

Napue v. Illinois, 360 U.S. 264 (1959); and,

United States v. Agurs, 427 U.S. 97 (1976).

2. With the decisions of this Court in:

LaCaze v. Warden, 645 F.3d 728 (5th Cir. 2011);

Mahler v. Kahlo, 537 F.3d 494 (5th Cir. 2008);

United States v. Davis, 609 F.3d 663 (5th Cir. 2010);

United States v. Fernandez, 559 F.3d 303 (5th Cir. 2009);

United States v. Miller, 520 F.3d 504 (5th Cir. 2008); and,

United States v. Sipe, 388 F.3d 471 (5th Cir. 2004).

3. And unnecessarily splits from the decisions of other circuits in:

Brooks v. Tennessee, 626 F.3d 878 (6th Cir. 2010);

Conley v. United States, 415 F.3d 183 (1st Cir. 2005);

Goudy v. Basinger, 604 F.3d 394 (7th Cir. 2010);

Mandacina v. United States, 328 F.3d 995 (8th Cir. 2003);

United States v. Gabrion, — F.3d —, 2011 WL 3319532 (6th Cir. 2011);

United States v. Jernigan, 492 F.3d 1050 (9th Cir. 2007);

United States v. Jones, 601 F.3d 1247 (11th Cir. 2010);

United States v. King, 628 F.3d 693 (4th Cir. 2011);

United States v. Kohring, 637 F.3d 895 (9th Cir. 2011)*;*

United States v. Madori, 419 F.3d 159 (2d Cir. 2005);

United States v. Pettiford, 627 F.3d 1223 (D.C. Cir. 2010);

United States v. Price, 566 F.3d 900 (9th Cir. 2009); and,

United States v. Risha, 445 F.3d 298 (3d Cir.2006).

Consideration by the full Court is therefore necessary to secure and maintain uniformity of the Court's decisions, to apply Supreme Court authority correctly, and to avoid creating a split with other circuits.

I also express a belief based on a reasoned and studied professional judgment that this case raises issues of exceptional importance:

1. Whether the standard of review of the materiality prong of *Brady* is *de novo*?

2. Whether the legal standard of *Brady*, which must be reviewed in light of the entire record, must be reviewed *de novo*?

3. Whether Brown is entitled to a new trial when the concealed evidence "could have" been used to impeach two witnesses (or more), went to the essence of the government's case, and prosecutors repeatedly capitalized on their concealment?

/s/ Sidney Powell
Sidney Powell

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STATEMENT OF THE CASE RELEVANT TO *EN BANC* REVIEW

Jim Brown, a former Merrill Lynch executive, appeals the denial of his motion for a new trial on perjury and obstruction–the only charges remaining from his initial conviction in 2004.[1] Between late 2007 and March 2010, new prosecutors disclosed 6,300 pages of grand jury testimony, 302s and notes that former prosecutors had concealed, including exculpatory statements that the prosecutors had highlighted in yellow and presented to the trial court *in camera* as *Brady* and *Giglio* evidence.[2]

In considering the prosecutors' 4-line "summary" of statements by Enron's Treasurer Jeff McMahon, the Panel held that the "district court clearly erred in holding that the government's disclosure letter fully disclosed" evidence from the notes of McMahon's 2002 interviews. Op. at 16. Yet, the Panel denied Brown a new trial, holding that Brown failed "to give us 'a definite and firm conviction'" that the suppressed evidence "establishes a substantial probability of a different outcome," and the "district court did not clearly err in holding that the evidence was not material." *Id*. at 1, 16, 18.

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[1] Despite Brown's specific requests for *Brady* evidence, prosecutors consistently said that none existed. Dkt.1168, Chart 1. He went to trial with only a few pages of "summaries."

[2] After these disclosures, new prosecutors dismissed all wire fraud charges against Dan Bayly *sua sponte* in January 2010, Dkt.1100, and against Brown three days before his scheduled retrial in September 2010, Dkt.1263. Accordingly, the government has never proved a conspiracy or wire fraud against any Merrill Defendant.

Brown was convicted for his grand jury testimony, expressing his *personal understanding* that Enron had not made an unlawful "promise" or a "guarantee" to buy back the Nigerian barges from Merrill, but instead had committed to use its "best efforts" to remarket the barges to a third party.[3] "Best efforts" is a term of art that the prosecutors knew rendered the agreement lawful. Tr. 1651-53, 6151-52, 6485.[4] The government had to prove beyond a reasonable doubt that Brown's testimony was *knowingly* false. Brown could not be convicted if he believed his testimony was true when he gave it, even if he was mistaken. *United States v. Abroms*, 947 F.2d 1241, 1245 (5th Cir. 1991). The government contended that former Enron Treasurer Jeff McMahon made an illegal guarantee that Enron CFO Andrew Fastow ratified, and that no "best-efforts" representation was made. Prosecutors told the jury that McMahon was "the key." Tr. 6159-60, 6218-19.

Reviewing even a few pages of the concealed evidence, the Panel found the first two prongs of a *Brady* violation: "The McMahon notes contain numerous passages that unequivocally state that . . . there was only a 'best efforts' agreement

[3] Brown was asked to testify about conversations he did not participate in and a document he did not write. He explained to the grand jury that a "promise" or "obligation" was "inconsistent with his understanding." "If assurance is synonymous with guarantee, then that is not my understanding. If assurance is interpreted to be more along the lines of strong comfort or use best efforts, that is my understanding." (BrownX980, 980B: 76, 77, 81, 82, 88, 91, 92; Tr. 3238-41).

[4] In suppressed SEC testimony, Merrill counsel Katherine Zrike referred to "best efforts" as a "term of art" which was the basis for Merrill's decision to participate. Dkt.1168, Ex. Y, at 306-8.

and no 'promise,'" and they were "plainly suppressed." Op. at 16. The Panel correctly observed: "'No' is not the same thing as 'I do not recall.'" *Id*. Nonetheless, and making significant factual errors (which Brown has addressed separately in a Petition for Panel Rehearing), the Panel found the non-disclosures immaterial.

The Panel's analysis of the materiality prong of *Brady* is deeply flawed on three levels. It applied (i) the wrong standard of review, (ii) the wrong test for materiality, and (iii) it ignores and conflicts with binding precedent establishing that the suppressed evidence was material. It conflicts with *Kyles v. Whitley*, 514 U.S. 419 (1995), with this Court's most recent *Brady* decision, *LaCaze v. Warden*, 645 F.3d 728 (5th Cir. 2011), which the Panel did not cite, and splits from eleven circuits. It also applied the wrong standard of review to the overarching *Brady* question.

STATEMENT OF THE ISSUES WARRANTING *EN BANC*

Whether the Panel failed to apply the correct standard of review, the correct test for materiality, and, created a conflict with settled precedent that establishes the materiality of the concealed evidence?

ARGUMENT AND AUTHORITIES

"Where the question of guilt or innocence may turn on exactly what was said, the defense is clearly entitled to all relevant aid which is reasonably available to determine the precise substance of the statements." *Dennis v. United States*, 384 U.S. 855, 872-73 (1966). Under *Dennis* and *Brady*, where words create the alleged crime,

as in perjury and obstruction, a defendant is entitled to all of the words of the most important actors. Only defense counsel can decide how to use contradictory evidence, and only the jury can weigh it. *Id*. at 873-75.[5] The prosecution cannot reserve for itself the ultimate determination of materiality under *Brady*, and courts cannot play "what if" in hindsight. *LaCaze*, 645 F.3d at 734, 736, 737 n.1.

I. REHEARING *EN BANC* IS REQUIRED TO ACHIEVE UNIFORMITY AND CLARIFY THAT ALL *BRADY* QUESTIONS ARE REVIEWED *DE NOVO*.[6]

The Panel's use of a "clear error" standard of review for any prong of a *Brady* claim is legal error. Op. at 1, 12. This Court has long and consistently held that it

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[5] Brown was entitled to all exculpatory information *before* his trial and to have the jury consider defense counsel's interpretation of it. *United States v. Rodriguez*, 496 F.3d 221, 226 (2d Cir. 2007). The panel also ignored the fact that the government's incomplete and misleading "summaries" could wrongly "represent [] to the defense that the evidence does not exist" and cause the defense "to make pretrial and trial decisions on the basis of this assumption." *United States v. Bagley*, 473 U.S. 667, 682-83 (1985); Dkt.1226. *See United States v. Sipe*, 388 F.3d 471, 482 (5th Cir. 2004) (government cannot "usurp the role of the court and unfairly limit the options of a criminal defendant.").

[6] These arguments apply also to the 556 pages of evidence from Merrill counsel Zrike, which the Panel assumed *arguendo* were suppressed and exculpatory. The government's one-page "summary" of her testimony did not mention Brown or "best efforts." Her suppressed evidence was replete with exculpatory evidence as to both. The Panel's acknowledgment that her evidence could have helped Brown alone requires reversal. *Kyles*, 514 U.S. at 437-40; *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *LaCaze*, 645 F.3d at737-38. Zrike was the key defense witness, yet Brown knew nothing of her testimony *about him* or "best efforts" or her continued role. Zrike's SEC testimony, which, contrary to the Panel, was *not* given to the district court to review *in camera*, Dkt.1217, at p. 1 n.1, must be reviewed *de novo*. *See* Dkts.1157, 1168, 1217. *See* Dkt.1168, Ex. Y (Excerpts of Zrike SEC Testimony from 2003). Prosecutors repeatedly capitalized on their concealment of Zrike's clear answers to their arguments. They even shifted the burden of proof to Brown to explain evidence they had concealed. *Compare* Tr. 6151-52, 6485-86 *with* Dkt.1217, Ex.C: 63-64, 69, 75 (BRE 10). Zrike tried to document the best-efforts representation and the remarketing agreement, but Vinson & Elkins–*Enron's* counsel–rejected both terms in later negotiations.

reviews the materiality of exculpatory evidence *de novo*. *See*, *e.g.*, *United States v. Davis*, 609 F.3d 663, 696 (5th Cir. 2010); *Sipe*, 388 F.3d at 479. *LaCaze* is clear: "Whether evidence is material, for purposes of a *Brady* violation, is a mixed question of law and fact, which we review *de novo*." 645 F.3d at 736. *See also Mahler v. Kaylo*, 537 F.3d 494, 500 (5th Cir. 2008) (materiality review is *de novo*); *United States v. Miller*, 520 F.3d 504, 514 (5th Cir. 2008) (*Brady* allegation in motion for new trial is reviewed *de novo*). The Panel's clearly erroneous standard of review of materiality conflicts with clear precedent of this circuit and splits from eleven circuits–all of which hold that materiality must be reviewed *de novo*.[7]

The overarching and anterior question of a *Brady* violation must be also be reviewed *de novo*. The Panel misappropriated the clearly erroneous standard from

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[7] Every circuit has rejected the clearly erroneous standard in reviewing the mixed question of fact and law raised by the materiality prong of *Brady*. Materiality is an issue that is reviewed *de novo* in every circuit. *See*, *e.g.*, *Conley v. United States*, 415 F.3d 183, 188-90 (1st Cir. 2005) (applying *de novo* review to *Brady* determination); *United States v. Madori*, 419 F.3d 159, 169 (2d Cir. 2005) (reviewing materiality *de novo*); *United States v. Risha*, 445 F.3d 298, 303 (3d Cir. 2006) (same); *United States v. King*, 628 F.3d 693, 701-2 (4th Cir. 2011) (same); *Davis*, 609 F.3d at 696 (*de novo* review of materiality); *United States v. Fernandez*, 559 F.3d 303, 318-19 (5th Cir. 2009) (same); *Brooks v. Tennessee*, 626 F.3d 878, 891 (6th Cir. 2010) (same); *Goudy v. Basinger*, 604 F.3d 394, 398-99 (7th Cir. 2010) (same); *Mandacina v. United States*, 328 F.3d 995, 1001 (8th Cir. 2003) (reviewing *de novo*, even after dual review by district court); *United States v. Price*, 566 F.3d 900, 907 and n.6 (9th Cir. 2009) ("district court's denial of a new trial motion based on alleged *Brady* violations is reviewed *de novo*"; "it is clear [in this circuit] that the legal questions at issue in a *Brady* claim are reviewed *de novo*"); *United States v. Jernigan*, 492 F.3d 1050, 1053-54 (9th Cir. 2007) (*en banc*) (materiality is always reviewed *de novo*); *United States v. Cooper*, — F.3d —, 2011 WL 3559929, *11 (10th Cir. 2011) (same); *United States v. Jones*, 601 F.3d 1247, 1266 (11th Cir. 2010) ("We review *de novo* alleged *Brady* violations."); *United States v. Pettiford*, 627 F.3d 1223, 1227-28 (D.C. Cir. 2010) (materiality review under *Brady* is always *de novo*).

a line of cases determining whether evidence constitutes a "statement" for purposes of *Jencks*. Borrowing from its *Jencks* review, and as an aside, a panel of this Court mistakenly recycled the same standard for its *Brady* review of the same evidence. *United States v. Mora*, 994 F.2d 1129, 1139 (5th Cir. 1993). The next two applications of that standard in this Circuit, in 1993 and 1994, referred *only* to *Mora*, without considering its appropriateness under *Brady*.[8] Neither *Mora*, *Williams,* nor *Holley* cited any Supreme Court or extra-circuit precedent for this now completely self-referential standard. Further, abundant authority exists in this Circuit that the clear error standard applies only to review of *Jencks* issues–not *Brady*.[9]

After fifteen years of rightful oblivion, the clearly erroneous standard of review of *Brady* issues suddenly reappeared in *United States v. Skilling*, 554 F.3d 529, 579 and n.74 (2009), *vacated in part on other grounds*, 130 S. Ct. 2896 (2010) (citing the

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[8] *United States v. Williams*, 998 F.3d 258, 269 (5th Cir. 1993) (another *Jencks* case where the *Brady* analysis of the same evidence was secondary); *United States v. Holley*, 23 F.3d 902, 914 (5th Cir. 1994) (FBI Reports; citing *Mora*).

[9] *See*, *e.g.*, *United States v. Naranjo*, 309 Fed. Appx. 859, 865 (5th Cir. 2009) ("We review *Brady* determinations *de novo*.... We review a district court's ruling regarding discovery under the Jenks Act for clear error."); *United States v. Forte*, 2003 WL 1922910, *8-10 (5th Cir. 2003) (same); *United States v. Cathey*, 591 F.2d 268, 274 (5th Cir.1979) ("The clearly erroneous standard of review applies to district court determinations of what material must be produced under the *Jencks* Act."); *accord United States v. Moore*, 452 F.3d 382, 389 (5th Cir. 2006); *cf. Jones*, 601 F.3d at 1266 (clear error for *Jencks*; *de novo* for *Brady*); *United States v. Farley*, 2 F.3d 645, 654-55 (6th Cir. 1993) (*Brady* and *Jencks* review employ different standards–clearly erroneous is reserved for *Jencks* Act review); *United States v. Conteh*, 234 Fed. Appx. 374, 389 (6th Cir. 2007) (same).

earlier Fifth Circuit cases to support use of the standard).[10] A mere month after *Skilling*, a different panel of this Court correctly eschewed the clear error standard once again. *Fernandez*, 559 F.3d at 318-19.

Following *Skilling*, the Panel here applied the clear error standard to review Brown's *Brady* claims. This highly deferential standard has never been countenanced by the Supreme Court in any of its *Brady* opinions. Some courts apply different standards of review for facts and for materiality under *Brady*. This Court, however, has rejected the "clear error" standard, for both the underlying factual determination and for materiality–even when the trial court conducted *in camera* review. *See Fernandez*, 559 F.3d at 318-19. The use of the clear error standard in like circumstances has also been explicitly rejected in the Sixth, *United States v. Gabrion*, — F.3d —, 2011 WL 3319532, *18-19 (6th Cir. 2011) (*de novo*), and impliedly in

[10] *Skilling* cited *United States v. Trevino*, 89 F.3d 187, 190 (4th Cir. 1996), but *Trevino* rests only on *Mora* (and involved the *in camera* submission of "confidential" material) and has not been cited in a published opinion for this proposition by the Fourth Circuit since. *Skilling* also cited two Ninth Circuit cases, *United States v. Strifler*, 851 F.2d 1197, 1202 (9th Cir. 1988) (fashioning clear error standard from whole cloth without citing any authority, but adopting standard only where *in camera* review was of a *probation file*), and *United States v. Monroe*, 943 F.2d 1007, 1012 (9th Cir. 1991) (citing back to *Strifler* as only authority for a clear error standard of review). While the Ninth Circuit, usually in unpublished opinions and where confidential materials are at issue, has occasionally referenced this standard in the intervening years (citing only its earlier opinions in *Strifler* and *Monroe* as authority), the same court has clearly rejected that standard for review of pure *Brady* issues. *Price*, 566 F.3d at 907 and n.6.

every circuit except the Ninth.[11] Even more evidence would have been deemed favorable to Brown–and deemed to have been suppressed–if the Panel had applied the *de novo* standard of review. Because *Brady* is a legal standard that considers the value of suppressed evidence in light of the entire record, *United States v. Agurs*, 427 U.S. 97, 108-9, 112 (1976), all *Brady* violations must be reviewed *de novo*.[12]

II. REHEARING *EN BANC* SHOULD BE GRANTED TO APPLY THE CORRECT TEST FOR MATERIALITY AND RESOLVE THE CONFLICT.

The Panel's "substantial probability of a different outcome" is the wrong test for materiality under *Brady*. Op. at 9. In *Kyles*, the Supreme Court held that "the question is not whether the defendant would more likely than not have received a

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[11] *But see United States v. Echeverria*, 1993 WL 337533, *3 n.1 (9th Cir. 1993) (refusing to choose between *de novo*, abuse of discretion and clear error); *United States v. Brumei-Alvarez*, 991 F.2d 1452, 1456 (9th Cir. 1991) (same); *and see* note 10 and accompanying text (lesser standard devised only for cases involving *in camera* review of *probation* files). Two cases, one each from the Seventh and Eighth Circuits, have applied an "abuse of discretion" standard, but only where the evidence reviewed *in camera* was privileged, sealed or otherwise confidential. *See United States v. Phillips*, 854 F.2d 273, 276-78 (7th Cir. 1988) (abuse of discretion where *in camera* review of confidential informant file); *United States v. Willis*, 89 F.3d 1371, 1381 n.6 (8th Cir. 1996) (abuse of discretion where *in camera* review of juvenile's sealed statement, and district court had reviewed summary of evidence defendant argued was suppressed). By definition, a court "abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996).

[12] Logically, there should be no variation in the standard of review of a *Brady* claim after district court review (pre- or post-trial). Given courts' repeated admonition that *Brady* must be assessed in the context of the entire record, it is unfathomable that a pre-trial *in camera* review of *Brady* could be entitled to more deference than a post-trial review. *Cf. Agurs* at 108 ("the significance of an item of evidence can seldom be predicted accurately until the entire record is complete"). Pre-trial, the court has no significant information about the defense strategy. That is why the Supreme Court has said that the advocate is the best judge of the value of the exculpatory evidence and, if in doubt, the prosecutor should err on the side of disclosure. *Id.* at 108-9.

different verdict with the evidence, but whether in its absence he received a fair trial, ... resulting in a verdict worthy of confidence." 514 U.S. at 434. *Brady* evidence is material when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id*. at 435.

Although the Panel in *Brown* stated at the end of its opinion that the suppressed evidence "did not create a reasonable probability of a different outcome," that is still error.[13] Op. at 17-18. The Panel opinion failed to cite, and conflicts with, this Court's recent decision in *LaCaze*, in which this Court reversed the denial of habeas corpus, finding a *Brady* violation in the state's suppression of its assurances to one witness. Here, the Panel already found that the concealed statements of McMahon alone could impeach *two* witnesses. Brown is not required to prove that the suppressed evidence "did" or "would" or even "probably would" lead to a different outcome, but rather that it "*could*." After *Kyles*, the focus is not on the difference between two possible "outcomes," but rather, on fairness and on whether "the favorable evidence *could* reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435 (emphasis added).

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[13] That test arose from *Bagley*, 473 U.S. at 682, on which the Panel also relied, but was replaced ten years later by the *Kyles* standard. *Harrington v. Richter*, 131 S. Ct. 770, 792 (2011), cited by the Panel, is not a *Brady* case and has never before been cited in one. Although *Bagley* "borrowed" the *Strickland* standard to test *Brady* claims, the Court has not done so since *Kyles*, and *Harrington* is singularly inapposite.

III. THE PANEL'S ANALYSIS IGNORED AND CONFLICTS WITH PRECEDENT ESTABLISHING THAT THE SUPPRESSED EVIDENCE WAS MATERIAL.

A. Evidence that Could Impeach a Key Witness Is Material as a Matter of Law, and Glisan and Kopper Were Key.

Although the Panel cited *Rocha v. Thaler*, 619 F.3d 387, 396 (5th Cir. 2010), for the proposition that evidence "generally is *not* found to be material" under a particular set of circumstances, it ignored *Rocha*'s alternative admonition that a "*Brady* violation is more likely to occur when the impeaching evidence would seriously undermine the testimony of a key witness on an essential issue. . ." *Id*. at 397. Although the Panel acknowledged that "Brown could have used McMahon's statements . . . to impeach Glisan's and Kopper's testimony that McMahon told them there was a buy-back 'promise,'" (which was alone enough to find materiality), it failed to appreciate that the government's case *depended* on the McMahon guarantee. Op. at 17. The Panel opinion conflicts with *Kyles*, 514 U.S. at 441 ("'essence of state's case'" undermined); *Giglio v. United States*, 405 U.S. 150, 154-55 (1972) (reversing for failure to disclose leniency to a principal witness); and, *Mahler*, 537 F.3d at 503 (finding *Brady* violation where concealed statements "could have been used for impeachment" and were central to the theory of the defense).[14] *Accord*

[14] *See United States v. Campos*, 1994 WL 144866, *12-15 (5th Cir. 1994) (raw notes from critical witness were suppressed; "conclud[ing] that there was at least a reasonable likelihood that the suppressed evidence *could have* affected the verdict") (emphasis added) (citation omitted).

LaCaze, 645 F.3d at 738; *United States v. Kohring*, 637 F.3d 895, 912 (9th Cir. 2011) (finding *Brady* violations and granting new trial on facts similar to those here).

Glisan and Kopper were so important that the government made deals with each of them. They testified for more than 300 pages each. In closing arguments, prosecutors pointed to Glisan's testimony at least 46 times, to Kopper's 13 times, and to the "McMahon guarantee" 56 times.[15] Because McMahon was the original purported guarantor, had participated in the Fastow phone call, stole no money, and had not been indicted, McMahon's statements were crucial to Brown's defense. The government concealed McMahon's statements because they undermined the linchpin of its case *and* corroborated Brown's belief and testimony. McMahon definitively said: "No–never guaranteed." "Agreed E[nron] would use best efforts to help them sell assets." "Use best efforts to try to resell." BRE:12.

B. The Panel Ignored Binding Precedent that "Establishes the Materiality."

Prosecutors opened and closed their case referring to the "McMahon guarantee" and relying on McMahon, Glisan, and Kopper, over 100 times. Their theory of illegality rested entirely on their assertion that "McMahon made the illegal guarantee," which Fastow orally confirmed in the December 23rd conference call (in

[15] Tr. 6158-60, 6167-68, 6175, 6182-84, 6193, 6198, 6218, 6244, 6247-49, 6251, 6253, 6255-56, 6512, 6514, 6521, 6523-24, 6528, 6547-48, 6550.

which Brown did not participate). Tr. 6168.[16] In doing so, the Panel ignored precedent holding that the fact that government repeatedly "capitalized on [its] misrepresentations, . . . itself shows the materiality" of the concealed evidence. *LaCaze*, 645 F.3d at 737 n.1 (state repeatedly capitalized on suppression) (citation omitted). *Cf. Kyles*, 514 U.S. at 444 (prosecutor capitalized on suppression in closing argument). But there is still more.

C. The Panel Ignored that McMahon's Statements Could Have Impeached Other Important Witnesses.

1. McMahon's statements could have impeached government witness Timothy Henseler, a federal agent who took notes of McMahon's statements that the prosecutors highlighted but concealed from Brown's defense team. Brown did not have any information that would have enabled him to cross-examine Henseler about McMahon's statements. Tr. 2914-48, 2989-3073 (BRE:12).

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[16] *See also* Tr. 402-404, 6144, 6217, 6510; Dkt.1217, Charts 2, 6, 7 (BRE9). Brown's case is more egregious than *LaCaze's*, because Brown's prosecutors individually highlighted McMahon's and Zrike's statements as *Brady* and *Giglio* evidence, but concealed them from Brown, and, instead, provided meager and misleading summaries. *See United States v. Stevens*, No. 1:08-cr-00231-EGS (D.D.C. April 7, 2009), Dkt.1217, Ex. A-3, at 9 ("use of [*Brady*] summaries is an opportunity for mischief and mistake"). Evidencing the materiality of "McMahon's guarantee," prosecutors repeatedly asserted and elicited testimony that McMahon provided an illegal guarantee, while they foreclosed defense efforts to prove a "best-efforts" representation. (Glisan and Kopper – "no best efforts," Tr. 1508, 1650-53, 3618); (Agent Bhatia testifies "best" was his word–not Kopper's, Tr. 3403-11, 3521-22); (excluding defense witness Herb Washer's testimony of "best efforts," Tr. 5701-2). *See* Fastow Raw Notes, Dkt.1160, Ex. A:000263, 000348-49 (BRE11); McMahon Charts, Dkt.1217, Charts 2, 6, 7 (BRE9). On this record, the Panel's assertion that McMahon's exculpatory statements were not material defies the record and "simply lacks force." *LaCaze* at n.1.

2. McMahon's statements could have impeached FBI Agent Bhatia, who improperly vouched for the entire prosecution, testifying: "Based on my investigation, my conducting interviews with numerous people, the review of all the documents, the evidence, going over all the transcripts of the people that are here in this trial, that [Enron "promising" a buy-back] is exactly what I believe to have happened in this case." Tr. 3289-90. The concealed *Brady* evidence of McMahon, Zrike and Fastow could have impeached Agent Bhatia on every assertion and explained the documents on which he (and the Panel) relied. Without the suppressed evidence, however, the lead case agent, who purported to know every major player's statements based on evidence only he was privy to, testified against Brown with devastating effect–and without fear of contradiction.

D. The Suppressed McMahon Evidence Would Have Undermined Trinkle's Testimony.

The Panel viewed Trinkle's testimony as "considerable evidence" of Brown's guilt.[17] Op. at 18-19; *see id*. at 4-5, 17. Trinkle, the only Merrill witness, was also the government's only witness against Brown specifically. McMahon was the *only* source

[17] Zrike's SEC testimony that the Panel found favorable and suppressed also rebuts Trinkle's testimony and proves that Brown repeatedly objected to the deal after the Trinkle call. As did Zrike, Brown repeatedly stated that Enron could not retain any risk–there could not be a guarantee. Dkt.1168, Ex. Y, at 87, 107-10, 123-24, 135-36, 192, 196-207, 284, 304-9.

for the alleged "guarantee" referenced on the "Trinkle call." Tr. 6157-60.[18] Evidence directly contradicting the "McMahon guarantee" would have undermined Trinkle's testimony and supported Brown's avowed belief in what he told the grand jury.

E. McMahon's Statements Would Have Been Admissible Even If the Government Had Not Elicited the McMahon Guarantee from Glisan and Kopper.

The Panel held that the suppressed McMahon evidence failed the materiality prong of *Brady* based on its own hypothetical: *If* the government had not asked Glisan and Kopper about what McMahon told them, then Brown could not have used McMahon's statements. Op. at 17. Even *if Brady* and *Kyles* permitted the Panel to imagine that the government did *not* ask its two star witnesses *the very questions on which its entire case depended*, it still erred. Brown could have asked the questions himself, and used leading questions to prove that McMahon had denied the existence of a guarantee and agreed only to best efforts.[19] Dkt.1217, Chart 6 (BRE9). With respect to Brown's belief in the truth of his statements, McMahon's statements were not hearsay. They would have been admissible simply because they elucidated

[18] Tr. 6159-60 (Prosecutor: "So the key, who Tina Trinkle heard Mr. Furst or Mr. Tilney discussing in that call, was Jeff McMahon. . . . Ms. Trinkle and Mr. Glisan totally and completely corroborate each other. Trinkle told you that he -- someone at Enron -- gave Merrill Lynch its word that Merrill Lynch would not own the barges on June 30th. And Glisan told you that Jeff McMahon confirmed to him that he gave that exact guarantee."). Trinkle knew nothing of the later Fastow call or the parties' subsequent negotiations. Tr. 1050.

[19] As the Panel recognized elsewhere, hearsay can be used to impeach hearsay. Op. at 17 n.22.

Brown's personal understanding–the effect on the listener.[20] Dkt.1217, Chart 6 (BRE9). Furthermore, it is doubtful that a fair application of *Brady* and *Kyles* would permit the Panel to imagine a sea change in the government's fundamental trial strategy.

CONCLUSION

Knowing McMahon was "the key," the government provided an affirmatively misleading "summary" to conceal McMahon's contradiction of the essence of their hearsay-only case. The suppressed evidence not only corroborated Brown's understanding but undercut "even the good faith" of the prosecution, *Kyles*, 514 U.S. at 445, dramatically weakening the prosecution's already threadbare case against Brown. Brown's trial was not fair. The concealed testimony of McMahon, with or without Zrike's and Fastow's, "*could* reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."' *Id.* Given the serious procedural and substantive errors of the Panel opinion, this Court should grant rehearing *en banc*, vacate Brown's convictions and award him a new trial.

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[20] The Panel also wrongly dismissed the Fastow notes as "not favorable" to Brown. *See Sipe*, 388 F.3d at 481-82. Those notes reveal that *Fastow* also said Enron would use its "best efforts" and he explained it at length as a term of art. Repetition and consistency among the major actors is itself vital *Brady* evidence. *Napue*, 360 U.S. at 270. It is compelling that both men told multiple different federal agents at least 2 years apart that Enron committed to use "best efforts," and that Zrike tried to document it that way. *Sipe*, 388 F.3d at 482, 491 (evidence is material under *Brady* where it allows defendant "to attack the government's case from every angle"); *cf*. *Napue*, 360 U.S. at 269.

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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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