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

REPLY BRIEF OF DEFENDANT-APPELLANT JAMES A. BROWN

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I. INTRODUCTION AND SUMMARY OF THE ARGUMENT IN REPLY.

The government's brief opposing Brown's request for a new trial is most notable for what it does not address. It ignores the undeniable fact that even though the prosecutors gave the district court acknowledged *Brady* evidence (including yellow-highlighted portions of clear, declarative statements by key witnesses with personal knowledge of the barge transaction), the Enron Task Force [ETF] did not transmit that evidence to the defense. The ETF's mere 19 pages of disclosure were rewritten summaries of summaries that obscured the truth, omitted affirmative, exculpatory statements of parties, and blurred essential distinctions between lawful and unlawful conduct. The government also fails to address the fact that the prosecutors were able to hammer home certain refrains to the court and jury only because they withheld the contradictory evidence.

Since the Supreme Court's reversal of *Arthur Andersen*, similar government tactics have derailed prosecutions and prompted changes in DOJ policies.[1] The Department confessed error in *Stevens* for *Brady* violations. Courts have reversed

[1] The DOJ reinstated remedial training on *Brady*. *See* Memorandum from David Ogden, January 4, 2010, available at http://www.justice.gov/dag/discovery-guidance.html (last visited December 13, 2010). *See infra* note 15 and accompanying text.

numerous cases involving *Brady* violations, other government misconduct in financial crimes cases, and every ETF case actually tried to verdict.[2]

In the last two years, new prosecutors have reluctantly produced more than 6300 pages of *Brady* material in this case, including grand jury testimony, 302s from interviews with Merrill counsel, statements of former Enron Treasurer Jeff McMahon, and handwritten notes of hundreds of hours of government interviews of Andrew Fastow, who began cooperating with the ETF before Brown's trial, but did not testify. *See* Dkt.1157 (cataloguing *Brady* production after *Brown I*). These materials directly contradict the government's repeated representations, theories, draft documents, and key witnesses at Brown's trial, demonstrating that the newly produced evidence is (i) exculpatory, (ii) suppressed and (iii) material to prove that Brown testified truthfully before the grand jury. The repetition and consistency in the new evidence of the actual participants amplifies its exculpatory value. The withheld *Brady* material was

[2] *See Skilling v. United States*, 130 S. Ct. 2896 (2010) (vacating convictions for prosecutorial overreaching); *Yeager v. United States*, 129 S. Ct. 2360 (2009) (reversing on the collateral estoppel arm of double jeopardy where prosecutors erroneously sought to retry defendant); *Hirko v. United States*, 129 S. Ct. 2858 (2009) (vacating Fifth Circuit opinion and remanding for further consideration in light of *Yeager*); *United States v. Howard*, 517 F.3d 731 (5th Cir. 2008) (affirming the vacating of convictions of Enron executive and grant of new trial where prosecution overreached in charging decision); *see also Arthur Andersen, LLP v. United States*, 544 U.S. 696 (2005) (convictions unanimously reversed where prosecutor's sought and procured unconstitutional jury instructions); *Regents of University of California v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372 (5th Cir. 2007), *cert. denied*, 552 U.S. 1170 (2008) (bankers in this very transaction owed no duty to Enron or its shareholders).

crucial to explain Brown's understanding of the transaction and to demonstrate that his testimony was truthful.

Whether the suppression of this *Brady* material was another mistake or intentional misconduct, *Brady* entitles Brown to a new trial. "[O]nce a court finds a *Brady* violation, a new trial follows as the prescribed remedy, not as a matter of discretion." *United States v. Oruche*, 484 F.3d 590, 595 (D.C. Cir. 2007).

II. BACKGROUND.

Defendant Appellant James A. Brown seeks a new trial for his convictions of perjury and obstruction of justice. Brown was originally convicted on an indictment that failed to state valid offenses of conspiracy and wire fraud and with evidence that was so weak one judge of this Court would have acquitted him entirely. *United States v. Brown*, 459 F.3d 509, 517, 523, 537 (5th Cir. 2006), *cert. denied*, 550 U.S. 933 (2007) ("*Brown I*") (DeMoss, J., concurring in part and dissenting in part). The government's case depended primarily on (a) carefully orchestrated hearsay testimony of Fastow's subordinates at Enron–none of whom dealt with Brown; and (b) draft documents that the government claimed were edited by the defendants but which newly disclosed *Brady* material shows were edited and negotiated vigorously by Merrill counsel to ensure the legality of the transaction.

The perjury and obstruction charges–the only ones remaining from the original prosecution–stem from Brown's grand jury testimony about his understanding of a December 23, 1999, phone conversation between Bayly and others at Merrill and McMahon, Fastow, and others at Enron. Brown did not participate in the December 23 phone call, but testified about his understanding that the parties had agreed to a lawful "best-efforts" assurance that Enron would attempt to remarket the barges–not an unlawful guarantee or promise that Enron itself would repurchase the barges. *See* Brown Opening Brief ("BBr") at 6-7 and n.2.

Brown was indicted for testifying: "In - - no, I don't - - the short answer is no, I'm not aware of the promise. I'm aware of a discussion between Merrill Lynch and Enron on or around the time of the transaction, and I did not think it was a promise though." (GJ Tr. at 88, lines 13-18)" (Dkt. 311; RE2) (underlining in indictment as basis for offense).

The government, like the district court, elides the fact that Brown explained in the same testimony: "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) (emphasis added). The exact language of Brown's explanation establishes the materiality of the suppressed *Brady* material, which both

demonstrates the truth of Brown's testimony and explains the basis for his understanding of the agreement as "best efforts" rather than a guarantee.[3]

Ironically, Brown consistently opposed Merrill's participation in the barge transaction as simply too risky–a stance inconsistent with any purported guarantee.[4] His superiors approved the deal over his objections; the deal was shepherded through the process by in-house counsel. Tr. 1035-37, 1090-1105, 1145, 1149-50, 4053-54, 4060-63, 4074, 4077-81, 4085, 4094-98, 4115-16, 4126-27, 4132-33, 4202-06, 4445. Pursuant to Merrill's counsel's instructions, Brown gave Fuhs the task of facilitating documentation by outside counsel. Tr. 1968, 3257-59, 4430-31, 4436-38, 4442, 4463-

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[3] *United States v. Abroms*, 947 F.2d 1241, 1245 (5th Cir. 1991), *cert. denied*, 505 U.S. 1204 (1992) (perjury [and by extension, obstruction] requires the government to prove that defendant lied about a material fact and knew that he was doing so). *United States v. Shotts*, 145 F.3d 1289, 1298 (11th Cir. 1998), *cert. denied*, 525 U.S. 1177 (1999) (perjury statute may not be loosely construed). *See also Conley v. United States*, 415 F.3d 183, 193-94 (1st Cir. 2005) (new trial ordered for perjury and obstruction where government withheld memorandum from key witness indicating support for defense).

[4] Only one Merrill witness, Tina Trinkle, even thought Brown participated in an internal Merrill call–the government's only testimony about Brown. Trinkle was a mid-level accountant at Merrill whose only involvement (if it can even be called that) in the transaction was as a nonparticipating listener to this preliminary conference call at Merrill. Trinkle mistook the time of that call. Tr. 1068-70, 3257-59, 3261, 6201. In yet another belated *Brady* disclosure, telephone records reveal no call-in by Brown. Letter from Department of Justice to Defense Counsel, March 7, 2005. *See* Dkt.948, at 18. Trinkle also admitted at trial that Brown was so opposed to the deal that she did not think it would go through, and that Brown may have been silent on the call. Tr. 1036-37, 1046, 1068-70, 1149-50. Zrike's newly disclosed *Brady* material confirms that Brown continued to argue against the transaction long after the so-called "Trinkle call." Zrike SEC Testimony, Dkt.1168, Ex. Y: 192, 196-207.

64, 6167-68, 6199. Brown then went to Arizona on vacation and neither reviewed nor signed any documents. Brown's GJ Tr., Dkt.489, Ex. B: 106, 187, 201, 211.

Because the ETF threatened to indict all of Brown's colleagues at Merrill, including counsel, and all those at Enron who played any role in this transaction, none of the witnesses whose information new prosecutors recently disclosed was available to Brown before his trial. Despite Brown's vigorous and repeated requests for exculpatory evidence and motions challenging the ETF's tactics, the ETF provided only 19 pages of *Brady* disclosure. *See* Dkt.1227, Charts 1, 2 (cataloguing *Brady* arguments). This material–the government's summaries of other summaries–was so edited that it was virtually useless. *See* BBr: 33 (government's further "qualification" of "summaries").

III. ARGUMENTS AND AUTHORITIES IN REPLY.

The government confessed error with respect to its initial argument that Brown failed to file a timely notice of appeal. However, it should go further, and confess error on its entire position in this case as it did in *United States v. Stevens*, No. 1:08-cr-00231-EGS (D.D.C. April 7, 2009) (verdict against former Alaska Senator Ted Stevens vacated for *Brady*/*Giglio* violations). *See* Dkt.1217: Exs. A-2, A-3.

The government repeatedly chides Brown for failing to consider context, but is itself tone deaf to the implications of the materials it suppressed. The alleged

financial fraud, and Brown's testimony regarding his understanding of it, depended on the distinction between an unlawful "guarantee" on the one hand, and a lawful "best efforts" agreement to remarket on the other. The crucial issue for the perjury and obstruction charges was Brown's actual understanding concerning which of those two–guarantee or "best-efforts"–resulted from the December 23 phone call.

The government's argument that its truncated and tendentious paraphrases of the key players' statements satisfied *Brady* is untenable. The government hints that its "ongoing investigation" prevented it from providing more direct and voluminous disclosure–but never explained why that should be so. This leaves the unsettling impression that the government deliberately sacrificed Brown's constitutional rights to guarantee its convictions of Lay and Skilling.

Brown's defense turned on his honest belief about the transaction, which in turn relied on specific words uttered by key players in specific context, most notably what Merrill's lawyers knew, said and did. It is unacceptable that Brown's defense team was forced to rely solely on his adversary to determine which characterization or which words would be disclosed. *Brady* ensures that the Defendant is to be given exculpatory material for precisely that reason. *DiSimone v. Phillips*, 461 F.3d 181, 195 (2d Cir. 2006) ("To allow otherwise would be to appoint the fox as henhouse guard.").

Tellingly, when the government finds a particular choice of words or characterization of the barge deal inconvenient, it simply deems the speaker's phrase a "euphemism" uttered with a wink and a nod, rendering it inculpatory and unworthy of more than a recharacterized phrase. *See* Gov't Brief ("Gbr") at 22, 35, 36, 43. But *Brady* assures that the defendant is entitled to present the exculpatory language to the jury with his *own* views about whether a statement was true, false, a term of art, or a euphemism, and whether it was understood as such. The very fact of the different interpretations indicates that each participant's choice of words was vital.

Furthermore, because Brown did not participate in the phone call for which he was indicted, it is especially important that he receive as precise an accounting of the exact words as possible to prepare a defense and to conduct rigorous and nuanced cross-examination. Where major actors repeatedly asserted their understanding of the deal as a commitment to use "best-efforts," even the repetition and consistency among the participants is itself vital *Brady* information. In a dispute about whom to believe and what Brown actually did believe, recharacterizations of the the language of the phone call and Merrill's counsel's language are insufficient. Here, the ETF omitted the precise language that was crux of the agreement–a term of art among the parties.

Even a cursory understanding of the ETF's trial strategy reveals that the ETF's arguments and insinuations at Brown's trial are squarely contradicted by the *Brady*

material it withheld. Engaging in willful blindness, the government fails to address the subject of the highlighted material; it argues that the 19 pages of summaries Brown received somehow suffice for the 6300 pages of disclosure later prosecutors made; and it belittles the untendered evidence as immaterial and non-exculpatory. None of this is true, convincing, or in compliance with its *Brady* obligations.

A. The Government Ignores Material that the ETF Itself Highlighted as *Brady* Material but Nevertheless Withheld.

Among the thousands of pages of *Brady* material that the ETF provided for the district court's *in camera* review–material Brown did not see until recently–were affirmative exculpatory statements of key participants with personal knowledge of the crucial phone call and details of the transaction. The government highlighted in yellow selected statements for the court that it designated as *Brady* material, even while omitting other demonstrably exculpatory evidence on the same and other pages. Astoundingly, the ETF did not even produce the most important of the highlighted statements.

Instead of meeting its constitutional obligation, the ETF surgically excised much of the highlighted *Brady* material as it carefully crafted its summaries–with full knowledge that the defense vigorously, and with specificity, had requested this very evidence and had no other mechanism for unearthing exculpatory materials. No

witnesses would talk with defense counsel before trial–or agree to testify–for fear of criminal indictment.[5] Moreover, the government's recrafted, shaded and incomplete responses "represented to the defense that [other] evidence does not exist" and caused it "to make pretrial and trial decisions on the basis of this assumption." *United States v. Bagley*, 473 U.S. 667, 682-83 (1985).[6]

Until recently, prosecutors withheld *inter alia* (1) the Fastow notes showing a "best-efforts" agreement, (2) McMahon's statements that neither he nor Fastow

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[5] Zrike, who ultimately did testify for the defense, was under threat of indictment at the time and bound by Merrill's agreement with the government which required her to support the government's view. Dkt.1168, p. 59 and Ex. H: 2 ¶ 4, 3 ¶ 7 (Merrill employees with knowledge of the transaction could not "make any public statement, in litigation or otherwise, contradicting Merrill Lynch's acceptance of responsibility." "Any such contradictory statement," by any Merrill Lynch employee, "shall constitute a breach of this Agreement" and would subject Merrill to prosecution. All of these determinations rested "in the sole discretion" of the government.). *See also* BBr:53 n.30.

[6] The highlighting of this *Brady* material, for the court's *in camera* review, was itself an improper *ex parte* communication between the prosecution and the court. *See* BBr:36 n.19. Defendants possessed no knowledge regarding the extent of the *Brady* materials suppressed and had to prepare for trial assuming it did not exist. *See United States v. Ferrara*, 456 F.3d 278, 293 n.11 (1st Cir. 2006) ("When the government responds incompletely to a discovery obligation, that response not only deprives the defendant of the missing evidence but also has the effect of misrepresenting the nonexistence of that evidence."); *United States v. Fisher*, 106 F.3d 622, 635 (5th Cir. 1997) ("The Government knew of the [interview notes] and that [witness A] directly contradicted [the government's trial] evidence. Had the defense known of the [interview notes], it could have deposed [witness A] and had his testimony contradicting [the trial witness] ready for trial. The Government's failure to release this material information to the defense was error, and should have resulted in a new trial . . ."), *abrogated on other grounds by Ohler v. United States*, 529 U.S. 753 (2000).

guaranteed Merrill a rate of return or buy-back but *only* a "best-efforts agreement," and (3) Merrill counsel Zrike's grand jury testimony and 302s that prove that all counsel knew about the "best-efforts" agreement. In fact, she tried to document the "best-efforts" agreement for Merrill, but Enron's counsel rejected her efforts out of concern that even it could be deemed a buy-back. This suppressed evidence contradicts the prosecutors' theories of the case, provides a lawful explanation of the underlying documents, impeaches their hearsay witnesses, and refutes their key and repeated arguments.

B. The Government's Brief Remains Rife With Significant Errors that Misrepresent the Strength of the Case and Demonstrate the Materiality and Exculpatory Nature of the Suppressed Evidence.

1. The government's factual statement is better understood as its subjective account that continues to rely on an invalid indictment and empty conspiracy and wire fraud charges it never proved. *Brown I*, 459 F.3d at 522-23 (reversing convictions). After its belated disclosure of thousands of pages of *Brady* material, the government decided not to prosecute any of the remaining Merrill defendants on any charge that would even render Brown's testimony material to the grand jury's investigation. Dkts.1100, 1101, 1263, 1264; Brown's Opp. Dkt.1252. Thus, its case was never tested by a court or jury against a valid indictment.

2. The government repeatedly and wrongly relies on innocent emails written by Bill Fuhs, Brown's subordinate in Merrill's leasing division, who coordinated communications between Merrill, Enron, in-house, and outside counsel. Gbr:12,16-17, 40. After an initial call to Merrill's outside counsel (at the instruction of Merrill's in-house counsel Zrike) to alert counsel to expect Fuhs' call, Brown told Fuhs:

> to make sure the attorneys were documenting the transaction, make sure our outside counsel was talking to Enron's outside counsel, so that the deal could be documented by year-end; to make sure that our attorneys knew, when they were documenting the deal, that they were to try to limit our downside risk as best as possible to solely our 7-million-dollar investment, so there couldn't be some additional capital or some other means by which we could lose more money.

Tr. 4463-64. New *Brady* material produced regarding Merrill Lynch outside counsel Hoffman corroborates this. Dkt.1204, Ex. A:1-5.

The entire panel in *Brown I* acquitted Bill Fuhs on "insufficient evidence" of "guilty knowledge." 459 F.3d at 523-25. In fact, significant evidence showed that Fuhs was privy to information unknown to Brown. *Id*. at 524-25. Therefore, the government's repeated reliance on emails written by Fuhs, to buttress its case against Brown, is preposterous. *See id.* at 525 (panel dismissing the Fuhs' email as "jocose").

3. The *Brady* material reveals that the engagement letter on which the government relied so heavily in *Brown I* as evidence of a crime (and wrongly relies upon still) was actually edited by Merrill Counsel Gary Dolan, who told the

government that *he* removed the buy-back language because Merrill had determined that it would *not* participate in a "parking transaction." Thus, contrary to government assertions, the suppressed material the ETF withheld from the defense at trial shows that the Defendants hid nothing from the lawyers–they were consulting them.[7] Astonishingly, the ETF highlighted this vital information for the court but omitted it from its disclosure. Dkt.1217, Exs. B-1, B-2.[8]

4. The government is mistaken when it asserts that Brown signed the engagement letter. GBr:12. He did not. He saw no drafts and signed nothing. Tr. 1938, 1959, 3126, 4551-52. *See also* GRE16, 17 (emails and first draft engagement letter); GX214, GRE18 (black-lined letter); GX518 (final draft); GRE4 (fax and final letter); (none to or from Brown).[9] Brown was in Scottsdale Arizona

[7] This *Brady* violation alone caused Fuhs to serve 8 months in a maximum security prison, and was one of many that caused the wrongful conviction of Brown, his superior.

[8] Directly rebutting one of the government's primary allegations, Dolan (Merrill counsel) told the government in November 2002 that he changed the engagement letter and deleted the buy-back language: "such an agreement would be improper because such a transaction could be viewed as a 'parking' transaction." Dkt.1217, Ex. B-2.

[9] The government's reliance on the "draft demand letter, " Gbr: 16-17, also fails. Brown was not in the email chain, and the letter itself was never sent. Tr. 4557-58. Zrike's *Brady* material also proves that all drafts were wrong. Dkt.1168, Ex. E: 14; Ex. F: 108-10.

and did not review or sign anything after he handed it off to counsel and Fuhs.[10] Dkt.489, Ex. B: 189, 201-2.

5. The government is mistaken that no one monitored Merrill's investment. *See* Gbr:13, 15-17. Although Merrill moved the deal out of Brown's unit because he opposed it, when Brown saw an article on civil unrest in Nigeria in February or March 2000, he expressed his concern for Merrill's $7 million investment. Tr. 4554. Fuhs then repeatedly called Enron to check on its status. Tr. 4554-55. This is inconsistent with the government's core contention that Brown demonstrated no concern because he knew of the guarantee. He was concerned precisely because he thought that Merrill's $7 million *was* at risk–exactly as he testified before the grand jury.

6. This Court reviews *Brady* determinations *de novo*. *United States v. Hughes*, 230 F.3d 815, 819 (5th Cir. 2000). Only 1,500 of the recently produced 6300 pages were even submitted to the district court *in camera*, and those were impermissibly highlighted. The district court did not compare the few pages of letter-summaries that

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[10] This allegation appeared for the first time in the government's brief on the first appeal. Gov't Brief, *United States v. Brown*, No. 05-20319 (5th Cir. October 11, 2005). The ETF did not even argue at trial that Brown signed this letter. Even the government's exhibit list recognized that "Brown denies signing." Tr. 1938, 1959, 3126; Dkt. 621 GX List: GX 216. Merrill counsel Dolan approved the letter, including the characterization of the "advisory fee" (which Brown called an "aggravation fee"). Dkt.489, Ex. B: 62 (Brown GJ); Dkt.1168, Ex. E: 13 (Zrike 302).

the government provided to Brown against the thousands of pages of highlighted and unhighlighted *Brady* material. Brown, of course, did not know of the highlighting so as to request any further review, and the court ignored Brown's multiple *Brady* motions. Dkt.1227, Chart 1.

7. The government's reliance on LJM2 as evidence of Brown's guilt is legally irrelevant and factually dishonest. Gbr:17-19, 21-22, 35-36, 41-44. First, Fastow's sworn testimony directly contradicts the government's innuendo that Brown bears any guilt because of LJM2. 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: 6485-86, 6573, 6596-97. Notably, LJM2 was a valid third party–a separate accounting entity as confirmed by its separate auditors, KPMG, and its separate attorneys, Kirkland & Ellis. *Id*. at 6897-98, 6951, 6920, 7218-29, 7234-36.

Second, new *Brady* disclosures contradict the government's arguments. McMahon told the government that he "doesn't believe LJM was even mentioned on the Dec[ember] 1999 phone call." Dkt.1217, Ex. D: 530. McMahon's statement is corroborated by never-indicted Enron employee Kelly Boots who was in Fastow's office for the December 23 call and was going to testify at Brown's trial until she was intimidated by the Task Force and "took the Fifth." Tr. 4336. No evidence exists that

Brown knew that LJM2 was anything other than a valid third party or that anyone told Brown that LJM2 was involved until after the deal was done. Tr. 1284-88, 1470-75, 1522-24, 1685-88, 3713, 3753-54, 3796-3802; GX806:105.

Third, newly disclosed *Brady* material demonstrates that when Zrike learned that LJM2 had purchased Merrill's interest in the barges, she discussed it with fellow counsel Marinaro. Dkt.1168: Ex. E: 17-18. Although LJM2 was not the purchaser she expected, it was a separate entity, fully disclosed to Enron; this was within Enron's purview, and she "got comfortable" with LJM2, who she believed, "for better or worse," "was specifically set up to operate this way with Enron properties," and "had gone all the way up to the [Enron] board level." Dkt.1168, Ex. F: 194-95.

Finally, Brown and others at Merrill were victims of Fastow's later fraudulent conduct with LJM2. Brown, with many other Merrill executives, had invested in LJM2–and lost money. *See also* Dkt.1168, at pp. 4-5 and nn.12-13, 15 and n.26, 19-22, 28 and n.36 (discussing legality (and Fastow's representations) of LJM2, and as third-party purchaser).

8. In arguing that the evidence of Brown's guilt was "overwhelming," the government ignores that one member of this Court urged Brown's acquittal–even on the government's best, carefully-constructed case in 2004–tried without all the subsequently disclosed exculpatory material. *Brown I*, 459 F.3d at 537 (DeMoss, J.,

concurring in part and dissenting in part).[11] With *all* of the evidence in play, the government would have been hard-pressed to argue against a "best-efforts" agreement, or to argue that Brown lied.

The only mistake, untruth, or exaggeration on Brown's part emanates from the shard of evidence that the government repeatedly mentions: an "off-the-cuff" email from March 2, 2001, which was admittedly erroneous on its face[12] and written in an unrelated leasing transaction in which a guarantee would have been lawful. *Cf. id.* Because leasing was Brown's area of expertise, he may have remembered the barge deal as a lease when he wrote the email 15 months later. In any event, this one, unsworn, facially erroneous piece of evidence cannot negate the materiality and exculpatory nature of all the *Brady* material that should have been timely

[11] The panel of this Court that heard Brown's original appeal was precluded from considering defense evidence in evaluating whether there was "sufficient evidence" to support Brown's (and others') convictions. *Brown I*, 459 F.3d at 523 (*citing United States v. Rhodes*, 631 F.2d 43, 44-45 (5th Cir. 1980)). However, in determining whether the district court abused its discretion in denying Brown's Motion for New Trial, there is no such prohibition, and acquittal evidence (from Fuhs, Zrike, and other defense witnesses) must be considered in this Courts's review–especially in evaluating the importance of the suppressed evidence to corroborate the defense. Nothing was available to Brown's defense at trial unless the ETF provided it.

[12] The email reflects Brown's belief that Merrill counsel Zrike participated in the crucial December 23rd phone call. The belated *Brady* material reveals that others also believed–incorrectly–that Zrike participated, which only further evidences Brown's belief that the transaction was lawful. Dkt.1217, Ex. F: 677-678, 726 (Schuyler Tilney: Zrike was on call). Notably, Kelly Boots, who was in Fastow's office for the entire phone call, also believed and told the ETF in 2004 that Merrill counsel, a woman, was on the call. Dkt. 1004, Ex. I: 3.

tendered–especially on a theory that guilt was overwhelming. To the contrary, to the extent the government deems the email inculpatory, disclosure of the exculpatory statements of the actual call participants was more imperative.

9. The government continues to distort Brown's testimony to the grand jury. His testimony involves more than just a statement regarding "promise versus no promise." Brown explained what he meant:

> 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. 3237-41) (emphasis added).

The wrongfully withheld evidence of Zrike, McMahon, Fastow, Dolan, and others, verifies Brown's understanding of the precise words he used, and the ETF knew this. Instead of disclosing the inconvenient truth, the ETF re-crafted the statements into inculpatory summaries, blurring or avoiding crucial distinctions and carefully omitting highlighted statements that contradicted their theories.

10. The government's assertion that Brown should have known all of these exculpatory facts defies reality. If the evidence dribbled out in the last three years were available before or during Brown's trial, the team of experienced lawyers representing the four Merrill executives[13] would have used it at the trial and on direct

[13] *See* RE7: 21 n.35 ("Brown and his five co-defendants were represented in trial by some of America's preeminent criminal defense attorneys.").

appeal–if there had still been a conviction. However, because of the ETF's ruthless tactics, Brown lacked vital exculpatory information, and the Task Force made sure that he had no way to discover it. Dkt.1168:54-69. The government nowhere addresses or acknowledges its pretrial pressure against potential witnesses. Instead, it touts its willingness to make Fastow available at the trial, without the defense having had any pretrial preparation. This suggestion is wholly unrealistic and disingenuous; no competent defense counsel would do so.[14]

C. Because *Brady* and *Giglio* Mandate that Brown Be Provided Exculpatory and Impeaching Evidence Before Trial, This Court Must Reverse.

"The suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87-90 (1963). This principle applies to evidence that impeaches a witness's credibility as well. *Giglio v. United States*, 405 U.S. 150, 154 (1972).[15] The "Government must make [these] disclosures in sufficient time that

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[14] Dkt.1160, at 13 n.13, 17-18. At the same time, the ETF foreclosed Fastow from testifying in parallel civil litigation and clearly intended that he testify for the first time in the later *Skilling* trial. *Id*. *See also* Dkt.1004, at 16-17 and nn. 27-28; Dkt.1061, at 17-18, 21-25.

[15] *See Banks v. Thaler*, 583 F.3d 295, 311 (5th Cir. 2009) (impeachment evidence falls within the *Brady* disclosure rule), *cert. denied*, 130 S. Ct. 2092 (2010); *accord United States v. Sipe*, 388 F.3d 471,478 (5th Cir. 2004) (impeachment evidence is "material" and must be disclosed where that evidence would "undermine the testimony of a key witness on

[Defendant] will have a reasonable opportunity" "either to use the evidence in the trial or use the information to obtain evidence for use in the trial." *United States v. Rodriguez*, 496 F.3d 221, 226 (2d Cir. 2007). It does not matter whether the evidence was suppressed deliberately or inadvertently. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Evidence is material and there is a "reasonable probability" of prejudice when the suppression "undermines confidence in the outcome of the trial," *Kyles v. Whitley*, 514 U.S. 419, 421-22, 435 (1995), "even where the remaining evidence would have been sufficient to convict the defendant." *United States v. Kohring*, 2011 WL 833263, *4 (9th Cir. 2011) (citing *Strickler*, 527 U.S. at 290).

This Court considers the suppressed evidence "collectively, not item by item," and upon finding a material violation, "there is no need for further harmless-error review." *Kyles*, 514 U.S. at 435-36. *Cf. Sipe*, 388 F.3d at 478. The *Brady* obligation is a continuing one. *See Monroe v. Butler*, 690 F. Supp. 521, 525 (E.D. La. 1988), *aff'd*, *Monroe v. Butler*, 883 F.2d 331 (5th Cir. 1988) (*Brady* obligation continues until exhaustion of collateral remedies).[16]

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an essential issue or [where] there is no strong corroborati[ve]" evidence on the issue) (citation omitted).

[16] Despite this continuing obligation, the government has never produced letters to the SEC and DOJ from McMahon, one of which states flat out that Glisan lied in Brown's trial about the "McMahon guarantee," Dkt.1020, Ex. A: 6 (McMahon "reviewed the transcript of ... former Enron treasurer Ben Glisan's testimony in the Lay-Skilling trial, [and] Mr. Glisan's testimony in the trial of the Nigerian Barge case .... Based on that review and

D. Specific Examples of Suppressed Testimony Amply Demonstrate *Brady* Violations.

1. Prosecutors' Arguments Prove That Withholding Zrike's Prior Testimony Constituted a *Brady* Violation.

The government and the court below fail to acknowledge the prosecutors' multiple misrepresentations and their effect on Brown's defense of his personal understanding in his explanation of "best-efforts." The ETF vehemently argued to the jury that the "best-efforts" defense was a lie:

> [T]he written agreement between Enron and Merrill Lynch had no re-marketing or best efforts provision. You heard testimony ,.., that there was *some suggestion*[,] made primarily through Ms. Zrike, ... that the Merrill Lynch defendants *believed* that all that Enron had committed to do was to re-market . . . Merrill Lynch's interest in the barges; .... You can spend as many hours as you would like. You will nowhere in those documents ever find a reference to a re-marketing agreement or a best-efforts provision. It's not there. Tr. 6151-52 (emphasis added).

A second prosecutor compounded the prejudice to Brown and impermissibly shifted the burden of proof to the defense, ironically calling upon the defense to explain what only the prosecutors knew:

> The Merrill Lynch Defendants take the uniform approach ... that all that was going on was just that it was a re-marketing agreement. That's all it was. There was no buyback. It's just a re-marketing agreement. But ask yourselves this simple question: *If* it's a re-marketing agreement, *if* that's all it is, *why was*

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his knowledge of what actually occurred, [he] concluded that [Glisan] testified falsely regarding Mr. McMahon's involvement in the transaction."), which Brown correctly cited to the court below–with or without ellipses; *contra* and [sic] RE7: 28.

> *it not put in writing*? Kathy Zrike, all the witnesses who testified, tell you there is nothing wrong with re-marketing. There's nothing wrong with that. They could have gotten sale and a gain treatment on this. *If* it was a re-marketing agreement, there wouldn't have been a problem with that. *If* that's all it was, *why wasn't it put in writing*? During the time the Merrill lawyers spoke to you for almost four hours, no one even addressed that question once. They don't have an explanation." Tr. 6485-86 (emphasis added).

Simultaneously, the ETF suppressed Zrike's grand jury testimony that directly refuted prosecutors' arguments. Zrike told the ETF, and the prosecutors had highlighted as *Brady*: "The fact that they would not put in writing an obligation to buy it back, to indemnify us, all those things were consistent with the business deal and were not things that I felt were nefarious [or] problematic." Dkt.1217, Ex. C: 75. This example of prosecutorial misconduct alone should end the inquiry. *Kohring*, 2011 WL 833263, *15 (reversing for new trial because of myriad similar *Brady* violations).[17]

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[17] *See also United States v. Delgado*, 631 F.3d 685, 711 (5th Cir. 2011) (reversal for new trial where "an aggregation of errors" including "misconduct by members of the prosecution team" deprived the defendant of a fair trial); *United States v. Reyes*, 577 F.3d 1069, 1078 (9th Cir. 2009) (reversal for new trial in "backdating options" case where "prosecution argued to the jury material facts that the prosecution knew were false, or at the very least had strong reason to doubt"); *United States v. Ruehle*, No. SACR 08-00139 (C.D. Cal. Dec. 15, 2009) (Ordering dismissal in Broadcom case: "The cumulative effect of [prosecutorial] misconduct has distorted the truth-finding process and compromised the integrity of the trial."); *United States v. Stevens*, 2009 WL 6525926 (D.D.C. April 7, 2009) (setting aside convictions of Senator Ted Stevens [and later ordering criminal contempt investigation] for *Brady* violations); *United States v. Triumph Capital Group, Inc.*, 544 F.3d 149 (2d Cir. 2008) (reversal for new trial where the government suppressed evidence--raw notes from witness interviews which conflicted with FBI agent's summary--in its possession which was both exculpatory and impeaching); *United States v. Gracia*, 522 F.3d 597, 603

And, there is more. Near this highlighted material appeared additional and more direct exculpatory testimony by Zrike:

> [T]he Merrill Lynch lawyers in my group and myself did ask that we include a provision that–two types of provisions that we thought would be helpful to us. One would be to indemnify us or hold harmless if there was any sort of liability like a barge explosion or environmental spill, loss of life, or something that was, you know, a disaster scenario....The other thing that we marked up and we wanted to add was a best efforts clause, ...that they would use their best efforts to find a [third-party] purchaser.***[T]he response from the Enron legal team was that–both of those provisions would be a problem....[t]hey kept coming back to the fact that it really had to be a true passage of risk.***[W]e were not successful in negotiating that [in] with Vinson & Elkins." Dkt.1217, Ex. C: 63-64, 69. *See also id*. at 66-70 (same, including Alan Hoffman's involvement negotiating with V & E).[18]

Thus, the recently disclosed *Brady* material supports Brown's understanding that the "best-efforts" agreement was more than a "suggestion" or "belief"–it *was* the deal, and Brown had ample grounds to believe it so. Zrike herself had said so. That Merrill lawyers tried to document it as such demonstrates the validity of his understanding. Zrike's personal knowledge of all aspects of the deal based on her own involvement in the negotiations–not from Brown or Furst–was crucial

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(5th Cir. 2008) (reversal for new trial where repeated instances of prosecutorial misconduct "cast serious doubt on the correctness of the jury's verdict").

[18] The ETF also withheld from Brown Zrike's 302–a third occasion where Zrike told the ETF about the true terms of the transaction and her knowledge of it, corroborating Brown's grand jury testimony. FBI 302 of Katherine Zrike, Dkt.1168, Ex. E: 10-11, 15. Zrike's *Wells* submission, on which the district court wrongly relied to assert Brown knew of all relevant facts, did not contain this information. *See* RE7: 37-38 (citing to Merrill Lynch *Wells* submission, Dkt.125, Ex. 5).

exculpatory evidence. Had Brown received his rightful *Brady* disclosures, he could have elicited this testimony from Zrike and countered the government's theory that defendants had snookered or avoided legal counsel. Zrike's withheld *Brady* material is not cumulative. It meaningfully supports Brown's advice of counsel defense, the "best-efforts" defense, and proves the truth of his grand jury testimony. It illustrates how all parties, and notably the lawyers, made the precise distinction that Brown drew in his testimony.

2. The ETF Violated *Brady* By Concealing McMahon's Statements that He Did Not Provide a Guarantee.

Three prosecutors told Brown's jury no fewer than16 times that McMahon provided the initial unlawful buy-back guarantee that Fastow ratified in the subsequent conversation with Bayly. The government makes the same representation 19 times in its brief. For example, the ETF said:

- "You know that Enron, through its treasurer [McMahon] and chief financial officer [Fastow], made an oral guarantee to these Merrill Lynch defendants, that they would be taken out of the barge deal by June 30th, 2000, at a guaranteed rate of return." Tr. 6144.

- "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." Tr. 6159.[19]

[19] *See also* Tr. 402-404, 6160, 6168, 6217-19, 6510-11. *And see* Dkt.1168: 30-31.

While the ETF made these representations to Brown's jury, the prosecutors withheld from the defense McMahon's own statements , which they had highlighted for the district court (or worse, highlighted *around*),[20] including the following direct and specific contradictions to the government's arguments:

> "Never made rep[resentation] to ML [Merrill Lynch] that E[nron] would buy them out at price or @ set rate of return." Dkt.1217, Ex. D: 449, 493 (same).
>
> Andy said E would help remarket equity w/in next 6 months.–no further commitment. *Id*. at 494.
>
> "AF [Fastow] agreed that E[nron] would help them [Merrill Lynch] remarket the equity 6 mo[nths] after closing." *Id*. at 450; 478 (same).
>
> "Disc[ussion] between Andy [Fastow] & ML [Merrill Lynch]. Agreed E[nron] would use best efforts to help them sell assets." *Id*. at 447.

This evidence reflects consistent reports by multiple government interviewers, one of whom testified for the government. Unfortunately, because Brown knew nothing of his interview of McMahon, Brown was powerless to cross-examine him. Tr. 2914-48, 2989-3073 (Timothy Henseler; BRE:12). Had McMahon's statements been produced, they would have formed a basis for a request for immunity for McMahon

[20] The highlighting in the text was made by the ETF on material submitted to the district court but not disclosed to Brown. Dkt.1217, Ex. D.

to testify for the defense. Although the ETF repeatedly threatened McMahon, it never indicted him.[21]

McMahon's evidence would also have informed Brown's preparation for opening statement, his decision whether to call Fastow, and his strategy for impeaching Glisan, Kopper, and others. It verifies Brown's understanding, corroborates his belief and testimony, and obviously, it squarely contradicts the prosecutors' refrain that McMahon made a guarantee. The meager four lines that the ETF recrafted from McMahon's voluminous, precise, declarative statements fell far short of disclosing that McMahon told the government long ago, repeatedly and in unequivocal terms, that he, Fastow and Enron agreed *only* to engage in "best efforts," and "No–never guaranteed to take out [Merrill Lynch] w/rate of return." Dkt.1217, Ex. D: 493. Withheld until 2010, this proves a *Brady* violation.

3. The Fastow Raw Notes Prove a *Brady* Violation.

The government–not Brown–wrongly "plucked snippets" from the Fastow notes. *See* Gbr:34. And, by doing so, it violated *Brady*.[22] No doubt other notes

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[21] McMahon resolved his civil issues with the SEC for $300,000, without any admission of wrongdoing. *SEC v. McMahon*, Civil Action No. H-07-2051 (S.D. Tex. July 5, 2007). Brown was never charged by the SEC in the parallel civil litigation on the barge deal. *See S.E.C. v. Merrill Lynch & Co., Inc., Daniel H. Bayly, et.al.*, Civil Action No. H-03-0946 (S.D. Tex. Feb. 12, 2003).

[22] The government provided Brown with a four-page, misleading, ambiguous, "non-verbatim" "summary" of its own interpretations of Fastow's interviews while concealing

support the government's view, but that only proves Brown's point: Brown was entitled to all the evidence that contradicted the government's theory of the case. Brown's adversary was not free to evaluate the evidence and disclose only the parts that supported its theory or shade wording it disliked to render it inculpatory.[23]

Only the handwritten notes show that Fastow told the ETF: "It was [Enron's] obligation to use 'best efforts' to find 3rd Party takeout." Dkt.1168, Ex. B: 000263. Fastow went on to detail his sophisticated knowledge of a best efforts agreement:

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thousands of pages of materials in the form of 302s and raw notes from multiple government interviewers including those notes most crucial to Brown. *See* John C. Hueston, *Behind the Scenes of the Enron Trial: Creating the Decisive Moments,* 44 AM. CRIM. L. REV. 197, 199-200 (2007) (No cooperator in the history of federal white-collar crime investigations was debriefed more thoroughly and extensively than Mr. Fastow. Government prosecutors and investigators collectively spent well in excess of 1,000 hours working with Mr. Fastow.) (quoting ETF prosecutors).

[23] The government repeatedly points to Fastow's self-proclaimed clever euphemisms, subtlety, and that he "in effect"–if not in actual words–meant to convey a guarantee. Gbr:22, 35, 36, 43. There is no evidence that Bayly, much less Brown, actually knew that Fastow's chosen words meant the opposite. Additionally, the government's approach highlights the central error in its position and proves the materiality of the suppressed evidence. If Brown's counsel had known all sides of Fastow's story, they could have (i) made an informed decision whether to call him, (ii) cross-examined him fully on which parts were true, false or euphemisms, and how Bayly (much less Brown) knew that, and (iii) prepared to cross-examine his subordinates. *Cf. DiSimone v. Phillips*, 461 F.3d 181, 195 (2d Cir. 2006).

The government cannot have it both ways. When the government likes what someone says or says he *meant*, it's true and damning evidence. When the government doesn't like what someone says, it's a euphemism or the declarant meant the opposite, and it is also damning evidence. That way, nothing is exculpatory, and everything *only* proves the government's theory. This distortion informed the government's non-disclosure decisions and denied Brown a fair trial.

"'Best Efforts' - must do everything possible that a reasonable businessman would do to achieve result..... Best effort would be to find a 3rd Party to accomplish buy out." *Id*. This note alone is as important to Brown as was the one note by a government *attorney* regarding a key witness that caused the government to confess error in *Stevens*.[24]

Other exculpatory notes corroborate Brown's testimony using the same words and revealing the same understanding. They (i) implicate government "star witness" Glisan in Fastow's contradictory statements within Enron, (ii) explain the language in Glisan's email, (iii) contextualize the "guarantee" or buy-back language in draft documents; and (iv) impeach Glisan and Kopper's testimony. (Tr.1652-53, 3608; *see also* Tr. 3407-11, 6159, 6523; BBr:38):

> Fastow: "W/ Subordinates
> 1) Probably used a shorthand word like promise or guarantee
> 2) Internally at Enron. AF, JM + BG would tell Enron people this was a guarantee so to light a fire with Int'l people - so it should be in paperwork.
> 3) On phone call, didn't say EN would buy-back - Rep of 3rd party. Explicit. Internally said Enron would buy back. Unit less motivated if know of LJM."

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[24] This was the first evidence of a "best-efforts" representation by Enron ever disclosed to Brown; it was the crux of his defense; and it renders the transaction perfectly lawful, which the government long ago conceded. Dkt.1168, at 18 n.29. *Accord* Dkt.1217, Ex. A-3 (*Stevens* Transcript): 6, 9, 11 (failure to disclose interview note from critical witness was "most shocking and serious *Brady* violation[] of all"); *see also id*. at 9 ("use of summaries is an opportunity for mischief and mistake"); *id*. at 4-5 (upon discovery of each "blatant," *Brady* violation, government claimed omissions were "mistake[s]," "immaterial," "inadvertent," "unintentional," etc.).

Dkt.1168, Ex. B: 000349.

Phone call did not obligate [Enron] to buy out. Did not intend to bind [Enron]."

Id. at 000263.

> "Object[ed] to word obligate" in internal Enron [GLISAN'S] e-mail as inconsistent with transaction.

Id. at 000264.

In yet another note, the ETF asked Fastow about the *same* Enron document about which Brown testified and for which he was indicted (BRE:11). This is only one of the many key facts that distinguishes the importance of this information to Brown from its import to Skilling.[25] Fastow said, *just as Brown did*: "Summary" of transaction was "not consistent" with [Fastow's] understanding because it included the word, "promise." *Id*. at 000263; Brown RE 11. Fastow agreed with Brown: "It was [Enron's] obligation to use 'best efforts' to get third party takeout." *Id*. "Best efforts would be to find 3rd party to accomplish buyout." *Id.* Brown was entitled to have a jury hear this evidence–even if other notes contradicted it–or especially because they did. It was *Brady* material, and the ETF suppressed it.

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[25] Skilling had the Fastow 302s before trial, and the factual and legal issues were completely different. "Best-efforts" in the December 23rd phone call did not matter in *Skilling*, where Skilling argued that he was not "in the loop" *at Enron* with regard to the Barge transaction. *Cf*. BBr 32-33 and n.17; *United States v. Skilling*, 554 F.3d 529, 588, 590 (5th Cir. 2009), *vacated in part and remanded*, 130 S. Ct. 2896 (2010). Furthermore, the Barge transaction was only a minuscule part of the government's proof in *Skilling*.

4. The Fastow and McMahon Notes Corroborate Each Other.

Significantly, government interview notes of Fastow and McMahon, even though they were interviewed several years apart, corroborate each other on the precise words used: "best-efforts"–a term of art crucial to Brown. Separately or combined, the importance of this evidence to Brown's defense cannot be overstated. Withheld evidence that *both* purported guarantors spoke only of an admittedly lawful "best-efforts" representation creates a "reasonable probability" of prejudice to Brown and "undermines confidence in the outcome of the trial." *Kyles*, 514 U.S. at 434-35, 437-40; *cf. Strickler*, 527 U.S. at 289-90.

Appearing only in the raw notes of interviewers,[26] the "best efforts" from Fastow's (and McMahon's) lips demonstrate that Brown's "understanding" of the transaction and his testimony regarding the specific Enron document were true. They provide powerful first-hand evidence that would have been "favorable, material, and

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[26] In another mistake, the government quotes at its first bullet, "[b]est efforts would be to find 3rd party to accomplish buyout...", GBr:33, but that information was not provided to Brown until recently. Indeed, there was no mention of "best efforts" in anything the ETF gave Brown regarding Fastow. *Cf.* Dkt.1186, Ex. I. The government's contention that notes which are favorable to Brown may have been an agent's question–not Fastow's answer (Gbr:34 n.10)–simply justifies Brown's request for an evidentiary hearing–as does the district court's selective conclusion that the notes (favorable to Brown) are not clear. RE7: 13 n.21. Contrary to the government's assertion, Brown preserved his alternative request for a hearing (a purely procedural remedy) with accompanying argument and case citation. BBr:25 n.13; *cf. United States v. Brown*, 261 Fed. Appx. 810, 812 (5th Cir.), *cert. denied*, 553 U.S. 1061 (2008); FED. R. APP. P. 28(a)(9)(A).

irreplaceable," *United States v. Fischel*, 686 F.2d 1082, 1093 (5th Cir. 1982), in demonstrating Brown's honest belief.

Not surprisingly, the government went to considerable effort and expense to avoid producing Fastow's notes, including two rehearing petitions to this Court.[27] The prosecutors knew that the notes would hurt their case, and any reasonable jury allowed to hear the suppressed evidence would think so too. The government effectively acknowledged as much by dismissing the empty conspiracy and wire fraud charges against Brown. Without the conspiracy and wire fraud charges, Brown could not be convicted of perjury and obstruction on these facts. He is entitled to a new trial with all of the evidence germane to these counts available to him for the first time.

CONCLUSION

The government's *Brady* violations warrant dismissal of the indictment with prejudice. *Cf. Kohring*, 2011 WL 833263, *16.[28] In the alternative, nothing less than

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[27] *See* BBr:26-29, 34 (and Charts hyperlinked therein).

[28] *See United States v. Strouse*, 286 F.3d 767, 771-76 (5th Cir. 2002) (dismissal appropriate where government misconduct in knowingly sponsoring false testimony corrupts process and prejudices the Defendant); *United States v. Fullmer*, 722 F.2d 1192, 1195 (5th Cir. 1983) (same); *United States v. Welborn*, 849 F.2d 980, 985 (5th Cir.1988) (noting that the court's supervisory authority "includes the power to impose the extreme sanction of dismissal with prejudice"). *See also United States v. Lyons*, 352 F. Supp.2d 1231, 1243 (M.D. Fla. 2004) (Ordering dismissal of indictment with prejudice: "myriad [*Brady* and *Giglio*] violations that collectively reveal a prosecution run amok"); *United States v. Dollar*,

a new trial could remedy the injustice perpetrated in this case. In the unlikely event this Court has not seen enough to invoke these remedies, then it should remand for a full evidentiary hearing.

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25 F. Supp.2d 1320, 1332 (N.D. Ala. 1998) (Dismissal ordered: "the United States has defaulted on its fairness obligation in this case"); *United States v. Ramming*, 915 F. Supp. 854, 868 (S.D. Tex. 1996) (Dismissal ordered: "Only a person blinded by ambition or ignorance of the law and ethics would have proceeded down this dangerous path.")

CERTIFICATE OF SERVICE

I hereby certify that true and complete copies of Appellant's Reply Brief was this day delivered by electronic case filing to the Clerk of the Court and to counsel for United States at the following addresses:

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

The undersigned counsel certifies that this Reply Brief of Defendant-Appellant James A. Brown complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) because it contains 8,497 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

The undersigned counsel further certifies that this brief complies with the typeface requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect Office X5 for Windows in Times New Roman typeface and 14-point font size.

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