UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,	§	
Plaintiff,	§	
	§	
v.	§	**CR. NO. H-03-363-2 (Werlein, J.)**
	§	
JAMES A. BROWN,	§	
Defendant.	§	

DEFENDANT BROWN'S REPLY ON SUPPLEMENTAL BRIEFING IN SUPPORT OF HIS MOTION FOR NEW TRIAL, DKTS. 1004, 1020, 1030, 1061, 1160, 1201.

PORTER & HEDGES LLP

DANIEL K. HEDGES
Texas Bar No. 09369500

1000 Main Street, 36th Fl.
Houston, TX 77002
Telephone: (713) 226-6000
Facsimile: (713) 228-1331

SIDNEY POWELL, P.C.

SIDNEY POWELL
Texas Bar No. 16209700

TORRENCE E. LEWIS
IL State Bar No. 222191

3831 Turtle Creek Blvd. #5B
Dallas, Texas 75214
Phone: (214) 653-3933
Fax: (214) 319-2502

ATTORNEYS FOR DEFENDANT JAMES A. BROWN

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INTRODUCTION

In *Brown I*,[1] the government made four specific arguments attempting to prove Brown knew there was an unlawful guarantee and lied to the Grand Jury: **1)** Brown was aware of a guaranteed buyback because of his presence on the conference call with Tina Trinkle and joined the conspiracy because he did not continue to object to the transaction after the Trinkle call.[2] **2)** Brown did not tell Zrike about the buy-back guarantee, so any reliance on counsel was void for Brown's failure to disclose all relevant information. **3)** Brown executed the engagement letter with Fastow–which, because it deleted the buy-back language, was incriminating on its face.[3] And, **4)** Brown's email 14 months later, on which the government relied almost exclusively, as it does now, proves that Brown lied to the Grand Jury.

Despite its blanket denials of any *Brady* issue, the government's response concedes two crucial violations. First, as to Dolan, the government concedes that it did not disclose that Dolan

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[1] *United States v. Brown*, 459 F.3d 509 (5th Cir. 2006), *cert. denied*, 550 U.S. 933, 127 S. Ct. 2249 (2007).

[2] *See* Brief For Appellee United States, No. 05-20319 (5th Cir. October 12, 2005), at pp. 97-98 ("It is therefore quite telling that none of the government's evidence suggests, as Brown now does, that he still opposed the deal after the call.").

[3] The government's argument which lead the Fifth Circuit to affirm Brown's perjury and obstruction convictions is all the more appalling now: "More significantly, on the day of closing, Brown and Fastow executed the official engagement letter purportedly summarizing Merrill's 'purchase' of an 'equity interest' in Enron's barges. [ ] Unlike the first draft of the engagement letter, . . . this final version pointedly omitted any reference to the oral guarantee of a takeout at a sum certain. Brown knew from the Trinkle call that the final engagement letter did not represent the real deal. He also knew that the reason it did not reference the oral guarantee was 'because, otherwise, [Enron would not] get the right accounting treatment.' Tr. 1046 (Trinkle). The fact that he signed it anyway refutes his assertions that he never 'finalized any documents' (Brown Br. 12) or 'agreed to conceal anything' (*id*. at 29), and it provides devastating proof . . . ." Brief For United States, No. 05-20319 at p. 101. But the record is now indisputable that Brown *did not sign* any closing documents, Merrill counsel deleted the buy-back language from the engagement letter, and the lawyers knew about the best efforts and accounting issues.

knew about the "fees to [Merrill] and the gain to Enron." Dkt.1223:6. Yet, at trial, ETF prosecutor Hemann told the court and jury: "There will not be any evidence in this case that any lawyer was asked if it was all right for Enron to count this deal as income." Tr. 419. That argument made the ETF's withholding of this information a *Brady* violation–whether intentional or not. The prosecutors knew–but withheld–that Dolan and Zrike had told them that the lawyers were well aware that Enron was going to book a gain from this transaction. That information is *Brady* within itself, but even more important and exculpatory was the fact that *the lawyers knew it.* Everything the lawyers knew belied the ETF's case, and the sole reason Hemann argued there was "no evidence" that the lawyers knew that crucial fact is because the ETF withheld it. That is a *Brady* violation.

Second, the government has conceded an irrefutable *Brady* violation as to the withheld McMahon evidence. It admits that McMahon's statements were contradicted by all its hearsay witnesses. Dkt.1223:11. That concession proves the *Brady* violation: Brown was entitled *before trial* to McMahon's explicit statements contradicting all the government's witnesses. Brown was entitled to those statements to prepare his case, to cross-examine and to impeach Glisan, Kopper, Long and others. *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 766 (1972) (Exculpatory evidence includes material that goes to the heart of the defendant's guilt or innocence as well as that which might alter the jury's judgment of the credibility of a prosecution witness.). The government conceded the same violation in the *Stevens* case and then dismissed the indictment itself. Dkt. 1217, Ex. A-2. In Brown, the error is even worse. The government repeatedly represented that McMahon made an unlawful "guarantee" while it hid unequivocal, definitive, contradictory evidence from McMahon that the ETF itself had highlighted for this Court: "Andy agreed E[nron] would help remarket [the] equity w/in next 6 months–**no further commitment**." Dkt.1217, Ex. D, at 000494.

See also id. at 000478, 000513, 000514. And on a page with other highlighting but not highlighted itself: "**No – never guaranteed to take out w/rate of return**." *Id*. at 000493.

Third, the government cannot refute the pivotal nature of the first-hand evidence of the best-efforts agreement–from the purported guarantors, call participants and the lawyers–that it suppressed. **Evidence establishing that Merrill counsel said there was a best-efforts agreement that counsel tried to document, but Enron refused, was *Brady***. At the same time the government was making its misleading arguments at trial, it shut down every attempt by defendants to introduce the best-efforts agreement into evidence in any form. First, the ETF solicited testimony from Glisan and Kopper that there was no best efforts agreement. Tr. 1584, 3618. The government vehemently objected when the defense tried to cross-examine Kopper with his FBI 302 (produced as Jencks) that stated that Enron "will do the best [it] can to find a third-party investor." Tr.1506-08, 1695.[4] Then, FBI Agent Bhatia, who wrote Kopper's 302, went so far as to testify that the words, "do the best we can" were actually Bhatia's words and that Kopper "never said that." Tr. 3403-11, 3521-22.

By concealing the significant, uniform, first-hand evidence of the "best efforts" agreement by Fastow and McMahon–and counsel's knowledge of it and their attempts to document it–the government was able to paint the entire defense as a lie: "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. In addition, the ETF was able to make the case that Zrike was simply "cut out of the deal." Tr. 6503.

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[4] While he denied that it was a best efforts agreement, Kopper was well aware of the significance of a best efforts representation. He testified: "So to simplify it, if I was a banker that was raising a 700-million-dollar loan on behalf of a client, I might say to the client, 'We'll make our best efforts to raise $700 million. I'm not committing to you that we'll raise $700 million. We may raise only $680 million, but we will make our best effort to reach 700.' And they have not committed that they will somehow or other, if they fall short, fill the difference." Tr. 1652-53.

"Things were hidden from her time and time again." Tr. 6503. Indeed, the government ridiculed the defense for even suggesting that counsel was involved in all facets of the transaction. Tr. 6500 ("This was a case, not about reliance on counsel; this was a case about defiance of counsel."). This was possible only because the ETF suppressed, *inter alia*, Zrike's statement that: "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, at p. 75.

Suppression of this evidence enabled the prosecutors to argue that the defense's assertion that the only "assurance" in the transaction was an oral best-efforts agreement to assist in re-marketing the barges was merely Zrike's "belief"–based on the cover-story/lie she had been told by Brown and the other defendants. The belatedly-disclosed *Brady* materials tell a radically different story: Zrike, Dolan, and Hoffman did their best to obtain as much protection as legally possible for Merrill's $7 million investment, but ultimately, had to agree to none because Enron rejected anything that could be deemed a buy-back, they all knew Enron was going to book a gain, and it had to be a true sale. Accordingly, Dolan deleted the buy-back language from the draft engagement letter to avoid a "parking transaction," and Zrike requested a bests-efforts agreement in the deal documents, but finally accepted Enron's refusal to retain even that risk. The evidence recently produced by the government is not only "favorable to the defense" within the contours of *Brady*, but it squarely contradicts and defeats each of the government's arguments that there was any crime or that Brown lied to the grand jury. With the new evidence, there can be no confidence that the jury's verdict was correct. *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 1566 (1995).

The government fails to address its misconduct in presenting this Court with *highlighted* materials for in *camera* review, for which it then, *in apparent compliance* with this court's order, created "summaries," yet omitted crucial material that even the ETF had highlighted as *Brady*. Nor does the government address the plethora of misrepresentations ETF prosecutors made to the court and jury during *Brown I*–misrepresentations that are directly refuted or explained by the exculpatory materials the prosecutors withheld from the defense. The government's assertions that it made "copious disclosures" before trial are belied by multiple examples as simple as the new evidence that Dolan deleted the precise buy-back language that Brown allegedly hid from the lawyers.[5] And, its contentions that its belated disclosures are "neither material nor exculpatory" to Brown's convictions on perjury and obstruction would be laughable were it not for the fact that four men were denied even bail pending appeal and lost a year of their lives in prison because of the evidence withheld. For young Bill Fuhs, it was 8 months in a *maximum security* facility–falsely accused of deleting the

[5] As one example, the government lead off its brief discussing the withheld evidence from Gary Dolan and argued that, "the government disclosed that Dolan believed Enron had not guaranteed a buy-back so when he received a draft that indicated Enron had guaranteed a buy-back, he changed the language. This is precisely the information Brown claims was withheld from him." Dkt.1223:5; *see id*. at p. 6 (same). This is grotesque obfuscation. First, that Dolan deleted the buy-back language is the very information the ETF did NOT disclose. The ETF's summary does not inform what language Dolan deleted at all. Dolan's 302 (withheld until 2007) specifies that the letter is from Geoff Wilson–the same letter which formed the basis for the government's case against Fuhs and Brown–*see* Dkt.1204:14-17. The reference to Wilson is critical, because Fuhs testified Wilson worked with counsel on the letter (Tr. 4441, 4486-87, 4672), and the ETF made Fuhs out to be a liar for it (Tr. 4678-79, 6222, 6538-39). New evidence also proves that others at Merrill Lynch, and outside counsel Hoffman, also disparaged this "draft" of the engagement letter and its young author who was not operating with the salient facts. *See*, *e.g.*, Dkt.1168, Ex. Y (Zrike never-disclosed SEC testimony), at pp. 283-90 (discounting incorrect drafts); Dkt.1217, Ex. C, at pp.54-55 (Zrike and Brown understandings on the deal terms were in unison), pp. 151-52 (discounting incorrect drafts). Moreover, Dolan did not just make the change "because [he] did not *believe* that those were the actual terms." Dkt.1223:5. Rather, Dolan deleted the buy-back language because he understood that it would create a "parking transaction" which was legally untenable and factually inaccurate. Merrill was not going to do that. The import of this omission extends further, because Dolan oversaw the documentation to insure that the transaction was handled lawfully–to avoid a parking transaction. Dolan's "understanding" *was* the real deal. He was responsible for making it so. *See also* Tr. 4489 (Fuhs quoting from June 1999 memo from Brown: "make sure all engagement letters are reviewed by Gary Dolan in legal before they are sent to a client").

precise language from the engagement letter that the ETF knew Dolan had deleted, and on which the Fifth Circuit relied to affirm Brown's perjury and obstruction. The newly discovered *Brady* evidence, with or without the additional misconduct perpetrated by the government, goes further than simply casting doubt on Brown's conviction, it exonerates Brown.

The government insistence that none of this withheld evidence constitutes *Brady* begs a number of questions: Why did DOJ find it necessary to change its *Brady* policy since *Brown I*? Why did new prosecutors recently disclose these thousands of pages of material the ETF vehemently fought against producing and the defense has requested repeatedly for seven years?[6] If this were not enough of a stretch, the new prosecutors ask this Court to believe that the government's pre-trial "summaries" (totaling 19 pages) somehow sufficed to satisfy *Brady*, **while not a single sentence or recitation in the 4,482+ pages of materials the ETF fought vigorously to hide for as long as six years–of the witnesses who had personal knowledge of the transaction and tried to document it–not a word of that, the government says, constitutes *Brady*.** Unbelievable.

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[6] And if not to engineer defendants' convictions, why else would these "All-Star" prosecutors have made such surgical edits and alterations of the material–editing out "subsequent," and that "Brown was worried," which indicated Brown's continuing objections and concerns of risk, and Dolan's knowledge of the "parking transaction," which showed both reliance on counsel and the literal truth of Brown's testimony? And why omit Zrike's knowledge of the buy-back issue that the ETF had already highlighted for the court as *Brady* material? Why change or omit words and phrases to shift the evidence from declaratory statements to qualified beliefs–couching the "disclosures" with clauses like, "belief," "did not believe," "did not recall," or "did not feel"–if not to obfuscate the truth and minimize what the lawyers and call participants actually said and knew? And why not just give the defendants all the 302s, grand jury testimony, etc. in the first place? These were not unsophisticated prosecutors–they were the cream of the Department's crop. The withheld material undercut their entire case, they knew it, and they hid it. In sum, it is really this simple: the materials of McMahon, Fastow and the lawyers that were concealed until new prosecutors came on board contradicted every theory of the ETF's case at trial.

I. *BRADY* ENTITLED BROWN TO ALL OF THIS MATERIAL BEFORE TRIAL–TO PREPARE HIS DEFENSE.

The entire premise of *Brady* is to insure that the government discloses all exculpatory material early enough in the litigation to enable a defendant to put that evidence to effective use. Accordingly, the DOJ has recently changed its *Brady* policy: "Providing broad and early discovery often promotes the truth-seeking mission of the Department and fosters a speedy resolution of many cases. ... Exculpatory information, regardless of whether the information is memorialized, must be disclosed to the defendant reasonably promptly after discovery." David Ogden, Guidance for Prosecutors Regarding Criminal Discovery, January 4, 2010, *available at* http://www.justice.gov/dag/discovery-guidance.html (last visited July 27, 2010). Pre-trial disclosure of these thousands of pages of withheld materials would have informed every facet of defense strategy from pretrial motions, witness selection and examination, opening statements, cross-examinations, through closing arguments. No court could reasonably believe that counsel for Brown or Fuhs would not have called Dolan as a witness had the ETF disclosed the crucial fact that Dolan himself deleted the buy-back language from the engagement letter to keep Merrill out of a "parking transaction." The same is true for the questions that the defense would have asked Merrill counsel Zrike had her knowledge of the transaction and her efforts to document it been disclosed pretrial so they could have prepared to examine her. Brown was irreparably prejudiced and wrongly convicted as a direct result of the ETF's suppression of the exculpatory information.[7]

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[7] *See also United States v. Ferrara*, 456 F.3d 279, 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. Jackson*, 345 F.3d 59, 70 (2d Cir. 2003) ("The fact that [the relevant witness] did not testify at the defendants' trial presents no obstacle to application of *Brady* and its progeny."); *United States v. Fisher*, 106 F.3d 622, 635 (5th Cir. 1997) ("The Government knew of the [interview notes] and that [witness A] directly

Furthermore, in situations where a person faces and serves time in prison for his testimony about his personal understanding of a telephone call to which he was not a party, based on, ultimately, the difference between the words, "promise" and "assurance,"– and allegedly lied to the lawyers– *every word by persons with personal knowledge* and "***who** knew what*" was important. The government contends that if its summaries disclosed that *anyone* "believed" it to be a best efforts agreement, then it has immunity for its willful concealment of the direct evidence from *the lawyers* and **both** of the alleged "guarantors" that it actually was a best efforts agreement. Dkt.1223:10-11.[8] Such government gamesmanship defies both the letter and spirit of *Brady* and of *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 633 (1935). The government could have disclosed that 100,000 people "believed" it to be a best-efforts agreement, but where the ETF built its criminal case on alleged unlawful guarantees by McMahon and Fastow, which the ETF said Brown hid from the lawyers and lied to the grand jury about, then what the "**guarantors**" **actually said** (revealed only in the raw notes of their interviews) and **what the lawyers actually knew and did** (revealed only

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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 for [Brown.]"), *abrogated on other grounds by Ohler v. United States*, 529 U.S. 753, 120 S. Ct. 1851 (2000); *United States v. Harrison*, 524 F.2d 421, 427 (D.C. Cir. 1975) ("[w]hether or not the prosecution uses the witness at trial, the notes could contain substantive information or leads which would be of use to the defendants on the merits of the case"); *United States v. Bagley*, 473 U.S. 667, 682-83, 105 S. Ct. 3375, 3384 (1985) (suggesting that an incomplete response could "represent[] to the defense that the evidence does not exist" and cause it "to make pretrial and trial decisions on the basis of this assumption").

[8] For example, although it is clear that the ETF highlighted certain exculpatory information contained in the notes of the 2002 interviews with McMahon, it withheld the crucial fact that **McMahon said Fastow "agreed to use best efforts to remarket the barges" and "no–never guaranteed to take out w/rate of return."** Dkt. 1217, Ex. D, at 000493; 000449. It did not suffice, as the prosecutors now claim, that "Brown had the requisite information" (a reference to best efforts) from any source. Dkt. 1223:12. This slight of hand does not comport with any extant interpretation of *Brady*, nor should it, as evidenced by the government's failure to cite a single case in support of its alleged immunity from *Brady.*

in their sworn testimony and FBI 302s) was *Brady* material.[9] Indeed, it was the entire defense–and repeatedly requested–pretrial.

While the *Brady* obligation is, of course, ongoing, *Pennsylvania v. Ritchie*, 480 U.S. 39, 60-61, 107 S. Ct. 989, 1003 (1987), it is primarily a mandate for pre-trial disclosure of exculpatory materials. *United States v. Douglas*, 525 F.3d 225, 245 (2d Cir. 2008) ("*Brady* material must be disclosed in time for its effective use at trial."); *Leka v. Portuondo*, 257 F.3d 89, 103 (2d Cir.2001) (*Brady* material that is not "disclos[ed] in sufficient time to afford the defense an opportunity for use" may be deemed suppressed within the meaning of the *Brady* doctrine.).[10] Therefore, the government's unsupported arguments that there is no *Brady* violation, and Brown is not entitled to a new trial because Zrike testified, fail. Dkt.1223:8-9, 14. *Without* full and accurate disclosure of Zrike's knowledge and actions, *and with* Zrike under threat of personal indictment, Weissmann glaring at her as she testified, *and* the destruction of Merrill on her shoulders if she testified contrary to the government's theory as required by Merrill's non-prosecution agreement, Brown did not have an "adequate opportunity to explore th[ese] issues with Zrike when he cross-examined her as a defense witness at trial." Dkt.1223: 9. Why? Because the government withheld hundreds of pages of her consistently exculpatory testimony before the Grand Jury and the SEC, including the crucial

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[9] The government in *Stevens* so confessed. Dkt.1217, Ex. A-2 (". . . citing the failure to produce *notes taken by prosecutors themselves* in a [witness interview]. . . . the government conceded that these notes contained information that the government was constitutionally required to provide for the defense for use at trial [under *Giglio*]").

[10] *See also Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S. Ct. 837, 845-46 (1977) (The prosecutor has "duty under the due process clause to insure that 'criminal trials are fair' by disclosing evidence favorable to the defendant upon request."); *United States v. Sipe*, 388 F.3d 471, 485 (5th Cir. 2004) (same, even if inadmissible at trial). "The government must make [these] disclosures in sufficient time that the defendant will have a reasonable opportunity to act upon the information efficaciously." *United States v. Rodriguez*, 496 F.3d 221, 226 (2d Cir. 2007).

statement the ETF itself had highlighted, and an FBI 302 memorializing her initial interviews with the ETF. Nor did Brown have an "adequate opportunity" to cross-examine the government's parade of hearsay-witnesses without knowing that McMahon and Fastow told the government that a best-efforts assurance is all the commitment was and that Fastow purposely described it differently to those whom the government hand-picked to testify to their false understandings. The evidence appearing only in the raw notes of McMahon and Fastow directly contradicts if not destroys the government-sponsored-testimony of Glisan, Kopper and others on which the government acknowledges its case depends. Dkt.1223:2, 11-12. This information is *Brady*. *See also* Dkts.1160:9, n. 9; 1168:22, n. 30.

Instead of facing its *Brady* violations and other misconduct, the government *continues* to rely on admittedly contradicted hearsay testimony from its list of Enron characters. However, all their testimony must be discounted if not completely ignored because of suppressed *Brady* evidence that (1) Fastow purposefully misled his subordinates at Enron when he told them–internally–that Enron had guaranteed Merrill's equity interest in the barges and would have to buy back that interest if Enron was unable to find a third-party purchaser within six months; (2) McMahon stated categorically (as did Fastow in his *Newby* testimony) that the testimony of Kopper and Glisan was either false or wrong; and (3) all call participants confirm there was only a best-efforts agreement. *See* Dkt.1217, Chart 11.

The government's argument continues to be, in practical effect, (1) we gave you the names of people we believe might have exculpatory information, and (2) our *Brady* obligation is therefore satisfied even if those individuals are "unavailable" and even though we possessed reams of exculpatory evidence from each of those individuals that contradicted the basis for every element

of your convictions and everything we said. *See* Charts 1, 2, attached. However, this is not the law.[11] "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process.... Prosecutors' dishonest conduct or *unwarranted concealment* should attract no judicial approbation." *Banks v. Dretke*, 540 U.S. 668, 696, 124 S. Ct. 1256, 1275 (1986) (emphasis added) (citations omitted).

II. THE NEWLY DISCOVERED EVIDENCE IS MATERIAL AND EXCULPATORY TO BROWN'S CONVICTIONS ON PERJURY AND OBSTRUCTION.[12]

A. Brown's Grand Jury Testimony Was Literally True.

The withheld evidence proves that Brown's grand jury testimony–as alleged in Counts IV and V of the indictment–was a literally true statement of verifiable fact. *Bronston v. United States*, 409 U.S. 352, 360, 93 S. Ct. 595, 602 (1973).[13] The suppressed, newly discovered evidence is

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[11] Neither does the new trial inquiry include a "reasonable doubt" proviso. Dkt.1223:3-4. Even if this were actually the appropriate standard for review, Brown would be entitled to a new trial. There is a reasonable doubt with all the new evidence and *Brady* violations. Even without the thousands of pages of material and exculpatory evidence concealed from Brown, one federal Circuit Judge determined that no reasonable jury could have found Brown guilty for perjury and obstruction. *Brown I*, 459 F.3d at 537 (DeMoss, J., concurring in part and dissenting in part).

[12] The government's assertion that Brown has somehow abandoned any claim premised on "newly discovered evidence" is bizarre. Brown has repeatedly argued and set forth supporting authority for a new trial on the grounds of newly discovered evidence. Dkts.1004, 1020, 1061, 1160, 1201. Brown has also repeatedly argued with supporting authority that he is entitled to a new trial based on the misconduct of ETF prosecutors in misrepresentations to this Court and to the jury (including misconduct that does not fall neatly within the parameters of *Brady per se*). Dkts.1160, 1168, 1201, 1204. *See United States v. Jimenez*, 509 F.3d 682, 691 (5th Cir.2007); *United States v. Wyly*, 193 F.3d 289, 298-99 (5th Cir.1999). Indeed, the government itself stated: "[T]he remedy for the government's alleged *Brady* violations is a new trial, not dismissal of the indictment. Of course, Brown has already been granted that remedy [on Counts I-III]." Dkt. 1185:1. *Id*. at pp. 18-24, 47. The government's response counters none of this authority.

[13] Perjury (and by extension, obstruction) requires the government to prove that Brown lied about a material fact and that he knew that he was doing so. *United States v. Abroms*, 947 F.2d 1241, 1245 (5th Cir. 1991). The government must prove that the defendant made a declaration under oath, that was (1) false, (2) material to the crime being investigated, and (3) not believed by the defendant to be true. 18 U.S.C. § 1623; *Abroms*, 947 F.2d at 1245. The perjury statute may not be loosely construed, and if a witness is telling the literal truth to the question as asked, then he has not committed perjury. *United States v. Shotts*, 145 F.3d

material and exculpatory to Brown's convictions in several ways. And, the government cannot avoid a new trial by premising Brown's perjury and obstruction convictions on the over-simplification of "promise v. no promise," when in the same breath, Brown told the grand jury his understanding that the conversation between Fastow and Bayly did not reflect a "promise" in the sense of a "guarantee," but rather that Enron had given assurances it would use its best efforts to remarket the barges.[14]

The new evidence was material and exculpatory as to each element of perjury and obstruction. First, the newly discovered statements of every call participant and those of Fastow and McMahon prove the literal truth of Brown's Grand Jury testimony as not a promise or guarantee, but rather an assurance of best efforts to re-market Merrill's equity interest. The Fastow and McMahon raw notes prove that each man told the government they gave only a best-efforts representation, and the new evidence shows that Zrike and Dolan knew it and tried to document it. Second, this suppressed evidence demonstrates that the underlying transaction was lawful, and it renders Brown's personal understanding of the lawful conversation to which he was not a party immaterial to the Grand Jury investigation of a *crime*. Third, at the very least, it provides every reasonable foundation for Brown to believe that what he said was true. Accordingly, the withheld and newly discovered evidence refutes every element of Brown's convictions on both counts and undermines any

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1289, 1298 (11th Cir. 1998), *cert. denied*, 525 U.S. 1177 (1999); *United States v. Crippen*, 570 F.2d 535, 537 (5th Cir. 1978), *cert. denied*, 439 U.S. 1069, 99 S. Ct. 837 (1978).

[14] Tr.80 (an obligation to get Merrill out of the deal was "inconsistent with my understanding of what the transaction was." **** "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."). Brown: "I thought we had received comfort from Enron that we would be taken out of the transaction within 6 months or we would get that comfort. 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 (emphasis added).

confidence in the jury's verdict (a jury which did not hear what McMahon, Fastow and others on the call actually said, nor what Zrike, Dolan and Hoffman knew and actually did).

1. Standing Alone, And Even If It Were Admissible, The Brown Email Is Insufficient To Justify Brown's Convictions.

At bottom, the government relies only on the email Brown wrote more than a year after the Barge transaction about an unrelated *leasing* transaction in which even an oral *guarantee* would have been lawful. This email is insufficient to counter the newly discovered evidence, *Brady* violations or government misconduct documented by Brown. First, the email is multi-level hearsay which renders it inadmissible even against Brown.[15] Second, even if it were admissible, the email is either inaccurate on its face or now contradicted by belatedly disclosed *Brady* material as to Zrike. Third, the email is a red herring: the government cannot *prove* perjury with an *unsworn* statement, and where the sworn testimony at issue is literally true.[16]

[15] Written more than 14 months after the Enron barge sale, after the government's alleged conspiracy terminated, and in the context of a wholly unrelated and legally different transaction, the email is imprecise short-hand and inadmissible under FED. R. EVID. Rules 802 and 805, as rank, inaccurate "hearsay within hearsay." Its use is also foreclosed by FED. R. EVID. Rule 403, as incorrect, erroneous, without personal knowledge, and its prejudice would outweigh any other possible value in a second trial of this matter. The Fifth Circuit did not reach the issue whether this email was, in fact, admissible against any defendant, and it was not. *See In re Pequeno*, 126 Fed. Appx. 158, 164-65 (5th Cir. 2005); *Barry v. Simmons Airlines, Inc.*, 239 F.3d 366, 2000 WL 1741622 (5th Cir. 2000); *United States v. Dotson*, 821 F.2d 1034, 1035 (5th Cir. 1987); *Southern Stone Co. v. Singer*, 665 F.2d 698, 703 (5th Cir.1982). *Cf. Vazquez v. Lopez-Rosario*, 134 F.3d 28, 34 (1st Cir. 1998); *United States v. Kaplan*, 490 F.3d 110, 121 (2d Cir. 2007); *Cedeck v. Hamiltonian Fed. Sav. & Loan Ass'n*, 551 F.2d 1136, 1138 (8th Cir. 1977); *Boren v. Sable*, 887 F.2d 1032, 1036-37 (10th Cir. 1989).

[16] The divided panel pointed to only four (4) pieces of evidence (as evidence of Brown's knowledge of the unlawful guarantee) when affirming Brown's convictions for perjury and obstruction. *Brown I*, 459 F.3d at 528. The (1) initial draft of the engagement letter and (2) the "Trinkle call" are now contradicted by evidence the government withheld during *Brown I*. The (3) Brown email, is factually and legally insufficient upon which to predicate a perjury or obstruction conviction, and refuted by the *Brady* evidence withheld. And (4) the hearsay preliminary communications regarding the assurance provided by McMahon– are now belied by McMahon, Fastow and others.

2. The Evidence At *Brown I* Was Weak, and The Government Obtained These Convictions Only Through Its Misconduct And *Brady* Violations.

The panel on appeal was divided; they unanimously acquitted Fuhs, the only other defendant who worked in Brown's department, and one judge wrote to urge Brown's acquittal of perjury and obstruction. The trial was, in effect, a mis-matched swearing contest, with the government's hearsay witnesses insisting there was an unlawful guaranteed buyback, and the Merrill defendants arguing with little or no evidentiary support–without all the evidence the ETF concealed–that only a best-efforts agreement to re-market had been reached. Under those circumstances, even the slightest piece of material exculpatory evidence would have tipped the balance. Accordingly, the ETF suppressed the *defense's* "quantum of evidence"–all of which contradicted the engineered, hearsay case the ETF cobbled together. There is no credible or admissible evidence that Brown lied to the grand jury. The facts that the guarantors and call participants told the government it was a best-efforts agreement, and that the lawyers knew it all and tried to document it, **was the entire defense**–to all charges.[17]

B. The Plethora Of *Brady* Violations Undermine Any Confidence In The Verdict.

As just these few of many other examples show, it is the *Brady* violations that are "black and white" in this case:

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[17] The government's brief and chart repeatedly discount this necessary specificity, instead conflating material terms to make its pre-trial summaries appear substantial. For example, as to Schuyler Tilney–as with every other material witness–the government argues that having an understanding that the transaction was a true sale is somehow the same thing as saying that the two parties agreed to use best efforts–which we now know Merrill counsel attempted to document. The government also misrepresents the extent to which its pre-trial summary of Tilney somehow alerted Brown to Tilney's understanding of the transaction. For example, the government would have this Court believe that, "*Tilney thought Fastow said....*" (Summary), is somehow the equivalent of "*Fastow's representations did not include a guarantee–orally or in writing*." Dkt.1217, Ex. B, at 000680. Unlike the government's, Tilney's words are unequivocal and definitive.

(1) The ETF: "Things were hidden from her [Zrike] time and time again." Tr.6500.

Brady **from Zrike**: "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, at p. 75."Everyone understood the rules, the accounting rules and the accounting treatment. . ." *Id*. at p. 55.

(2) ETF: "McMahon made an oral guarantee to these Merrill Defendants that they would be taken out of the barge deal by June 30th, 2000 at a guaranteed rate of return." Tr. 6144.

Brady **from McMahon notes**: "Andy agreed E[nron] would help them remarket [the] equity w/in next 6 months–**no further commitment**" Dkt.1217, Ex. D, at 000478. *Id*. at 000494; 000513. "No – never guaranteed to take out w/rate of return." *Id*. at 000493.
Brady **from Fastow notes**: "Best efforts to find 3rd party takeout." Dkt. 1217: Chart 2.

(3) ETF: "If it's a remarketing agreement, if that's all it is, why was it not put in writing? . . . If it was a remarketing agreement, there wouldn't have been a problem with that. If that's all it was, why wasn't it put in writing?" Tr. 6486.

Brady **from Zrike**: "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 [for Merrill's equity interest.***[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, at pp. 63-64, 69.

(4) ETF: "The lawyer has to know what's going on; they have to know all the facts. . . there's no evidence that Mr. Fuhs made any efforts to talk to a lawyer or had any reliance on a lawyer about what was going on. . . . [Fuhs] gets copies, for example, of the engagement letter that had the offending language included, and that shows you what he knew at the time the deal was." Tr. 6538-39.

Brady **from Dolan**: **"DOLAN did object to this language and made the necessary changes." Dolan knew "that such an agreement would be improper because such a transaction could be viewed as a 'parking' transaction." Dkt.1217, Ex. B, at pp. 5-6.**

CONCLUSION

Brown requests this Court set a hearing on this Motion at the earliest possible date, and upon full consideration, order a new trial on Brown's convictions for perjury and obstruction–in the interest of justice–and then dismiss the Indictment on all counts.

Dated: July 30, 2010

Respectfully submitted,

PORTER & HEDGES LLP

DANIEL K. HEDGES
Texas Bar No. 09369500
1000 Main Street, 36th Fl.
Houston, TX 77002
Telephone: (713) 226-6000
Facsimile: (713) 228-1331

SIDNEY POWELL, P.C.

By: /s/ Sidney Powell
SIDNEY POWELL
Texas Bar No. 16209700

TORRENCE E. LEWIS
IL State Bar No. 222191

3831 Turtle Creek Blvd. #5B
Dallas, TX 75219
Telephone: (214) 653-3933
Facsimile: (214) 319-2502

ATTORNEYS FOR DEFENDANT JAMES A. BROWN

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served upon Patrick Stokes, counsel for the United States, via the ECF system on July 30, 2010. It has also been served electronically on all counsel of record.

/s/ Sidney Powell
Sidney Powell

CHART 1
DEFENDANTS' BRADY REQUESTS

Filing/Docket/Date	***Brady* Requests & Misconduct Allegations**	**Disposition**
Motion by Fuhs for Rule 16 discovery, Dkt.85, 2/9/04 (joined at Dkts.86, 89, 90; supplement at Dkt.94).	Request for preliminary declaration that SEC and DOJ are one entity for purposes of Rule 16 and *Brady*; Supplement (Dkt. 94) by Brown alleges failures of government to meet Rule 16 discovery obligations (comparison between NBT and EBS discovery).	Denied without prejudice at Dkt.145 (2/26/04); Supplement denied w/prejudice at Dkt.145.
Furst Motion for Leave to Issue Subpoenas, Dkt.88 (and 102), 2/11/04.	Request to get access to all records and documents from accountants and attorneys. **Referencing Weissmann statement in response to request that "We are not the SEC. Accordingly, documents that are exclusively in [the SEC's] possession, custody or control are not discoverable from the [ETF]**." (p. 5)	Taken under advisement at Dkt.145; Granted at Dkt.146 (3/1/04); Dkt.102 denied at Dkt.146
Furst Motion for Brady Materials, Dkt.113, 3/1/04.	Enumerating sixteen categories of evidence constituting *Brady* material.	**Denied** at Dkt.177 (as to *Brady*) on 4/21/04.
Furst Omnibus Pre-trial Memorandum, Dkt. 117, 3/1/04, Supplemented by Brown, Dkt.138, 3/1/04.	Detailed request for all *Brady* material, specifically witness statements (302, Grand Jury testimony, SEC statements) all evidence from outside and inside counsel and accountants. "The [ETF] has informed several of these entities and individuals … that they are 'targets' or 'subjects' of the government's investigation. The government's 'chilling' of witnesses helpful to the defense … raises questions about whether the government is impermissibly attempting to 'chill' Defendant's ability to prepare for trial." (pp.31-32)	**Denied** at Dkt.177 (as to *Brady*) on 4/21/04.
Bayly Request for *Brady*/*Giglio* Materials, Dkt.125, 3/1/04 (Reply in Support filed as Dkt. 166, 4/5/04)	Comprehensive request for all testimony from exculpatory witnesses (Fastow, **Zrike**, Hoffman, etc.). Government has not even attempted to meets its *Brady* obligations. Government "has even gone so far as to express a view of its obligations under *Brady* and/or *Giglio* that is inconsistent with the law of this Circuit."	**Denied** at Dkt.177 on 4/21/04.
Furst Omnibus Pre-trial Reply Memorandum, Dkt.158, 4/5/04.	Detailed request for all *Brady* material, specifically **Zrike** Grand Jury, witness statements (302, Grand Jury testimony, SEC statements) all evidence from outside and inside counsel and accountants. "While the defense may know of a potential exculpatory witness, that does not mean that they are 'available.' Zrike's attorney, for example, has repeatedly notified defense counsel that he will not permit defense counsel to speak with her client and, if called to testify, she will invoke her Fifth Amendment privilege against self incrimination." (p.11) "Invariably, individuals desired as	**Denied** at Dkt.177 (as to *Brady*) on 4/21/04.

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	potential witnesses refuse to speak with defense counsel in **light of conversations with the [ETF] informing such possible witnesses that they are 'targets' or 'subjects' of the Government's investigation**. The Government's actions have frustrated and, in some cases, thwarted, the defense's ability adequately to prepare for trial." (p.11). "The government cannot have it both ways. It cannot claim that critical elements of this case are 'intent' and 'defendants' understanding' of the [transaction] and, at the same time, 'target' a number of potential defense witnesses, all of whom played a role in evaluating the legal and accounting ramifications of the transaction. Simply put, if the government is not 'chilling' these potential defense witnesses but claims that such witnesses do not wish to incriminate themselves, then the Government should produce interview notes, 302 Reports, SEC and grand jury testimony, and testimony before the Bankruptcy Examiner." (p. 12). Upon further inquiry, however, the individuals have decided to forgo speaking with defense counsel, despite the usefulness of the information and desire to assist, because of the aggressive [ETF] tactics of 'targeting' or 'subjecting]' any potential exculpatory witness." (p. 12). *See also* p. 15 (**Zrike** grand jury testimony).	
Pre-Trial Hearing, August 5, 2004, Dkt.175.	"The next point I want to make, your Honor, is that some of these individuals [designated as possessing 'arguably exculpatory' information as per government letter] have advised us that not only will they not talk to us but they have been called either a target or a subject of the Government's investigation. Furthermore, we've been advised that in some cases, if called as witnesses by the defense, notwithstanding they won't even talk to us now because, I respectfully suggest, of the chilling effect of them being designated as targets and subjects, they will assert the Fifth Amendment privilege if called as a witness to presumably permit us to elicit this exculpatory material that they have which would assist us. We went so far, your Honor, as to talk to some counsel and are prepared to submit affidavits and letters to the Court in which those counsel for some of these people have said exactly what I said, that if called they will assert the privilege and they have been targeted or subject -- or designated as subjects." Pre-Trial Transcript, April 15, 2004, at pp. 8-9 "I will wrap up, your Honor, by respectfully referring the Court to our papers and urge the Court respectfully that the	Denied, Dkt.177.

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	Government can't have it both ways. They can't interview a witness, hear what the witness has to say, write it down, then designate the witness as a target, chill that witness, intentionally or otherwise -- and I'm not suggesting intentionally -- and then keep that information in its files, not disclose it to the defendants, and then submit a letter some six months after they said they didn't have *Brady* material and say, 'These witnesses may have exculpatory information; but since they're available and you know who they are, we're out of it.'" *Id*. at pp. 11-12. "I submit, your Honor, that fundamental fairness and the language and cases we cited in our brief under particularized need, .., mandate that we should at least see this information. If the Government wants to put restrictions on us that we can't disclose it, we would have to return it, we think we can work something out. But I respectfully submit the Government can't do it the way they've been doing it, the timetable they set, and under the terms that they set." *Id*. at p. 12. "That is correct, your Honor she [**Zrike**] did not invoke, we are told by Mr. Romano that she spent the better part of the day answering questions before the Grand Jury. Mr. Romano has told us that Ms. **Zrike** will not meet with us to discuss this case. ... Mr. Romano has also advised us that if called to testify at this trial she will invoke her rights under the Fifth Amendment. Mr. Romano has also shared with us that he believes that the testimony that Ms. **Zrike** gave both in front of the Securities and Exchange Commission and in front of the Grand Jury is clearly exculpatory as to Mr. Bayly and would be extremely helpful to Mr. Bayly. **Your Honor, Ms. Zrike is unavailable to us. We can't get to speak to her, and we can't get her testimony pursuant to subpoena down here. We want her Grand Jury testimony. We want her SEC testimony. We want any other exculpatory information that the Government has with respect to Ms. Zrike.**" *Id*. at pp. 14-15.	
Bayly's Motion to Dismiss or for an order requiring government to withdraw request to attend witness interviews, Dkt.180, 4/26/04.	Filed with accompanying declaration of Richard Schaeffer as to government obstruction. (1) References to government's request as "chilling" obligation – pp. 4-5. (2) Reference to ML plea agreement ("heavy hammer to wield over ML and its employees" – p. 2) which, by its plain terms, makes such requests, in actuality, obligations. (3) "**government has pointedly refused to state that ML will suffer no consequences if it declines the government's request.**" – p.	Unknown – no evidence in Docket that it was ever ruled on.

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	2. (4) Charging violations of Fifth and Sixth Amendments and attorney work product doctrine.	
Furst Motion to Reconsider *Brady*/*Giglio* Ruling, Dkt. 182, 4/27/04. (refiled as Dkt.219) Reply in support, Dkt.197, 5/5/04 – all under seal (joined at Dkts.216, 221)	Renew request for exculpatory information. "**The Government's attempts to define the defense strategy and, accordingly, limit its *Brady* obligation, have placed numerous obstacles before defense counsel attempting to prepare properly for an impending trial**." (p.6) "**Defense counsel has also been hampered by the Government's designation of witnesses as 'targets' or 'subjects.'** As we argued earlier, this conduct had 'chilled' and continues to 'chill' such witnesses from testifying or even speaking with defense counsel. **Moreover, we believe that the government has designated a number of individuals as 'targets' or 'subjects' simply because these individuals disagreed, and continue to disagree, with the Government's theory of the case. … Such witnesses, however, will not provide this information to defense counsel for fear of retribution by the Government**." (p.6).	Granted in part in sealed Order, Dkt.223, 5/26/04 (Triggered *Brady* letter of 6/1/04), but then denied at Dkt.228, 6/1/04.
Emergency Motion and Request for Immediate disclosure and/or hearing on government's *Brady* violations as to Fastow & Other Witnesses, Dkt.236, 6/3/04. *supplemented by Dkt.237 (6/3/04); joined by all at Dkt.238, 244, 245 (6/3/04)	Request based on 6/2/04 revelatory disclosure of material from edited Fastow 302. "**Obviously, the concern at this stage is that the government has not merely 'missed' or 'omitted' *Brady* material concerning Mr. Fastow [which is obstruction of justice]. Indeed, the conduct demonstrated by this belated 'compliance' by the government leads to the inescapable conclusion that similar exculpatory material has not been provided for others as well. How can the defendant-or this Court-take comfort that *Brady* obligations have been fulfilled where the government has so blatantly failed, and chosen to fail, to comply with a player so central to the case as Mr. Fastow." (p.3) "*Brady* is, after all, designed to assist defendants in maintaining their innocence and in preparing to defend against allegations of wrongdoing. In this case, in its conduct as to Rule 16, *Jencks*, *Giglio*, and, above all, *Brady*, the government has twisted its discovery obligations almost beyond recognition and, by doing so, hindered the defendants' right to prepare a defense and to due process**." (p.4).	Dkt.283 (6/25/04) does not rule but states "**As previously stated, the Court expects the Govt to furnish *Brady* material to counsel for the defts in accordance with the law**." Dkt. 290, 7/14/04 (granting and denying in part). Further, the Court has stated its expectation that the gov't will comply with *Brady* & Giglio. By 7/30/04 the government should provide to the defendants summaries of the exculpatory information that lead to the gov't identifying Kathy **Zrike** & other witnesses as having

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		exculpatory testimony.
Bayly Motion to Compel Disclosure of **Zrike**, Dkt.237, 6/3/04.	Request for all **Zrike**/*Brady* material.	**Denied**, Dkt.290
Furst Motion to Adopt and Join Bayly Motion to Compel Disclosure of Fastow materials, Dkt.244, 6/3/04 – formerly filed as Dkt.197	Request to Compel Production of all *Brady* material as to Fastow and/or preclude "handshake deal." "Finally, and perhaps most significantly, the latest revelation by the Government related primarily to a single witness, Andrew Fastow, who naturally does not appear on the witness list. Questions remain. **What else is out there? What other exculpatory information does the government continue to hold back under the arbitrary designation that it is '*Jencks* or *Giglio*-not *Brady*?' How much information does it intend to keep concealed simply by not calling a witness altogether? How much information do they hope is not available to the jury because it is provided so late [or not at all] that it cannot be incorporated into defensive theories?** We fear that the government in this case is perilously close to traveling the path of contrivance and avoidance of it's constitutional obligations pursuant to *Brady* and its progeny so well document in this very courthouse and outlined in *United States v. Rammning*, 915 F.Supp. 854 (S.D.Tex. 1996)." (p.3).	**Denied**, Dkt.290
Furst's Motion (Dkt.276) & Amended Motion (Dkt.282) to Dismiss or to Bar testimony of Glisan and Toone. 6/29/04.	Improper use of Grand Jury to gather evidence.	**Denied** at Dkt.392, 9/2/04.
MOTION by Daniel Bayly for Disclosure of Grand Jury colloquy and instructions, Dkt.302, 7/20/04, joined at Dkt.321 (reply at Dkt.336, 8/10/04)	Improper use or misconduct before Grand Jury.	**Denied** at Dkt.397, 9/13/04.

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Bayly Request for *Brady*/*Giglio* Materials, Dkt.305 (refiling of Dkt.125, 3/1/04).	Comprehensive request for all testimony from exculpatory witnesses (Fastow, **Zrike**, Hoffman, etc.). **Government has not even attempted to meets its *Brady* obligations. Government "has even gone so far as to express a view of its obligations under *Brady* and/or *Giglio* that is inconsistent with the law of this Circuit."**	**Denied** at Dkt.397 on 9/13/04.
Pre-Trial Motions Hearing, 6/25/04, Dkt.285	DEFENSE: "Your Honor, we have received from the government what the government characterized as not *Brady* material, a summary of what Mr. Fastow said to the government. They said it is not *Brady* material. Why didn't we receive it then? How come they are giving this to us? With respect to *Brady*, we offered months and months ago in our motion, contrary to what Mr. Friedrich says, a list of people we attempted to talk to and who refused to talk to us because the government -- we offered to submit letters from lawyers, which we have, of the 20 people that the government -- 20 people who the government said had exculpatory information, 7 from Enron, 13 from Merrill. We've run into a brick wall. We've made the effort. That's why we're trying to deal with this issue of calling these individuals at trial and having them assert the privilege. Mr. Friedrich has been over this. He knows precisely what we've attempted to do. We have run into every single wall that the government set up. If that turning Fastow over to us, which is not *Brady* material -- in their view -- of course, we take a different view -- then there's no reason, Your Honor, legally, logically, ethically, why they shouldn't turn over to us the information of the individuals who they have identified as having exculpatory material, who we have prepared and had done for the Court, identified all the efforts we've made to talk to these people and do it their way. And we've been stopped." Pre-Trial Hearing Transcript, June 25, 2004, Dkt.285, at pp. 37-38 DEFENSE: "… **we think we need a hearing on *Brady*. Let me explain why: If the Fastow statement, according to the government, is not *Brady* material, then there's a fundamental difference of view between the defense and the government and the case law as to what exculpatory material means. And, Your Honor, we are now at the point where the materials that the government handed over to you –** DEFENSE: "What I'm suggesting, Your Honor, is now that we've received this disclosure this late in the day, even though we got this disclosure this late, the government tells us	**Denied** – same hearing:

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	this is not *Brady* material, this is not exculpatory. *** THE COURT: This is the way they view it. But they have presented it to you and you do regard it as exculpatory. So, now you have that information in your possession; and you have your ability -- as to Mr. Fastow. DEFENSE: "I'm raising a *Brady* issue. I apologize for not explaining it clearly. *** DEFENSE: "But my point, Your Honor, is that the materials that the government selected as arguably *Brady* material were through the government's own view of what is exculpatory. THE COURT: What materials are you talking about? DEFENSE: "The statements by witnesses other than Mr. Fastow. THE COURT: The 302's? DEFENSE: "Correct, Your Honor. And grand jury testimony. THE COURT: And grand jury testimony. DEFENSE: "And SEC testimony. **I'm not only worried about what the government provided to you, I'm worried about what the government did not provide to you. Because if we now know that the government's definition of *Brady* is such that the Fastow statement is not exculpatory, then I am concerned that the application and definition of exculpatory that the government is using is skewed and is not in conformity with the law. And we don't know what we don't know.** What we do know is that the presumption that the government would like the Court to accept that it is complying with *Brady*, I suggest, is bankrupt. And it is bankrupt because we now know that a statement that is plain as day exculpatory, the government tells us is not exculpatory. It is an Alice in Wonderland world. **If we think that the government is calling this Fastow statement non-exculpatory, then I suggest that we cannot trust the government's judgment with regard to the materials that it continues to hold of SEC testimony, FBI 302's, and other materials that could go to the heart of this case. I join in the request of Mr. Schaeffer that the materials that**	THE COURT: I've previously ordered the government to have these transcripts available at the time of trial, if they should be required, that is to say on grand jury testimony. I forget whether I said SEC. I'm not sure how you would ever get SEC testimony in. In any event, the grand jury testimony which I think the defendants may have some argument to make. 302's do not have to be delivered by the government to the defendants at this time. They've been reviewed by me in order to see the basis for the government having disclosed these people to you as arguably having some information that may be exculpatory. Or in the case, I think, of Mr. Fastow, which I have not seen -- made his statement. I have seen the same description you've seen. The government is putting a characterization on that as not being exculpatory because they're looking at it in

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	were submitted to Your Honor be disclosed. I am also concerned about the materials that were not provided to Your Honor. And that is why I think we need a hearing on what the government views *Brady* to be as it's reviewing the materials within its possession. I hope I've made myself clear." Id. at pp. 35-43.	a larger context of what they think is incriminating testimony that he has given. So, it's a fine argument made by Mr. Zweifach. But at the same time, I tend to weigh these things in the context of advocates putting their own spin on this on their side of the table just as you do on your side of the table. And these witnesses are available subject to your subpoena power, same as the government. All right."
Furst Motion in Limine to Introduce Prior Testimony of Unavailable Witness, Dkt.348, 8/13/04 (Dkt.347 also)	Request to admit various prior sworn exculpatory statements (withheld) of unavailable witnesses. "These *Brady* witnesses … are unavailable to testify as defense witnesses because the [ETF] has also deemed them 'unindicted co-conspirators,' and the *Brady* witnesses will likely assert their Fifth Amendment privileges if called to testify at trial." In sum, the ETF simultaneously alerted the defense to the existence of witness who possessed arguably exculpatory testimony at the same time they designated those same *Brady* witnesses as "unindicted co-conspirators."	**Denied** at Dkt.397, 9/13/04. **Denied** again at trial. Tr. 4863-66
Bayly's Motion for Disclosure of Prior Testimony of Kathy **Zrike**, Dkt.494, 10/8/04.	*See* Dkt.230.	No docket ruling. See Dkt.290.
Furst's Motion to Admit prior statements of witnesses under Rule 806, Dkt.528, 10/12/04.	Request to admit various prior sworn exculpatory statements (withheld) of unavailable witnesses.	**Denied** at trial. Tr. 4863-66

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Bayly's Notice of prosecutorial duty to correct demonstrably false testimony and request for a hearing, Dkt.541, 10/14/04.	**Motion concerning failure of government to correct Trinkle's misrepresentation of the date of the so-called "Trinkle call" which the government knew was wrong from discovery materials in its possession and failed to disclose until after Trinkle had testified and returned to London.** "Notwithstanding their knowledge of this fact, the government has refused to correct the false testimony of Ms. Trinkle despite repeated requests by counsel for Mr. Bayly." Dkt. 541, at 1.	No docket ruling.
ON REMAND		Third Superseding Indictment Filed, Dkt.937, 4/5/07.
Status Conference Hearing, Dkt.925, February 16, 2007.	Request for production of exculpatory materials from Fastow generated in the discovery in the *Newby* civil litigation.	No docket ruling. No production of any materials from Government.
Status Conference Hearing, Dkt.939, April 4, 2007.	**Defendants concerned that there were not full disclosures made in the first litigation, there are "significant concerns that full discovery had not been given either in terms of *Brady* or possible other relevant material."** "We need all of Fastow's material. We never got Fastow's 302s in the first case. I understand that there are multiple volumes of Fastow's 302s." Dkt. 939, at 21. We repeatedly asked for *Brady* material from Mr. Fastow, particularly in the first trial. And that was never fully produced. We understand from Fastow's testimony in the Lay/Skilling trial, part of which I have seen, that there were multiple volumes of Fastow's 302s. And we don't know how many of those pertained to the barge trial because we still haven't been given those." *Id.* at 24. "And we don't know the full extent of all Fastow's possibly *Brady* material because it's never been provided." *Id.* Request for production of exculpatory materials from Fastow specifically generated in the discovery in the *Newby* civil litigation. (AUSA Spencer's Response: "I understand that all of the Enron documents and all of the Merrill Lynch documents were produced as part of the first litigation. And while I will go back and see … what new documents have been produced in that third category of unknowns, I, again, think that it's reasonable to say that it's going to be a nominal amount of documents." *Id.* at 22.)	**No docket ruling. No production of any materials from Government**. AUSA Spencer response: (1) Well, I'll commit to the Court that I personally will go back over the discovery that was made, as well as any documents the Government has received in the interim from the time the discovery was produced in the first trial until today; and we will make subsequent supplemental production, Dkt.939, at 15; (2) Well, that's obviously going to require quite a bit of work on my part to fulfill the

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	The Court stated: "Well, this is the first I've ever heard of any *Brady* claim being made against the Government in connection with this." *Id*. at 24.	Government's obligation. *Id*.; (3) "my agents inform me that we believe that we have produced most of the documents," *Id*. at 16; (4) "As I said, your Honor, I think the discovery -- additional discovery is going to be a nominal amount." *Id*. at 20.
Brown's Motion to Compel Production of Documents and *Brady* Material, Dkt.948, 8/15/07.	Requests for production of exculpatory materials, including, for example, (1) Fastow raw notes and any other record evidence (existence of which was clearly evidenced by interim proceedings in *Newby* and *Skilling*); (2) evidentiary materials from Merrill's inside and outside counsel and Enron's inside and outside counsel; (3) agreements, understandings made by or between the ETF and Glisan; (4) evidence from individuals who participated in and regarding the Fastow/Bayly Phone call; and (5) recorded evidence, in any form, supporting Defendants' theory that Fastow and Enron only agreed to use best efforts to re-market Merrill's interest in the Barges.	No docket ruling. No production of any materials from Government.
Brown's Motion for Order Granting Motion to Compel Production of Documents and *Brady* Material, Dkt.974, 9/18/07.	Renewing requests for production of exculpatory materials listed above.	No docket ruling. Government produces two "composite" 302s of Fastow on 9/28/07.
Bayly and Furst's Motion to Compel the Production of Specific *Brady* Material, Dkt.979, 9/28/07	**Request for exculpatory information from the following noting that the prior "summaries" from the first trial are insufficient**: Kelly Boots, Kathy **Zrike**, Mark McAndrews, Kevin Cox, Paul Wood, Vince DiMassimo, Jeff McMahon, Andrew Fastow, Schuyler Tilney, **Gary Dolan**, **Alan Hoffman**, Tina Trinkle, Brad Bynum, Bowen Diehl, and Ace Roman.	No docket ruling. No production of any materials from Government.
Brown's Reply in Support of Motion to Compel Production of Documents and	Renewing requests for production of exculpatory materials listed above.	No docket ruling. No production of any materials from Government.

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Brady Material, Dkt.993, 10/10/07.		
Reply in Support of Bayly and Furst's Motion to Compel the Production of Specific *Brady* Material, Dkt.1003, 10/26//07	Renewing request for exculpatory information from the following individuals (and noting that the prior "summaries" from the first trial are insufficient): Kelly Boots, Kathy **Zrike**, Mark McAndrews, Kevin Cox, Paul Wood, Vince DiMassimo, Jeff McMahon, Andrew Fastow, Schuyler Tilney, Gary Dolan, Alan Hoffman, Tina Trinkle, Brad Bynum, Bowen Diehl, and Ace Roman.	No docket ruling. No production of any materials from Government.
Pre-Trial Conference Motion Hearing, Dkt.1010, 11/16/07.	"Judge, we really can't work [*Brady*] out. I don't know if you want to hear argument right now, but, with all respect, we tried to work it out with Mr. Spencer. He keeps saying, 'I am going to comply with *Brady*.' … [W]e are asking the Court to do -- We need your help on this one." Dkt. 1010, at 78. Specific requests, as enumerated in Motions to Compel, for evidence regarding Fastow, **Zrike** ("Ms. **Zrike**'s grand jury testimony, Ms. **Zrike**'s SEC testimony and on and on – it's all listed there -- these are things we do not have. I believe I just demonstrated to you they have to be *Brady*. They are *Brady*. We're not speculating. And, yet, Mr. Spencer steps up and says, 'We'll comply with *Brady*. But **Zrike**'s grand jury and SEC? Huh-uh. You can't have that at all.'" *Id*. at 83. "Mr. Spencer's view of *Brady* to date discloses nothing other than the fact he cannot define what it is, and it includes exculpatory and impeaching information. The Supreme Court in *Strickler vs. Greene* held that Mr. Spencer has a duty to learn of and to disclose all exculpatory information or impeaching information. On April 4th Mr. Spencer committed to this court that he would personally review all the documents that the Government had reviewed the first time, the additional documents, even though we were talking at that point about the Newby discovery, we were talking at that point about the volumes of Fastow's 302s that are still out there. He has not done that. He said he would produce supplemental discovery by August 1. We got nothing. Only recently we received from him a few meager pages of additional Fastow 302 material that is actually the composite Fastow 302 that Agent Bhatia did after a number of revisions and consultation with other people. It's not even the original 302s. And we still don't have any material underlying Fastow's 302s, which I am sure is equally *Brady* material. The Fifth Circuit just recently over the Government's objection has ordered the Government to produce all the	**No docket ruling. No production of any materials from Government**. AUSA Spencer response: "And, Your Honor, I have not reviewed all of the decisions that were made by the Task Force the first time. I have consulted with them. I believe that they acted in good faith the first time." Dkt.1010, at 83-84. "So, there are different incidents that they're using to say, 'Ah ha! We discovered this piece of information. This is critical to our defense' -- which I don't think it is – **'It must be in the 302 or it must be in the grand jury testimony' -- which it's not**. And it's frustrating for me." *Id*. at 85.

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	material underlying Fastow's 302s in the Skilling case. We want that material as well to the extent it applies to the *Nigerian Barge* case, Merrill Lynch and any LJM2 transactions. We have no doubt that anything Mr. Fastow said in that regard that the Government has any sort of recording or knowledge of will constitute exculpatory information and/or impeaching information as to these defendants." *Id*. at 88.	
Motion for leave to issue Rule 17(c) subpoenas, Dkt.1013, 12/7/07	Request to obtain access to internal government documents concerning Brown's outstanding conviction, and sentence.	No docket ruling. Government produces exculpatory evidence, withheld for five years in violation of *Brady*, on December 13, 2007, including Grand Jury testimony and 302s from Merrill inside/outside counsel.
Pre-Trial Conference Motion Hearing, Dkt.1034, 12/21/07.	Request renewed for all Fastow materials (raw notes, original 302s, Binders, etc.). Possibility of Motion to Dismiss based on outrageous prosecutorial misconduct in light of *Brady* production of 12/13/07, demonstrating that critically exculpatory materials were withheld for 4+ years and the prosecutor's purposefully misrepresented facts to the jury and the Court as evidenced by that new discovery.	No docket ruling. No production of any materials from Government.
Brown's Supp. Motion to Compel Production of Documents and *Brady* Material, Dkts.1029, 1030 1/7/08.	In light of (1) the government's recent, and still incomplete production of *Brady* material, which has clarified the existence of additional, significant exculpatory material; and (2) the discovery of critical exculpatory evidence from an Enron executive, withheld from Defendants in this case in violation of *Brady* and its progeny, and which also demonstrates that additional exculpatory materials are likely being withheld, Defendant Brown files this Supplemental Motion to Compel Production. Specific and renewed request for all previously requested and still undisclosed materials; specifically (1) the complete Andrew Fastow File, including all raw interview notes, 302s, composite 302s, as well as the so -called Fastow Binders, and any material in the possession of the S.E.C., including raw notes from interviews; (2) any material, exculpatory letter(s) or submissions, written by any attorney for a material witness to and/or participant in the Barge transaction to the Enron Task Force or Department of Justice, the Assistant Attorney General for the Criminal	No docket ruling. No production of any materials from Government.

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	Division and/or her deputy on or around April 25, 2005, and to the SEC, on or around July 28, 2006, providing a first-hand account of the Barge transaction by a significant participant in it, and all attachments/exhibits to those letters and submissions, including e-mails written within Enron, evidencing that there was no buyback agreement or promise to buyback or guarantee a buyout of Merrill's equity (including copies from the files of named ETF members); and (3) in light of still deficient production, renewed and specific requests for additional evidence (clearly in existence) from Kathy **Zrike**, Kevin Cox, Gary Dolan, and Alan Hoffman.	
ON APPEAL TO FIFTH CIRCUIT Dkt.1038, 1/15/08	**Pursuant to Court Order, all three defendants file notices of appeal (for interlocutory review of their claims that a second prosecution would violate Double Jeopardy)**	
Motion to Compel Production of Fastow Binders, Dkt.1039, 1/15/08.	Request for all materials, evidence, raw interview notes, 302s, draft 302s, composite 302s, interview memoranda, and any other communications by, regarding, from, and to Andrew Fastow by the Department of Justice, Enron Task Force, IRS, and SEC (all cooperating agencies in the Task Force investigation)–as the government has been ordered to produce them in *United States v. Skilling*.	No docket ruling. No production of any materials from Government.
Brown's Second Supplemental Motion to Compel Production of Documents and *Brady* Material, Dkt.1041, 1/16/08.	Specific and renewed request in light of external discovery, for (1) any material, exculpatory letter(s) or submissions, written by any attorney for a material witness to and/or participant in the Barge transaction to the Enron Task Force or Department of Justice, the Assistant Attorney General for the Criminal Division and/or her deputy on or around April 25, 2005, and to the SEC, on or around July 28, 2006, providing a first-hand account of the Barge transaction by a significant participant in it; and (2) all materials, evidence, raw interview notes, 302s, draft 302s, composite 302s, interview memoranda, and any other communications by, regarding, from, and to Andrew Fastow by the Department of Justice, Enron Task Force, IRS, and SEC (all cooperating agencies in the Task Force investigation)–as the government has been ordered to produce them in *United States v. Skilling*.	No docket ruling. No production of any materials from Government.
Brown's Motion to Compel Production of Documents and *Brady* Material *Instanter*, Dkt.1063, 3/17/08.	Specific and renewed request for (1) Fastow materials; (2) McMahon materials; (3) **Zrike**, Dolan, and Hoffman materials; and (4) exculpatory evidence from Barry Schnapper.	No docket ruling. No production of any materials from Government.

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ON APPEAL TO FIFTH CIRCUIT 3/24/08	**On 3/24/08, and only after the Fifth Circuit orders the Fastow raw notes unsealed in Skilling, government produces Fastow raw notes to the defense. They contain significant *Brady* materials.**	
ON APPEAL TO FIFTH CIRCUIT	**On 5/28/09, Brown receives over 2,000 pages raw notes and transcriptions of interviews withheld since 2004, and clarifying various other belated productions. Stokes writes that Skilling has recently received these documents, and while many have nothing to do with the Brage transaction, he is providing them out of "an abundance of caution"**	
ON REMAND 8/13/09	Mandate from Fifth Circuit is issued as to Brown on August 13, 2009. Brown files his Motion to Dismiss for Violations of the Speedy Trial Act on April 13, 2010. No activity in case until court sets pre-trial conference for April 16, 2010.	
ON REMAND	Neither the court nor the government filed anything as to Brown as of 3/31/10.	On 3/30/10 Brown receives production of 1000 pages of *Brady* material from Stokes. Careful review of the electronic copy disclosed that the disk contains highlighting of *Brady* material selected by the ETF in 2004. The highlighted material was the basis for the ETF's "summaries" that the court ordered given to the defense in 2004 – over ETF objection – after its in *camera* review. Additional scrutiny discloses that the ETF withheld from the court-ordered summaries irrefutable *Brady* material of **Zrike**, Dolan, Tilney and McMahon–that the ETF had itself highlighted in these

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		documents.
Brown's Motion to Compel Production of Documents and *Brady* Material, Dkt.1157, 5/14/10.	Brown sets forth, again, a series of discrete areas of *Brady* material which must be produced, including, (1) the McMahon materials which have been requested since 2007; (2) additional materials from outside counsel for Enron; (3) correspondence by and between counsel for Merrill and counsel for Enron; (4) transcripts of any undisclosed Grand Jury testimony related to the Barge transaction; and, other categories of materials. All of this material has been "requested" for years.	No docket ruling. On 6/1/10 government produces two FBI 302s and one SEC transcript of Vinson & Elkins Attorneys, and ETF testimony from a Merrill employee. Government says this is not *Brady* material. Otherwise, response states, Dkt.1189, that there is no additional *Brady* material.
Brown's Reply in Support of Motion to Compel Production of Documents and *Brady* Material, Dkt.1197, 6/11/10.	Renewing, and where necessary, clarifying requests for specific *Brady* materials still not produced.	No docket ruling. No production of any materials from Government.

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Filing/Docket/Date	Government Representation On Existence of *Brady* Material	Resolution
Original Indictment issued 9/16/03 Dkt.1.		
Phone call of 1/27/04, referenced in Defendants'*Brady* letter of 2/3/04, at p. 4.	*Brady* obligation does not extend to the production of actual testimony that includes exculpatory information from a grand jury witness.	No underlying Grand Jury testimony of witnesses, identified as possessing exculpatory information, was turned over to Defendants until December 2007.
Government Response to Defendants' Motions for *Brady* Material. Dkt.154, **3/22/04**.	"**The government has ... far exceeded the discovery requirements of applicable law."Dkt. 154, at 78. "The government respectfully submits that the discovery afforded to date has been timely and in excess of that required by law**." *Id*. at 79.	**Court denied all *Brady* Motions** at Dkt.177, 4/21/04.
Government letter naming individuals who "arguably" possess exculpatory information 4/5/04. Dkt.1168, Ex. N.	"For the record, our position is that you are already aware of the identity, and potentially exculpatory nature, of all these witnesses, but we provide them to you out of an abundance of caution." Dkt.1168, Ex N, at 3. Naming Kelly Boots, Eric Boyt, Gary Carlin, Kevin Cox, Mike DeBellis, Mark Devito, Bowen Diehl, Gary Dolan, Gerald Haugh, James Hughes, Mark McAndrews, Jeff McMahon, Ace Roman, Barry Schnapper, Scott Sefton, Schuyler Tilney, KiraToone-Mertens, Paul Wood, Joseph Valenti, Kathy Zrike	No underlying grand jury testimony of witnesses, identified as possessing exculpatory information was turned over to Defendants until December 2007. Redacted FBI 302s of Kelly Boots were turned over on eve of trial, as Boots was listed as a government witness.
Pre-Trial Transcript, April 15, 2004, Dkt.175.	Friedrich: "We see this as the same situation, your Honor, where the defense lawyers already know to a substantial extent what the nature of the exculpatory information is that these witnesses would offer. We provided them a list. We've invited them to go and talk to these witnesses. If, as Mr. Sorkin indicated, that they, you know, try to reach these people and are unable, for example, to place them	

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	under subpoena, are unable to find out from the person's lawyer what the person might say, then we're willing to revisit the issue and we may provide further information at a later time." Dkt.175, at p. 22.	
Government letter with list of "unindicted co-conspirators" in Barge transaction4/22/04. Dkt.1168, Ex. T.	Naming: Eduardo Andrade, Eric Boyt, Richard Causey, Kevin Cox, Mike DeBellis, Mark Devito, Gary Dolan, Rodney Faldyn, Andrew Fastow, John Garrett, Steve Hirsch, Alan Hoffman, James Hughes, BenGlisan. Michael Kopper, Sean Long, Mark McAndrews, Rebecca McDonald, Jeff McMahon, Alan Quaintance, Ace Roman, Barry Schnapper, Cassandra Schultz, Jeffrey Skilling, Keith Sparks, Schuyler Tilney, Paul Wood, Joseph Valenti, Kathy Zrike.	No underlying grand jury testimony of witnesses, identified as possessing exculpatory information, was turned over to Defendants until December 2007. Only Fastow evidence turned over prior to Barge trial was 4-page "summary" of his 1,000+ hours of interviews with government agents.
Transcript 4/15/04, pre-trial conf. Dkt.175.	Friedrich: "**This is a situation in which this person, Ms. Zrike, participated with the defendants in the offense itself. That alone would be sufficient to remove the Grand Jury transcript from the rubric of *Brady*.**"Dkt. 175, at 16. "What is -- the reason that the information is being sought, your Honor, we submit, is for a non *Brady* purpose; and that is not something that the Court should be sympathetic to." *Id*. at 19. "[W]e've provided a list of names of potentially exculpatory individuals. **Ourbelief is many of these individuals are in the same category as Ms. Zrike**. Most of them -- the majority of the people in that -- on that list are current or former employees of Merrill Lynch. **Many of them will be designated as unindicted co-conspirators, as well**. And, again, the issue is: Does the defense have access to the gist of the information that these people could provide." *Id*. at 20-21. "We see this as thesame situation, your Honor, where the defense lawyers already know to a substantial extent what the nature of the exculpatory information is that these witnesses would offer. We provided them a list. We've invited them to go and talk to these witnesses." *Id*. at 21. "But we think that the -- we provided the Court with what we believe that -- is clear authority that providing those names is sufficient for *Brady* purposes." *Id*. at 22. "These	**No underlying grand jury testimony of witnesses, identified as possessing exculpatory information, was turned over to Defendants until December 2007.**

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	names are not unfamiliar to the defense, your Honor. We believe they are very familiar with these witnesses, they are very familiar with what they might say, and they want the information from the Government not for *Brady* purposes, but to be able to prep these people. And that, we think, is a non *Brady*purpose to which the Court should not be sympathetic." *Id*. at 23.	
Government Response to Furst's Motion for Reconsideration of *Brady* Motion 5/7/04, Dkt.189.	"Furst does nothing to rebut the authority cited by the government establishing that (1) *Brady* is satisfied where the government provides a list of potentially exculpatory witnesses; and (2) information known to the defense is not *Brady*."Dkt. 189, at 2.	**Court denied all *Brady* Motions** at Dkt.228, 6/1/04.
Transcript 5/27/004 pre-trial conf. Dkt.234.	"I think that in our consolidated response, your Honor, what we tried to do is inform the Court of a procedure which we followed in this Court which complied with *Brady*. And that procedure is **providing the defense with a list of potentially exculpatory witnesses complies with *Brady***."Dkt. 234, at 23-24.	Court ordered *in camera* review of some government material – which production to the Court was government selected. Dkt.285, at 34-35.
Government "*Brady*" letter, 6/1/04. Dkt.1168, Ex. I.	"This letter also provides you Jencks Act material for some witnesses the government expects to call in this case, and with information pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), *United States v. Agurs*, 427 U.S. 97 (1976) and *United States v. Bagley*, 473 U.S. 667 (1985)." Ex. I, at 2. Highly-redacted summaries of information from KiraToone-Meertens, Michael Kopper, Ben Glisan, Andy Fastow, and Ramon Rodriguez.	**No underlying grand jury testimony of witnesses,identified as possessing exculpatory information, was turned over to Defendants until December 2007**.
Government Response to Defense *Brady* Motions 6/3/04 Dkt.248	**"Information regarding Fastow is not only not *Brady*, because ofits substance and disclosure ... but also because thedefendants [a]re aware of Fastow's identity and his role as a coconspirator.**" Dkt.248, at 2. "Ironically, Fastow's mere assertion (that histestimony would incriminate him) would belie the suggestion that his testimony is exculpatory inthis case." *Id*. at 3.	No further production of Fastow evidence (even summaries of summaries of interviews) was produced by the government until September 2007.
Transcript 6/25/04 pre-trial conf. Dkt.285.	MR. SCHAEFFER (for Bayly): … the *Brady* issue….[I]n connection with it, Your Honor, at your direction, my understanding is that the government produced to you, I believe, on June 1st, approximately a week before our	**Court finds that government has met its *Brady* obligations**. Dkt.282, at 92-93.

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	previously scheduled June 7th trial date, *Brady* material. Your Honor, my application is to you to direct the Court -- to direct the government at this time to make that material available to each of the defendants. Thank you, Your Honor. *** MR. FRIEDRICH: Yes,Your Honor. I don't think – I don't believe just the fact that they've been given to the Court to review means that should be turned over for the same reasons that we've argued about. I think this is now the third time. There's a procedure that we set up to turn those over to the Court to review. **We provided a list of names**. And the defendants still continue to play this cat and mouse game of not telling the Court who they've talked to, not telling the Court who they've interviewed, not telling the Court what interviews they have gotten pursuant to joint defense agreements, all because, you know, as we said before, this is standing *Brady* on its head. **What many of these folks that we have turned over testimony from to the Court are people that the defendants may intend to call. What they desperately fear is that the government has a record from these folks of what they said and for that reason they want to get that testimony**. As we've previously argued to the Court, that's not the purpose of *Brady*. There's well established authority that -- which expressly adopts and approves of the procedures that we've gone through in letting them know the names of those people so they can choose to interview, if they wish. What they are doing now is saying, we don't have to do any of that, just give us the stuff, which is plainly against the law." Pre-Trial Hearing Transcript, June 25, 2004, Dkt.285, at pp. 35-37. FRIEDRICH: "Just to say, number one, in terms of some of the things that Mr. Cogdell said, it seems every time that *Brady* comes up, it's just sort of compassion speeches by the defense, but absolutely no response to the law we cited to the Court and the authority that we've cited ... that says what we are doing is correct. And it complies with *Brady* by making the names of witnesses available. That is a process that complies with *Brady*, period. There's no response to that. They just don't respond. They just get up and get angry and make compassion speeches. The reason for that is clear, Your Honor. We submit what these defendants desperately want to avoid is a trial on the merits of this case. And by talking again and again and	July 14, 2004 **Court orders government to provide summaries**.

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	again about *Brady* and things that we've already briefed, that we've already litigated, they are distracting us from moving the case forward. They are distracting us from litigating things like the motion in limine. Those have been briefed for weeks and weeks. Those will matter. Those are definitely opportunities for the Court to review and clarify and narrow the issues that will be presented to the jury. That's where we think it makes sense to go next." *Id.* at p. 44.	
Government "*Brady*" letter,7/30/04. Dkt.1168, Ex. O.	"The following summary is provided to you in compliance with the Court's Order of July 14th, 2004…. As you know, in April of 2004, the Enron Task Force provided you with the names of certain witnesses who possessed exculpatory and even arguably exculpatory information, many of whom you have already interviewed or had access to their information, and all of whom you can subpoena to testify at trial. [FN: "*Brady* requires no more."] As the Court noted, **this summary may provide you with even more than is required to be disclosed pursuant to *Brady***. The information that follows is not a substantially verbatim recitation of the witness's' statements. While the information contained below may be similar to information contained within FBI form 302s, notes, and grand jury transcripts, it is intended only as a summary of information. **We note that many of the witness names provided to you in April 2004 were listed out of an abundance of caution**. Indeed, some of the witnesses believed there was no agreement by Enron to take out Merrill Lynch ("Merrill") from the Nigerian barge deal (the "NBD") or a set rate of return simply because they were not present for inculpatory conversations. **Other witnesses are unindicted conspirators** who denied knowledge that could render them guilty…The summary, for instance, does not include the instances in which the witnesses below later recanted exculpatory information or admitted lying to the government about their knowledge of the deal. Finally, we have not set forth all of the information that would impeach any statements below or statements by the witnesses themselves that are inconsistent with the information set forth below."	**Newly produced evidence shows:** **Summaries, now known to be substantially false, misleading or incomplete especially as to information possessed by Gary Dolan, Alan Hoffman, Jeff McMahon, and Kathy Zrike**
8/1/04 through 9/1/07.	Not a single *Brady* production. In the interim, Defendants are convicted, sentenced, and sent to prison. The Fifth Circuit reviews cases on appeal and reverses 12 out of 14 convictions, for fatally flawed indictment. One Defendant	

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	is acquitted after spending 8 months in prison.	
Brief of Appellee United States, *U.S. v. Brown*, No. 05-20319 (5th Cir.) 12/12/05.	Brief for United States: "**The prosecution met its obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963), by providing a letter that informed the defendants precisely what Fastow told FBI agents about what he said during the December 23 conference call**. The prosecution was not required to disclose the FBI Form 302 memorializing Fastow's interview with the agents, because the letter already provided the relevant information. In any event, as the letter reflects, nothing in the Form 302 can plausibly be deemed exculpatory under *Brady*, because Fastow's statements only underscore that he provided an oral guarantee that 'Enron or an affiliate' would buy Merrill's interest in the barges even if no industry purchaser could be found. Fastow FBI Letter, Furst RE8 at 3-5. Because the defendants have not made a 'plausible showing' that the Form 302 contains 'material' exculpatory evidence, the district court properly declined to conduct an *in camera* inspection of the form." *Id*. at 58.	**Fifth Circuit does not reach any *Brady* issues on appeal**.
Transcript 4/4/07 pre-trial conf. Dkt.939.	AUSA Spencer "commit[ed] to the Court that [he would] personally [] go back over the discovery that was made, as well as any documents the government has received in the interim from the time the discovery was produced in the first trial until today; and [that the prosecution] will make subsequent supplemental production."Dkt. 939, at 15. Indeed, the government agreed to turn over this production by August 1, 2007, if not earlier. *Id*. at 10, 11, 15-20. Court says in response to defense: "Well, this is the first I've heard of any *Brady* claim being made against the Government in connection with this." *Id*. At 24.	AUSA Spencer makes limited production of highly-redacted Fastow 302s in September 2007. **No Court disposition on this or any other *Brady* matter as of 7/15/10**.
Government's Opposition to Brown's Request for Production of *Brady* Materials, 10/1/07. Dkt.986.	"Defendants' requests are moot and beyond the scope of *Brady*, *Giglio*, and Rule 16 of the Federal Rules of Criminal Procedure."Dkt. 986, at 1. Based on the record of production, the **Government asserts that "it has fulfilled its obligations under *Brady*.**" *Id*. at 2. "**The government is not aware of any documents that have been created since the first trial that would constitute *Brady* materials**." *Id*. The government also asserts that "it does not agree that the Fastow 302[s] constitute[] *Brady* materials." *Id*. at 7. In another utterly unfathomable claim, the government asserts that "it is curious that none of the	**No Court disposition on this or any other *Brady* matter as of 7/15/10**. **Defendants tried repeatedly to use the Fastow summary at trial to impeach witnesses. The government**

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	Defendants in the first trial . . . used the summary of [Fastow's] statements to impeach other witnesses." *Id.* at 9.	**vehemently objected, and the District Court did not allow use of evidence.**
Government's Opposition to Bayly and Furst's Request for Production of *Brady* Materials, 10/12/07. Dkt.1001.	"Based upon this record of production, **the government believes it has fulfilled its obligations under *Brady*.**" Dkt.1001, at 2. "The Defendants repeatedly speculate that the requested materials contain *Brady*. Using speculative phrases such as 'likely to contain' and 'it is highly unlikely that,' the Defendants presume to know the contents of documents. **Of course, the Defendants are not aware of contents**, but they are not entitled under the applicable rules and procedures to discover this information, unless it is material information that is either exculpatory or impeaching. 'Mere speculation that a government file may contain *Brady* material is not sufficient to require a remand for in *camera* review, much less reversal for a new trial.' *United States v. Morris*, 957 F.2d 1391, 1403 (7th Cir.1992)." *Id.* at 3-4. "Finally, Defendants seek discovery of information which is inculpatory, even though such information is not discoverable under *Brady*. ...**It is undisputed that these lawyers were not fully informed of the terms of the transactions, or even involved in the negotiations**." *Id.* at 6. "The Defendants' requests for materials related to Katherine Zrike are illustrative. The Defendants called Ms. Zrike, a sympathetic colleague of the Defendants, at the first trial, and the Defendants elicited information they believe was exculpatory. Clearly, they were able to obtain this information 'through … other means.' Having obtained her testimony, the Defendants are hardpressed to argue that they did not have an opportunity to discover additional, exculpatory testimony, and therefore are entitled to discovery of the Form 302s, grand jury testimony, or other testimony." *Id.* at 7.	**No Court disposition on this or any other *Brady* matter as of 7/15/10.** **Zrike testimony disclosed after these representations reveals startling exculpatory information the government withheld. Government still withholding Zrike SEC testimony.**
Pre-Trial Conference Transcript, 11/16/07. Dkt.1010.	"And, Your Honor, I have not reviewed the decisions that were made by the Task Force the first time. I have consulted with them. I believe that they acted in good faith the first time. I have reviewed a number of pieces of evidence. They've asked me to review a number of specific pieces of evidence, particularly those documents and testimony that's been taken since the first *Barge* trial has ended, and what I have identified as *Brady* in those or when I just even thought it wasn't *Brady* but itwas going	

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	to be argued as some sort of extreme theory, I produced those also." Dkt.1010, at 83-84. "I am happy to submit any piece in-camera. I am happy to review the former Task Force's decisions." *Id.* at 85. "**The Government understands its *Brady* obligations as being fulfilled by disclosing exculpatory information without necessarily disclosing the 302, without necessarily disclosing the grand jury testimony, and the Task Force did that in advance of Barge I**. There were no issues that came out of that on appeal. There were no decisions that were made. There were no sanctions that were issued. There was no finding that we didn't submit all the *Brady*. **They now believe that we have this Fastow evidence and they keep repeating that. And, suffice it to say, the Government takes a very different view.**" *Id.* at 86-87.	Fifth Circuit did not reach any *Brady* issues on appeal. AUSA Spencer makes limited production of additional 302s and Grand Jury testimony of Merrill employees on December 12, 2007.
Pre-Trial Conference Transcript, 12/21/07. Dkt.1034.	AUSA Spencer: "[W]ith regard to the *Brady* materials, there are several points to be made there. First of all, the defense is taking the position this is the first time that any of this [the production of December 2007] has been disclosed, and that's simply not the case. **The Court is aware the government made extensive disclosures about the testimony, and *Brady testimony* prior to the first trial**." Dkt.1034, at 21 (emphasis added). AUSA Spencer: "I have not [had] a chance since Mr. Hagemann filed the motion to sit down and compare what was disclosed in the summaries to - - -." *Id.* at 22. "THE COURT: Well, then how can I accept what you are saying to me that it was all disclosed and it wasn't a *Brady* violation if you haven't examined the letters yourself in order to make those comparisons? **AUSA SPENCER: If the question is whether or not there is a *Brady* violation, that needs to be seriously briefed and considered**."*Id.* at 22. "AUSA SPENCER: With regard to the Fastow notes, I don't think those will be – it sounds like we are going to make, come to a resolution on that relatively quickly, and again – THE COURT: When do you expect that will be resolved? AUSA SPENCER: Well, I have not even seen the order	**No Court disposition on this or any other *Brady* matter as of 7/15/10**.

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	yet on it, Your Honor. Nobody has seen the order. THE COURT: Is it your understanding, though, that the Fifth Circuit has ordered the disclosure of those notes? AUSA SPENCER: I have heard that representation from the defense attorneys this morning. It's the first I heard about it, when I walked in the courtroom today. **** THE COURT: How long would it take you to come up, I No. 1, determine whether you are going to make the same disclosure on Mr. Fastow in this case since the Fifth Circuit now has ordered in the other, in the case that I gather that it has before it on appeal, and how long would it take you to review all those notes and disclose the portions of it that, or at least, I guess, No. 1, reach agreement with the defendants on what portions should be. Mr. Hagemannis wanting something dealing with those LJMs, or whatever they were, in addition to just what had to do with the barge transaction? AUSA SPENCER: I understand the Court implicitly to be saying that you would urge us to conduct ourselves, the government, to the extent the government – THE COURT: I am just asking how long will it take to work through all of that, because if this is a precedent that would indicate **these defendants ought to have the same kind of information or basic notes of what Mr. Fastow said, since he was pretty critical to this barge transaction**. AUSA SPENCER: I guess the answer to my question, is the Court looking at the Fifth Circuit ruling as precedential? To the extent that it is, I would answer the question that we would anticipate producing the notes within the -- assuming the order says what it says, assuming there are no other significant issues, I would be in a position to produce these notes by the end of next week." *Id*. at 25-27.	
Government's Response to Defendants' Motions to Compel Production of Fastow Binders and	**Government resumes opposing production of Fastow raw notes: "These Motions should be denied because the Defendants have no right under Federal Rule of Criminal Procedure 16 or *Brady* to review any and all**	**On 3/24/08, and only after the Fifth Circuit orders the Fastow raw notes**

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Related Materials, 2/19/08. Dkt.1059.	**notes of** federal law enforcement agents. The Defendant's Motion to compel production based upon *Brady* is not timely, given the absence of a current trial setting." Dkt.1059, at 1. "**[T]he government is not obligated to produce the notes under *Brady* and its progeny**."*Id.* at 5. "**There has been no finding that these raw notes contain such *Brady* information - not by several different teams of government lawyers, not by any District Court, and not by the Fifth Circuit. But at this time, there is no ground on which to order the government to produce the raw notes**."*Id.* at 6.	**unsealed in *Skilling*, government produces Fastow raw notes to the defense. They contain significant *Brady* materials.**
ON APPEAL TO FIFTH CIRCUIT	Stokes writes that Skilling has recently received these documents, and while many have nothing to do with the Barge transaction, he is providing them out of "an abundance of caution." Letter from Patrick Stokes to Sidney Powell, May 28, 2009.	On 5/28/09, Brown receives over 2,000 pages of raw notes and transcriptions of interviews withheld since 2004, which clarify various other belated productions.
ON REMAND Government "production" letter, 3/30/10.	The accompanying letter states that these documents formed the basis for the ETF's "summaries" that thecourt ordered given to the defense in 2004 – over ETF objection–after its*in camera* review. Stokes further represents via email that these were, in fact, the exact same documents that were provided for the court's*in camera* review. Email from Patrick Stokes to Sidney Powell, March 19, 2010.	On 3/30/10 Brown receives production of 1005 pages of *Brady* material from Stokes. **Materials were highlighted before submission to the court; yet, in court-ordered "summaries" to the defense, highlighted and other *Brady* material was willfully excluded.**
Pre-Trial Conference Transcript, 4/16/10. Dkt.1051.	"Ms. Powell has throughout this accused the government of misconduct, ...,*without any basis in fact whatsoever*.We are not -- nonetheless, we are recognizing that it's Mr. Brown who is on trial. And so, we are trying to be -- trying to work out a reasonable resolution. But it isdifficult when the *allegations against the government are simply not founded in any fact* and it makes it difficult for us to negotiate in that sort of posture." Dkt.1051, at 13.	**No Court disposition on this or any other *Brady* matter as of 7/15/10**.
Government's Response	"The Court should deny Brown's motion in its entirety	**No Court disposition**

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in Opposition to Brown's Motion to Compel, 5/28/10. Dkt.1189.	because Brown has already received from the government all the *Brady* materials in the government's possession, custody and control to which he is entitled." Dkt.1189, at 1. "As has become standard fare for Brown, he levels serious allegations of prosecutorial misconduct with little to no regard for actual facts. In this motion, Brown breezily accuses prosecutors of rampant *Brady* violations as his basis for a stunningly broad set of requests. Hisallegations are without basis, and his requests far exceed any reasonable interpretation of *Brady*. **Moreover, his motion should be denied in whole because the government has complied and will continue to complywith its discovery obligations in this case**, whether under Rule 16, *Brady*, *Giglio*, or *Jencks*." *Id.* at 4-5.	**on this or any other *Brady* matter as of 7/15/10**.
Government "production" letter, 6/1/10.	"While these memoranda do not contain exculpatory information, the government will provide them to Brown. Dkt.1189, at 7. "The government does not possess exculpatory material related to Lyons. **However, because the government has continued to provide extensive disclosures related to this case despite it exceeding its discovery obligations**, it will make available to Brown a transcript of his testimony related to issues raised in Brown's motion." *Id.* at 8.	On 6/1/10 government produces two FBI 302s and one SEC transcript of Vinson & Elkins Attorneys, and ETF testimony from a Merrill employee. Government says this is not *Brady* material. **No Court disposition on this or any other *Brady* matter as of 7/15/10**.