10-20621

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE
V.
JAMES A. BROWN,
DEFENDANT-APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION
NO. CR H-03-363

BROWN'S MOTION TO STRIKE THE GOVERNMENT'S BRIEF, DISQUALIFY ALL JUSTICE DEPARTMENT ATTORNEYS, AND ABATE THE BRIEFING SCHEDULE

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REQUEST FOR ORAL ARGUMENT

Appellant Brown requests oral argument. This motion raises issues of exceptional importance to him personally, to his Constitutional rights, to the legal profession, and to the administration of Justice writ large. It warrants the full and careful attention and debate afforded by oral argument.

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I. INTRODUCTION.

James A. Brown appeals to this Court from the district court's denial of his Motion for New Trial, which raises significant *Brady-Giglio* violations by the Department of Justice, most notably its Enron Task Force (ETF). *See Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972). Before Brown can address that prosecutorial misconduct, however, he must confront another troubling ethical issue that has arisen.

Throughout this most recent phase of the litigation, Brown has raised concerns that Assistant Attorney General Lanny Breuer has participated in the case on the Government's side, even though he initially represented Daniel Bayly as a private defense attorney in this same prosecution. Bayly was Brown's superior at Merrill Lynch and long-time co-defendant. In fact, Brown and Bayly had a Joint Defense Agreement in this litigation. Thus, Breuer's side-switching in this case affects Brown just as much as it affects Bayly himself.

When Brown initially raised Lanny Breuer's former-client conflict of interest in the district court, the Justice Department conceded that Breuer was "conflicted out" with respect to Brown as well as to Bayly, and promised, therefore, that Breuer would

no longer "participate" in representation of the Government against Brown.[1] At the same time, however, the Government vigorously opposed Brown's discovery requests and any efforts to confirm that Breuer had complied with this ethical duty. The Department of Justice failed to disclose what, if any, mechanisms it had employed to ensure that Mr. Breuer was indeed "not participating."

After Brown filed his Brief in this Court on December 20, 2011, the Government filed its Appellee's Brief on February 23, 2011. It then filed a "corrected" Brief the following day to confess error on its factually and legally erroneous argument that Brown's Notice of Appeal was untimely. Shockingly, Lanny Breuer appears on the cover page and in the signature block of both briefs.[2] Moreover, as will be seen, Lanny Breuer's appearance is not *pro forma* or *ex officio.*

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[1] *See* Dkt.1187 (filed May 28, 2010), at p. 5 ("As counsel for Brown is well aware, the government informed her that Assistant Attorney General Breuer had recused himself from any involvement in this case due to his prior representation of Bayly."); *id*. at p. 6 n.1 ("The government states unequivocally that Assistant Attorney General Breuer has recused himself from this case in its entirety because of his former representation of Bayly."). *See also* Transcript of Hearing, June 24, 2010, Dkt.1212, at pp. 56-58 (Patrick Stokes: "Lanny Breuer, . . . has been recused from the case"). *And see White v. ARCO/Polymers, Inc.*, 720 F.2d 1391, 1396 (5th Cir. 1983) ("factual assertions in pleadings ... are considered to be judicial admissions conclusively binding on the party who made them.").

[2] Rule 11 of the Federal Rules of Civil Procedure provides a helpful analogy regarding what constitutes active participation in litigation for purposes of disqualification and other disciplinary sanctions. FED. R. CIV. P. 11(b)(2)-(4) ("Representations to the Court"). Specifically, Rule 11(b) provides that responsibility for a brief or other filing flows to all individuals who "present[] to the court a pleading, written motion, or other paper — whether by signing, *filing*, *submitting*, or later advocating it." *Id*. (emphasis added).

The taint and the irrevocable appearance of impropriety extend beyond Lanny Breuer personally. Because it would be ridiculous to suppose that the Assistant Attorney General for the Criminal Division of the United States Department of Justice, Lanny Breuer, permits his name to appear on a few randomly chosen briefs (of which he knows nothing), the only reasonable inference is that Mr. Breuer has conferred or consulted with other lawyers in the Department about Brown's Motion for New Trial and appeal to this Court. Therefore, contrary to the Government's representations, Lanny Breuer has not been screened from the case at all and in fact appears to have participated in it. In doing so, Mr. Breuer has assisted in the Government's prosecution of Brown and thereby prosecuted someone who is the equivalent of his own former client *in the same case*.[3]

Such a brazen violation of the ethical rules cannot stand—especially in a serious criminal matter, where the defendant's constitutional rights to due process of law and the fair administration of justice are at stake.[4] The fear that Mr. Breuer

[3] It is also possible and appears that Breuer furthered the interests of his former client Bayly, against whom the government *sua sponte* dismissed Counts I-III in January 2010, and then attempted to prosecute Brown a second time on those same empty allegations because Brown has so vigorously raised prosecutorial misconduct issues. Dkts. 1136, 1202.

[4] The discovery of Breuer's participation in the case against Brown is only the latest in a series of incidents involving prosecutorial misconduct. Brown has not slept on his rights with respect to these issues, but has repeatedly communicated with the Department's hierarchy in an attempt to obtain meaningful review. *See*, *e.g.*, Letter from Sidney Powell to David Margolis, August 19, 2008 (questioning role of Matthew Friedrich in continued

engaged in impermissible sharing of confidences and disloyalty is reasonable. The appearance of impropriety here is indisputable and alone requires redress. *In re Dresser Industries, Inc.*, 972 F.2d 540, 543-45 (5th Cir. 1992).

Under FED R. APP. PROC. 46(c), this Court may impose sanctions on lawyers appearing before it. More important for this motion, this Court has ample inherent

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prosecution); Letter from Sidney Powell to Rita Glavin, April 16, 2009 (misconduct issues); Letter from Sidney Powell to Lanny Breuer, May 19, 2009 (questioning government conduct); Letter from Sidney Powell to Lanny Breuer, June 17, 2009 (request to have independent prosecutor review case; copy to Eric Holder); Letter from Dan Hedges hand-delivered to Eric Holder, July 20, 2010 (request for formal review of case).

Instead of giving these important issues any independent or meaningful review, the prosecutors have become entrenched in defending their colleagues and their egregious *Brady* violations. *See generally* Barbara O'Brien, *A Recipe For Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 MO. L. REV. 999, 1004 (2009) ("when people must justify a decision to which they have already committed, they tend to engage in 'defensive bolstering'—holding fast to that position even in the face of contrary evidence"); *see also* Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 195–202 (2007) ("[A]mple evidence demonstrates that people are affected by sunk costs and permit prior investments of time, money, and resources to influence their current choices."). "The alternative, that [the government] sent an innocent man to prison . . . , is so antithetical to [a prosecutor's] view of [his] competence that [he] will go through mental hoops to convince [him]self that [he] couldn't possibly have made such a blunder." Carol Tavris & Elliot Aronson, MISTAKES WERE MADE (BUT NOT BY ME): WHY WE JUSTIFY FOOLISH BELIEFS, BAD DECISIONS, AND HURTFUL ACTS 131 (2007).

And despite troubling similarities between the misconduct in this case and that occurring in the case against former Alaska Senator Ted Stevens, in which the government finally confessed error, the Department has never responded on the merits to Brown's requests for independent review. Meanwhile, the Ninth Circuit has just reversed the convictions of Alaska Representative Victor Kohring for *Brady* and *Giglio* violations remarkably similar to those which entitle Brown to a new trial. *United States v. Kohring*, — F.3d —, 2011 WL 833263 (9th Cir. 2011).

power to take corrective action to ensure that its processes are not tainted. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-44 (1991). This Court should strike the Government's briefs and disqualify all attorneys in the Department of Justice from participating further in this case. Only then can an independent prosecutor from outside the Department provide a fresh, uncompromised evaluation of Brown's Motion for New Trial, and either confess error in this Court or file a new brief that is untainted by Lanny Breuer's participation. In either event, the existing briefing schedule should be abated immediately. If the independent prosecutor does not confess error, but instead chooses to defend the government's conduct here, then Brown requests 30 days within which to file his reply to any new brief.

II. LANNY BREUER'S PARTICIPATION FOR THE GOVERNMENT IN THIS CASE HAS IRREVOCABLY TAINTED THE PROCEEDING AND REQUIRES DISQUALIFICATION OF THE ENTIRE DEPARTMENT OF JUSTICE.

While in private practice, Mr. Breuer represented James Brown's co-defendant Daniel Bayly in this identical litigation. Mr. Breuer then switched sides and began working for the Department of Justice, which is prosecuting Brown and opposing his Motion for New Trial. Brown and Bayly participated in a Joint Defense Agreement when Breuer was still in private practice and presumably on the defense team. In addition, Brown was Bayly's subordinate at Merrill Lynch and acted under Bayly's instructions. As the government has recognized in previously admitting Breuer's

conflict, it would be just as improper for Breuer to oppose Brown as it would be for him to oppose Bayly in the same matter. *See supra* note 1 and accompanying text.

In matters of discipline and disqualification this Court applies a blend of both local—here Texas—and national professional norms. *See In re American Airlines*, 972 F.2d 605, 614, 619-20 (5th Cir. 1992); *In re Dresser Industries, Inc.*, 972 F.2d 540, 543-45 (5th Cir. 1992). The basic rules regarding representation against the interests of a former client and the rules governing the conduct of current government lawyers are roughly the same under both sources of law.

A. Motions to Disqualify Counsel in the Fifth Circuit.

As this Court explained in *Dresser Industries*, "[m]otions to disqualify are substantive motions affecting the rights of the parties and are determined by applying standards developed under *federal* law." 972 F.2d at 543 (emphasis added). In certain conflicts-of-interest situations, such as in bankruptcy cases, or where the same attorney seeks to represent co-defendants with conflicting interests in a criminal case, specific federal statutes or constitutional standards may apply. In the more generic

case,[5] however, this Court "consider[s] the motion governed by the ethical rules announced by the national profession in the light of the public interest and the litigants' rights." *Id*. This part of *Dresser Industries* concluded by noting that although well regarded national standards, such as the ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, the ABA MODEL RULES OF PROFESSIONAL CONDUCT, and the American Law Institute's Restatement of the Law Governing Lawyers, can serve as useful guidelines, they cannot control what is ultimately a matter of the federal common law of lawyer disqualification. *Id.* at 544.[6]

In this Circuit, motions to disqualify counsel are regarded with caution, but not disfavor. Indeed, in *American Airlines*, 972 F.2d at 610-611, this Court rejected the view that the remedy of disqualification of counsel should be reserved for cases in

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[5] Because *Dresser Industries* was a straight-forward civil case involving concurrent client conflicts of interest (in which a lawyer sues his own client in an unrelated matter), under what would now be Rule 1.7 of the MODEL RULES OF PROF'L CONDUCT, the opinion referred to "more generic *civil* case[s]," relying on *Woods v. Covington County Bank*, 537 F.2d 804 (5th Cir. 1976), and *Brennan's Inc. v. Brennan's Restaurant, Inc.*, 590 F.2d 168 (5th Cir. 1979), the second of which—like this case—involved former client conflicts and the standards set forth in what is now Model Rule 1.9. There is no reason for this Court to depart from its basic approach in this criminal matter. If anything, the case is even stronger here, in a federal criminal case, for this Court to make its own way as a matter of federal common law, guided but not controlled by the rules of "the national profession."

[6] *Dresser Industries* remains the standard in this Circuit. *See F.D.I.C. v. United States Fire Ins. Co.*, 50 F.3d 1304, 1311-12 (5th Cir. 1995); *American Airlines*, 972 F.2d at 610-11; *Hill v. Hunt*, 2008 WL 4108120, *2 (N.D. Tex. 2008); *see also see Ring Plus, Inc. v. Cingular Wireless Corp.*, 614 F.3d 1354, 1367 (Fed. Cir. 2010) (following *Dresser* in Texas case).

which the proceeding itself has been tainted and the movant has met the burden of showing that the disqualification motion was not made for tactical purposes only. Instead, this Court held:

> This circuit, however, has struck a different balance, electing to remain "sensitive to preventing conflicts of interest." *Matter of Consolidated Bancshares, Inc.*, 785 F.2d 1249, 1256 (5th Cir.1986). We have squarely rejected this hands-off approach in which ethical rules "guide" whether counsel's presence will "taint" a proceeding, holding instead that a "[d]istrict [c]ourt is *obliged* to take measures against unethical conduct occurring in connection with any proceeding before it." *Woods v. Covington County Bank*, 537 F.2d 804, 810 (5th Cir.1976).

972 F.2d at 611 (emphasis in original).

Immediately after that passage, this Court recognized that motions to disqualify counsel certainly may be used as "procedural weapons," but reassured both the Bench and the Bar that "a careful and exacting application of the rules in each case will separate proper and improper disqualification motions." *Id.*[7] A careful and exacting application of the rules here mandates disqualification.

[7] That approach is also still followed in this Circuit. In *In re ProEducation Int'l, Inc.*, 587 F.3d 296 (5th Cir. 2009), this Court questioned whether a particular substantive aspect of the *American Airlines* decision—one not implicated by the instant motion in this case—was *dicta* and need not be followed. But the *ProEducation International* opinion specifically reiterated this Court's continuing commitment to *obliging* courts in the Circuit to "take measures against unethical conduct." 587 F.3d at 299-300.

B. Lanny Breuer is Personally Barred from Representing the United States Against James Brown in this Litigation or from Disclosing Information about Brown that Breuer Learned While He was Part of the Defense Team.

Analytically, the first step in a conflict-of-interest analysis must focus on the individual lawyer who is moving offices. As noted, Mr. Breuer's personal disqualification is both obvious and undisputed. The Government does not appear to disagree that the standard "former client conflict" rules apply to Assistant Attorney General Lanny Breuer personally because of his role on behalf of the defense in this same litigation while he was in private practice. Both Model Rule 1.9 and legions of disqualification decisions by state and federal courts have provided, in roughly the same language, that "A lawyer who has *formerly represented* a client in a matter shall not thereafter represent another person *in the same or a substantially related matter* in which that person's interests are *materially adverse* to the interests of the former client [absent informed consent]." For this reason alone, the government's brief filed in the name of Lanny Breuer must be stricken.

The courts have not always distinguished whether the former client in question was a private party or a governmental unit, or whether *the individual lawyer* remains in, enters, or leaves either the public or the private sector. To ensure clarity on that point, the MODEL RULES OF PROFESSIONAL CONDUCT were amended in 2002,

in accord with the recommendations of the Ethics 2000 Commission, so that Rule 1.11(d)(1) now provides as follows: "Except as law may otherwise expressly permit, a lawyer *currently* serving as a public officer or employee is subject to [all aspects of] Rules 1.7 and 1.9." MODEL RULES OF PROF'L CONDUCT R. 1.11(d)(1) (emphasis supplied).

Whatever debate existed over the application of the disqualification rules to lawyers moving in and out of government service, the discussion has focused almost exclusively on whether the conflicts that migratory lawyers carry with them should be imputed to other lawyers in their new practice setting. To the extent that lawyers bring their conflicts with them, the debate has surrounded whether the timely establishment of a robust ethics screen sufficiently removes the imputed disqualification. *See* MODEL RULES OF PROF'L CONDUCT R. 1.10 and 1.11, discussed in Geoffrey Hazard, William Hodes & Peter Jarvis, THE LAW OF LAWYERING (3d ed. 2000, with supplements), Chapters 14-15, *passim*.

Applying these principles to Lanny Breuer, it is indisputable that he is personally disqualified from participating in the James Brown matter by Rule 1.9 "through" Rule 1.11(d)(1). As the Government conceded, although Breuer formerly "represented" only Bayly in the most formal sense, for purposes of disqualification that was tantamount to "former representation" of Brown because of their joint

defense. In a joint defense, confidences of co-defendants are freely shared, and it is beyond dispute that in the representation of Bayly, Breuer learned confidential information about Bayly's subordinate, Brown. In legal ethics, reposing trust with respect to confidences and engaging in communications that are subject to the attorney-client privilege are the very stuff of a "representation."

As this Court said in *Wilson P. Abraham Const. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir. 1977):

> just as an attorney would not be allowed to proceed against his former client in a cause of action substantially related to the matters in which he previously represented that client, an attorney should also not be allowed to proceed against a co-defendant of a former client wherein the subject matter of the present controversy is substantially related to the matters in which the attorney was previously involved, and wherein confidential exchanges of information took place between the various co-defendants in preparation of a joint defense.[8]

Finally, this Court is spared the sometimes-complex issue of whether the two "matters" are "substantially related." In this case, they are in fact different stages of *the same* matter, which *a fortiori* invokes the disqualification principles underlying Model Rule 1.9. Even if it were not obvious that a Motion for New Trial is the same matter as the matter in which the first trial was held, the modern approach to "substantial relationship" treats the term as a surrogate for breach of confidentiality.

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[8] *Accord Westinghouse Elec. Corp. v. Kerr McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978). *See also United States v. Schell*, 775 F.2d 559, 565 (4th Cir. 1985) ("Such switching of sides is fundamentally unfair and inherently prejudicial.").

Thus, if a lawyer *could* have obtained confidential information in the first representation that would have been relevant (and adverse to the former client) in the second, or even if he *would* have learned such information in the normal course of events (but did not), the matters are considered to be "substantially related," for purposes of motions to disqualify counsel.[9]

C. Lanny Breuer's Actual Participation in the Current Phase of Brown's Case Disqualifies All Department Attorneys.

When a lawyer who is personally barred from undertaking a representation adverse to a former client moves from one practice setting to another in the private sector, or when such a lawyer *leaves* government service, the "taint" is automatically imputed to all lawyers in the firm with which the lawyer becomes associated. *See* MODEL RULES OF PROF'L CONDUCT R. 1.10(a) and 1.11(b). Barrels of ink have been spilled over the circumstances under which the imputed disqualification may be removed, and thousands of hours have been devoted to debate over the permissibility and the efficacy of imposing ethics screens to accomplish that purpose.

Where a lawyer (such as Mr. Breuer) *enters* government service after having represented a client in a substantially related matter, however, the situation is

[9] *See* Hazard, Hodes & Jarvis, THE LAW OF LAWYERING, supra, at §13.5. One of the leading cases is *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263 (7th Cir.1983). Its analytic framework has been adopted by many other courts, and it has been embodied in Comment [3] to Model Rule 1.9.

different. The long-standing rule, now effectively "codified" in the post-2002 language of Rule 1.11(d), is that the lawyer is still personally barred by Rule 1.9, as discussed in Section II.B, *supra*, but there is *no* automatic or presumed imputation of this bar to his new colleagues. At least as a baseline proposition, therefore, other government lawyers could participate in the case against the new lawyer's former client. But that is not the end of the matter.

If the personally tainted government lawyer in fact participates in the matter without the former client's informed consent, thus violating both Model Rule 1.9(a) (representation bar) and Model Rule 1.9(c) (use or reveal client information), then the former client may move to disqualify not only the individual lawyer, but also his new colleagues (or subordinates). Because the other government lawyers are now participating along with the personally tainted lawyer, *their* disqualification is required–not by virtue of any automatic or presumed imputation, but as a result of the need to respond to *actual* vicarious or accessorial violations of the rules.

Where the governmental unit is involved in prosecuting a criminal case, as here, the necessity of disqualifying *all* of the newly implicated lawyers is more pressing, because the ethical violations create an impermissible appearance of impropriety, undermine the fairness of the proceedings and any perception of justice, and implicate the constitutional rights of the defendant. In *United States v. Schell*,

775 F.2d 559 (4th Cir. 1985), the Court reversed criminal convictions because one of the prosecutors had previously represented two of the defendants in the very same matter, even though his participation in both the Grand Jury and the trial phases of the case against these two defendants was minimal. The Court stated: "We conclude that due process is violated when an attorney represents a client and then participates in the prosecution of that client with respect to the same matter." *Id*. at 566. *Cf*., *Aldridge v. State*, 583 So.2d 203 (Miss. 1991) (entire office disqualified where prosecutor did not prove that lawyer joining office after having represented defendant in the same matter was totally divorced from prosecution); *State ex rel. Myers v. Tippecanoe County Court*, 432 N.E.2d 1377, 1378-79 (Ind. 1982) (because prosecutor had administrative control over entire staff of deputy prosecutors, disqualification of entire staff was required in the face of prosecutor's own conflict).

Avoiding costly and embarrassing global motions to disqualify counsel is no doubt the chief reason that Comment [2] to Model Rule 1.11 counsels prudential screening of incoming government lawyers subject to former client conflicts of interest, even if it is not technically required:

> Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, *although ordinarily it will be prudent to screen such lawyers.*

(emphasis added). The Government apparently shared this view of the situation,

because eventually it represented to Brown's counsel that Assistant Attorney General Breuer was recused from the case and would not participate in it. This is simply another way of saying that he would be screened from contact with other lawyers in the Department of Justice who would be participating.[10]

Regrettably, a close look at the facts reveals that these promises were too late, empty, ignored, or forgotten. Even before Breuer appeared on the most recent Government briefs filed against Brown, as discussed in more detail below, there was cause to suspect that his "non-participation" was untrue or, at best merely formalistic. For example, after Lanny Breuer had taken his position as the Assistant Attorney General, and after the Department of Justice had decided to press ahead with a retrial of Brown on counts that had been reversed, neither Brown's counsel *nor other Government lawyers* fully understood Breuer's status. In June 2009, Brown's counsel sought a meeting at the Department of Justice to discuss the upcoming retrial, with a view to having the charges dismissed in light of the *Brady* and other misconduct claims. A series of emails, on June 2, 2009, leading up that meeting, is

[10] *See* Letter from Gary Grindler to Sidney Powell, July 13, 2009 ("AAG Breuer is recused from this matter."); Dkt.1187 (filed May 28, 2010), at p. 5 ("As counsel for Brown is well aware, the government informed her that Assistant Attorney General Breuer had recused himself from any involvement in this case due to his prior representation of Bayly."); *id*. at p. 6 n.1 ("The government states unequivocally that Assistant Attorney General Breuer has recused himself from this case in its entirety because of his former representation of Bayly."). *See also* Transcript of Hearing, June 24, 2010, Dkt.1212, at pp. 56-58 (Patrick Stokes: "Lanny Breuer, . . . has been recused from the case").

instructive. After Brown's counsel repeatedly inquired who would participate on the Government's side, Patrick Stokes, Deputy Chief of the Criminal Fraud Division and trial counsel in the Brown case responded as follows:

> I don't know who, at this point, will be at the meeting or the decision maker. Rita Glavin is the Acting Principal DAAG. Lanny Breuer is the AAG, but he *may* be recused. *If* Lanny is recused, then I believe that Rita will be the decision maker for the Criminal Division.

(emphasis added). *See* Exhibit A attached. Brown questions how Ms. Glavin (Breuer's deputy) came to her role in this case, under what instructions, and from whom, if she had not consulted Mr. Breuer about the case. More important, the email raises the troubling question how anyone in the Department would know *not* to discuss it with Breuer when they were unaware or unsure whether he was recused.[11]

The Government's quiet dismissal of all charges against Mr. Breuer's former client Bayly after Breuer joined the Justice Department and Mr. Breuer's participation in the Government's recent briefs are troubling indications that Breuer did not truly remove himself from this prosecution.[12] Moreover, Patrick Stokes–who, remarkably,

[11] Apparently, to this day no one in the Appellate Section of the Criminal Division of the Department knows that Breuer has a conflict and has been "recused." Stephan Oestreicher, counsel of record for the government herein, signed the brief even though Breuer appears on it. The already "corrected" brief was also reviewed by the upper echelon of the Appellate Section, and no one in the Department objected to Breuer's appearance against Brown.

[12] Stokes also objected to other questions raised by Brown including: (1) the continued involvement of former Enron Task Force prosecutors who are no longer in the Department and (2) the fact that Breuer's former client Bayly had been dismissed *sua sponte.*

appears with Lanny Breuer on the most recent Government briefs–expressed indignation and vehemently objected to Brown's request for discovery on Breuer's involvement in the case. This conduct shows little, if any, regard for the Due Process rights of Mr. Brown, the ethical responsibilities of the prosecutors, and it requires the disqualification of Breuer's colleagues and subordinates. Indeed, Breuer's involvement destroys public confidence in the system of justice Mr. Breuer swore to uphold and defend. *See Berger v. United States*, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win the case, but that justice shall be done.").[13]

Brown wanted to know the terms of Bayly's dismissal, which occurred while the government intended to renew its prosecution of Brown a second time on the same baseless charges. *See* Dkt.1187 (filed May 28, 2010), at pp. 5-6 ("As counsel for Brown is well aware, the government informed her that Assistant Attorney General Breuer had recused himself from any involvement in this case due to his prior representation of Bayly. Despite knowing this, Brown levels this wholly unsupported accusation and fails to cite any evidence that Assistant Attorney General Breuer was involved in the decisions at issue."); Transcript of Hearing, June 24, 2010, Dkt.1212, at pp. 56-58 ("[Brown's counsel] has just simply wholly fabricated a scenario which the Assistant Attorney General of the Criminal Division has somehow or another committed a Constitutional violation without a shred of evidence.").

[13] *See also City and County of San Francisco v. Cobra Solutions, Inc.*, 135 P.3d 20, 26-30 (Cal. 2006). Although *Cobra Solutions* is a civil case, the ethical issues are similar to those in the instant case. In *Cobra Solutions*, as here, the conflicted attorney's deputies "serve[d] at [the] pleasure" of the head of the department and thus were "subject necessarily to his oversight and influence." 135 P.3d at 26. The Court continued:

Mr. Breuer's appearance on the cover and signature page of *both* recently filed briefs is not merely *pro forma* or *ex officio* or the result of the use of a form or template or other clerical error.[14] To the contrary, a thorough Westlaw search of briefs and decisions revealed that it is a rare and deliberate act for Lanny Breuer to appear on a brief at the Circuit Court level. He has appeared on only 84 briefs across the circuits in the last three years. No clerk or other attorney unilaterally includes the Assistant Attorney General of the Criminal Division of the United States Department of Justice on an appeal. In fact, the Brown case is one of no more than fifteen cases in which Breuer has appeared (on the brief) as Assistant Attorney General in this Court. Nationwide, Breuer has appeared in only forty-three (43) reported decisions,

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> Individuals who head a government law office occupy a unique position because they are ultimately responsible for making policy decisions that determine how the agency's resources and efforts will be used. Moreover, the attorneys who serve directly under them cannot be entirely insulated from those policy decisions, nor can they be freed from real or perceived concerns as to what their boss wants. The power to review, hire, and fire is a potent one. Thus, a former client may legitimately question whether a government law office, now headed by the client's former counsel, has the unfair advantage of knowing the former client's confidential information when it litigates against the client in a matter substantially related to the attorney's prior representation of that client.

Id. at 29-30. Under these circumstances, and given the public interest in government integrity, the entire government office had to be disqualified. *Id*. at 30.

[14] Compare *United States v. Goot*, 894 F.2d 231, 236 (7th Cir. 1990), in which the Court found that the conflicted-out attorney's name was simply pre-printed on a form that was used routinely by the office staff, and therefore a mere "clerical error."

including the Supreme Court, during his current tenure as Assistant Attorney General.[15] The Government cannot require a criminal defendant simply to trust, without more, that when a lawyer on his joint defense team switches sides in the same case, and participates in the prosecution, that no confidences protected by Model Rule 1.9(c) have been leaked, or that loyalty to the former client, as protected by Model Rule 1.9(a), has not been compromised. The burden must be on the government.

In this case, the Department of Justice has rebuffed every attempt that Brown has made to learn the key facts about Breuer's continued participation, thus fostering the very fears and suspicions that robust disqualification rules are designed to allay—especially in the Fifth Circuit. The appearance of injustice is glaring. This Court 'recognize[s] that preservation of a popular faith in the judicial system is a primary consideration [in conflicts cases], and that lawyers generally should avoid even the appearance of impropriety." *F.D.I.C. v. United States Fire Ins. Co.*, 50 F.3d 1304, 1316 (5th Cir. 1995).[16]

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[15] Out of thousands of briefs filed by the federal government during the last three years, Breuer appears on only 84. Breuer does not appear on any government filings at the appellate level in the *Skilling* case–in this Court or in the Supreme Court. Breuer has appeared in reported decisions only 15 times in the Fourth, 9 times in the First, 3 times in both the Second and Tenth, twice in the D.C. Circuit, once in the Ninth and not at all in the Third, Fifth, Sixth, Seventh, Eighth, Eleventh or Federal Circuits.

[16] In considering the implications of a conflict of interest, this Court "views the rules in light of the litigant's rights and the public interest, considering 'whether a conflict has (1) the appearance of impropriety in general, or (2) a possibility that a specific impropriety will occur, and (3) the likelihood of public suspicion from the impropriety outweighs any social interests which will be served by the lawyer's continued participation in the case.'" *Horaist*

Therefore, this Court must disqualify not only Mr. Breuer (striking the brief on which he appears), but also all of the other lawyers in the Department of Justice. Justice cannot be done in this case until a truly independent prosecutor, untainted by previous ties either to Mr. Brown or Mr. Bayly or any other party or prosecutor in this case, is appointed to make a fresh and unbiased evaluation of the government's position on Brown's appeal and the government's conduct.

CONCLUSION

For these reasons, Brown requests an Order of this Court (1) striking the government's brief, (2) disqualifying all government attorneys who have formerly prosecuted this matter and the Department of Justice, (3) abating the appeal, (4) appointing a new, independent prosecutor to investigate these issues and determine an ethical course of conduct on a schedule to be set by this Court, and (5) granting Brown such other and further relief that this Court deems appropriate.

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v. Doctor's Hosp. of Opelousas, 255 F.3d 261, 266 (5th Cir. 2001) (quoting *In re Dresser Industires*, 972 F.2d 540, 544 (5th Cir.1992).

Dated: March 16, 2011

Respectfully submitted,

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ATTORNEYS FOR APPELLANT JAMES A. BROWN

CERTIFICATE OF CONFERENCE

Counsel for Brown called Acting Deputy Asst. Attorney General Greg Andres on March 15th to attempt to confer with the government. As of the time of this filing, he has not returned the call. Counsel for Brown also emailed government counsel Oestreicher and spoke with him today. Mr. Oestreicher was not able to represent the government's position at this time.

/s/ Sidney Powell
Sidney Powell

CERTIFICATE OF SERVICE

I hereby certify that true and complete copies of Brown's Motion To Strike Government's Brief, Disqualify all Justice Department Attorneys, and Abate the Briefing Schedule was this day delivered by electronic case filing to the Clerk of the Court and to counsel for United States at the following addresses:

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Dated: March 16, 2011

/s/ Sidney Powell
Sidney Powell

EXHIBIT A

From: Stokes, Patrick [mailto:Patrick.Stokes2@usdoj.gov]
Sent: Tuesday, June 02, 2009 5:55 PM
To: Sidney Powell
Subject: RE: meeting?

I don't know who, at this point, will be at the meeting or the decision maker. Rita Glavin is the Acting Principal DAAG. Lanny Breuer is the AAG, but he may be recused. If Lanny is recused, then I believe that Rita will be the decision maker for the Criminal Division.

From: Sidney Powell [mailto:sidneypowell@federalappeals.com]
Sent: Tuesday, June 02, 2009 5:53 PM
To: Stokes, Patrick
Subject: RE: meeting?

Rita Glavin?

From: Stokes, Patrick [mailto:Patrick.Stokes2@usdoj.gov]
Sent: Tuesday, June 02, 2009 5:52 PM
To: sidneypowell@federalappeals.com
Subject: RE: meeting?

Criminal Division Front Office

From: sidneypowell@federalappeals.com [mailto:sidneypowell@federalappeals.com]
Sent: Tuesday, June 02, 2009 5:48 PM
To: Stokes, Patrick
Subject: Re: meeting?

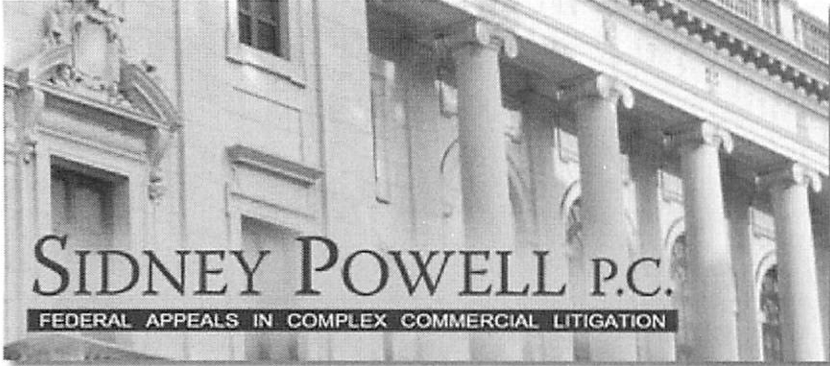
Ok thanks. Have tickets on hold that expire at midnight. Who is Front Office?

Sent via BlackBerry by AT&T

From: "Stokes, Patrick"
Date: Tue, 2 Jun 2009 17:48:21 -0400
To: Sidney Powell<sidneypowell@federalappeals.com>
Subject: RE: meeting?
I still have not heard back from the front office. I'll try again.

From: Sidney Powell [mailto:sidneypowell@federalappeals.com]
Sent: Tuesday, June 02, 2009 4:44 PM
To: Stokes, Patrick
Subject: meeting?
Importance: High

Patrick, Do you have meeting details and confirmation for me? Thanks. Sidney Powell



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