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 JAMES A. BROWN'S OPPOSITION TO GOVERNMENT'S MOTION TO STRIKE BROWN'S MOTION FOR *JAMES* HEARING

Brown's recent motion for a *James* hearing is timely, and new evidence of Brown's innocence and government misconduct mandates a hearing. The court has not set a deadline for filing non-dispositive motions, nor has it scheduled a final pretrial conference by which such motions as the *James* motion would ordinarily be filed.[1] Brown's recent Motion for a *James* Hearing rests on significant evidence different from prior filings and only recently discovered: the material that the Enron Task Force ("ETF") recognized as *Brady* material but withheld from the defense even when ordered by the Court to produce it. This included the crucial statement of Katherine Zrike that undercut the ETF's entire case: "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. It also included the clear

[1] Nor has the Court indicated that a separate hearing on the *James* issue is not required in light of the changed circumstances and evidence of government misconduct. Indeed, in its ruling on Brown's Motion to Dismiss for Violations of the Speedy Trial Act, the Court specifically stated that, and as to Motions pending prior to the interlocutory appeal: "[P]retrial hearings on pending motions were therefore [as a result of the interlocutory appeal] deferred." Memorandum and Order, Dkt.1208, at p. 10. *Id*. at p. 11 ("Consistent with this Court's practice .., the Court expected to conduct initial hearings or additional hearings on these [pending] motions."); *Id*. at p. 13 (same as to *James* hearing); *Id*. at p.14 (Court set pre-trial conference "with the expectation to set hearings on pending motions that remained at issue"). Citing to *United States v. Grosz*, 76 F.3d 1318, 1322-25 (5th Cir. 1996), the Court implicitly conceded that a post-appeal hearing was necessary to avoid the clear dictates of the Speedy Trial Act. *Id*. at p. 11 n.7.

statements of Jeffrey McMahon, the purported maker of the original "guarantee": "Andy agreed E[nron] would help remarket [the] equity w/in next 6 months–**no further commitment**." Dkt.1217, Ex. D, at 000494; and "**No – never guaranteed to take out w/rate of return**." *Id*. at 000493; *see also id*. at 000478, 000513, 000514. This new evidence proves there was no criminal conspiracy, the ETF knew that, and the ETF wrongly withheld it from the defense.

By email dated July 12, 2010, in response to a question as to whether the materials were *highlighted when given to the court*–action itself prejudicial to Brown, Mr. Stokes confirmed to Brown that it was his "understanding that the material we provided you are copies of the materials provided to Judge Werlein for review *in camera*." Mr. Stokes refused to inform Brown, upon specific request, as to the persons who imparted that "understanding" to him or to deny that he is still consulting his mentor, Matthew Friedrich, who is now in private practice. The government's increasingly hostile tone and Motions to Strike illuminate only its frustration and misplaced anger with being caught in irrefutable *Brady* violations and conduct that many, including other courts, view as both misleading and grounds for dismissal.[2] This court obviously trusted the government to

[2] *See United States v. Slough*, 677 F. Supp.2d 112 (D.D.C. 2009) (ordering dismissal of criminal charges against Blackwater employees: "explanations offered by the prosecutors and investigators in an attempt to justify their actions and persuade the court that they did not use the defendants' compelled testimony were all too often contradictory, unbelievable and lacking in credibility"); *United States v. Ruehle*, No. SACR 08-00139 (C.D. Cal. December 15, 2009) (Ordering dismissal in Broadcom back-dating case: "The cumulative effect of [prosecutorial] misconduct has distorted the truth-finding process and compromised the integrity of the trial."); *United States v. Stevens*, 2009 WL 6525926 (D.D.C. April 7, 2009) (setting aside convictions of Senator Ted Stevens (and later ordering criminal contempt investigation) on basis of prosecutorial misconduct in *Brady* violations conceded by government); *United States v. Shaygan*, 661 F. Supp.2d 1289, 1322 (S.D. Fla. 2009) (Ordering monetary sanctions and public reprimand against government attorneys where "conscious and deliberate wrongs [] arose from the prosecutors' moral obliquity and egregious departures from the ethical standards to which prosecutors are held"); *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008) (Dismissal order affirmed: "We further hold that the government thus unjustifiably interfered with defendants' relationship with counsel and their ability to mount a defense, in violation of the Sixth Amendment, and that the government did not cure the violation."); *United States v. Leung*, 351 F. Supp.2d 992 (C.D. Cal. 2005) (Dismissal ordered: "The government has engaged in willful

provide at least a fair summary of the evidence and to meet its *continuing Brady* obligations. It is clear that the ETF did not do so. Instead, it grossly "compromised the truth finding process" and "defaulted on its fairness obligation." The new prosecutors have done nothing, and can do nothing, to rebut the proof of their predecessors' misconduct. It is as "black and white" as the ETF declaring "McMahon guaranteed" v. McMahon saying "No – never guaranteed." The highlighted materials alone prove that—and more–Brown's innocence on all charges. The new prosecutors' refusal to acknowledge the previous wrongs, while instead desperately trying to protect their predecessors, only exacerbates the injustice to Brown.

CONCLUSION

For these reasons, Brown requests this Court deny the government's Motion to Strike and grant Brown's motions.

Dated: August 10, 2010

Respectfully submitted,

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and deliberate misconduct, depriving defendant of her right of access to a critical witness in her defense."); *United States v. Lyons*, 352 F. Supp.2d 1231, 1243 (M.D. Fla. 2004) (Ordering dismissal of indictment with prejudice: "myriad [*Brady* and *Giglio*] violations that collectively reveal a prosecution run amok"); *United States v. Dollar*, 25 F. Supp.2d 1320 (N.D. Ala. 1998) (Dismissal ordered: "the United States has defaulted on its fairness obligation in this case"); *United States v. Ramming*, 915 F. Supp. 854 (S.D. Tex. 1996) (Dismissal ordered: "Only a person blinded by ambition or ignorance of the law and ethics would have proceeded down this dangerous path.").

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served upon Patrick Stokes, counsel for the United States, via the ECF system on August 10, 2010. It has also been served electronically on all counsel of record.

/s/ Sidney Powell
Sidney Powell