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

BRIEF OF APPELLANT JAMES A. BROWN

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to FIFTH CIRCUIT LOCAL RULE 28.2.1, the undersigned counsel for Defendant-Appellee, James A. Brown, certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal in this appeal, No. 10-20621.

1. United States of America, Plaintiff-Appellee;

2. Andrew Weissmann, Matthew W. Friedrich, Kathryn H. Ruemmler, John Hemann, Former Attorneys for Plaintiff-Appellee (Enron Task Force);

3. Stephan Oestreicher, Sangita K. Rao, Joseph Palmer, Arnold Spencer, Patrick Stokes, J. Douglas Wilson, Albert B. Stieglitz, Jr., Attorneys for Plaintiff-Appellee (Department of Justice);

4. James A. Brown, Defendant-Appellant;

5. Sidney Powell, P.C., Counsel for Defendant-Appellant James A. Brown (Sidney Powell, Torrence E. Lewis, of counsel);

6. Porter & Hedges, Dan K. Hedges, Counsel for Defendant-Appellant James A. Brown

7. Merrill Lynch & Co., Inc.;

8. Bank of America;

9. Enron Corp.

Respectfully submitted,

/s/ Sidney Powell
Sidney Powell

REQUEST FOR ORAL ARGUMENT

The vast record in this case reflects a six-week trial prosecuted by the Enron Task Force ["ETF"], numerous motions, and two appeals. On direct appeal, this Court reversed 3 of 5 counts of Brown's conviction. Just days before Brown's scheduled retrial of the conspiracy and wire fraud charges (Count I-III), the government dismissed with prejudice. The district court denied Brown's Motion for New Trial on his convictions for perjury and obstruction (Counts IV and V) without a hearing and without addressing vital *Brady* material new prosecutors disclosed from 2007 through 2010. The thousand pages produced in 2010 alone reveal exculpatory evidence that the ETF highlighted for the court below *in camera* as *Brady* material but inexplicably withheld from the defense. This evidence directly contradicts the hearsay testimony of key government witnesses, and the prosecutors' specific arguments that led to Brown's convictions for perjury and obstruction–the only two counts affirmed by a split panel of this Court.

Because this appeal raises serious issues of prosecutorial misconduct, relates to a district court opinion that ignores crucial facts and fails to engage controlling issues, and perpetuates an egregious injustice, it warrants the most careful scrutiny of this Court and the interchange afforded only by oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Other Authorities

Statutes

STATEMENT OF JURISDICTION

This is an appeal from the district court's order denying James Brown's Motion for New Trial for perjury and obstruction of justice. 18 U.S.C. §§ 1503, 1623. The district court had jurisdiction pursuant to 18 U.S.C. § 3231. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. Brown timely appealed (Dkt.1244; RE2).

STATEMENT OF THE ISSUE

Whether the district court misapplied the law and abused its discretion when it denied Brown's motion for a new trial on perjury and obstruction given that it failed to address the new prosecutors' disclosure of crucial, first-hand evidence that: (i) proves Brown's testimony was true; (ii) directly contradicts the hearsay of government witnesses, (iii) explains language in documents that the ETF claimed proved Brown's crimes; (iv) refutes the ETF's specific arguments at trial; and, (v) the concealment of which provided an unfair advantage to the government in *Brown I*, adversely affecting everything from Brown's ability to prepare for trial to the conduct of the trial and his appeal.

STATEMENT OF THE CASE

A. Course Of Proceedings and Disposition Below.

In July 2004, the Enron grand jury returned a third superseding indictment, charging two Enron employees and four Merrill Lynch employees with conspiracy

and wire fraud and charging James Brown with perjury and obstruction of the grand jury (Dkt.937 (as redacted for retrial) RE3). A six-week jury trial resulted in guilty verdicts against Merrill employees James Brown, Daniel Bayly, William Fuhs, and Robert Furst (Dkt.628; RE4). (Dkt.778; RE5). Brown was sentenced to 46 months imprisonment, restitution of $368,750, and a fine of $250,000 (Dkt.769; RE6). Brown was denied bail and imprisoned for a year while the appeal was pending (Dkts. 800, 825, 834).

This Court vacated the conspiracy and wire fraud convictions, rejecting the government's expansive use of the "honest services" statute. *United States v. Brown*, 459 F.3d 509, 517, 523 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 2249 (2007) ("*Brown I*"). The panel unanimously acquitted William Fuhs on all charges but split in affirming Brown's convictions for perjury and obstruction. *Id.* at 526-31, 535-537. On Brown's motion that he had served the maximum guidelines sentence for perjury and obstruction, the government promptly agreed to his release *instanter*. Brown's Motion for Release *Instanter*, *United States v. Brown*, No. 05-20319 (5th Cir. Aug. 3, 2006). Response of the United States, *United States v. Brown*, No. 05-20319 (5th Cir. Aug. 4, 2006).

In late 2007, in preparation for a retrial on the conspiracy and wire fraud charges *without* "honest services," new prosecutors disclosed thousands of pages of

Brady material that had been withheld in *Brown I*. *See*, *e.g.*, Dkt.1004, Exs. C & D (Fastow FBI 302s, produced September 28, 2007); Dkt.1020, Exs. E-H; Dkt.1030, Ex. J (various 302s and grand jury testimony, produced December 12, 2007). In response to this avalanche of new exculpatory evidence, Brown filed a motion for new trial on the perjury and obstruction charges. Dkts.1004, 1020, 1030.

In January 2008, the district court certified all defendants' double jeopardy challenges to the remaining conspiracy and wire fraud charges for interlocutory appeal. Dkt.1026, 1038, 1040, 1044. The district court refused to act on Brown's new trial motion while the separate interlocutory appeal was pending. Dkts.1035-1135. Almost one-and-a-half years later, this Court denied defendants' interlocutory appeal. *United States v. Brown*, 571 F.3d 492 (5th Cir.), *cert. denied*, 130 S. Ct. 767 (2009) ("*Brown II*").

On remand from the interlocutory appeal, the government, *sua sponte*, dismissed all charges with prejudice against Bayly (Counts I-III). Dkt. 1100. The government did not file any additional briefing regarding Brown, nor did it initiate his retrial for over eight months.[1] Dkt. 1135. The government produced a large

[1] Mandate issued as to Brown on August 13, 2009. Because of this extraordinary delay, Brown filed a Motion to Dismiss for violation of the Speedy Trial Act, which the district court denied, in part because Brown's new trial motion had been "pending" for over two-and-a-half years. Dkts. 1137, 1154, 1164, 1176, 1208:5 n.2, 11 n.7, 13, 16.

volume of additional discovery in March and June 2010. *See* Dkt.1217, Exs. B-D, F (highlighted 302s, grand jury testimony of Merrill Counsel, and raw notes).

These new disclosures required significant supplemental briefing on the Motion for New Trial. Dkts.1160, 1168, 1201, 1217, 1227. The district court promptly denied Brown's motion without a hearing. The court adopted the government's view that the ETF's original disclosures sufficed and the new evidence was either "cumulative" or not material. The court did not address evidence the ETF itself had highlighted as *Brady* for the court but failed to disclose to the defense. It did not address specific arguments the ETF made at trial that the withheld *Brady* evidence directly contradicted. Dkts. 1212, 1217, 1227, 1239; RE7. Brown timely filed notice of appeal from the denial of his Motion for New Trial. Dkt.1244; RE2. A few days before the scheduled retrial on the conspiracy and wire fraud charges, the government dismissed them with prejudice. (Dkt. 1264; RE8).

This brief focuses on the facts relevant to Brown's new trial issues, on his *Brady* claims and, on the irrefutable and material *Brady* violations and misconduct that the district court ignored: first-hand evidence of Fastow and McMahon confirming the "best-efforts" agreement and Merrill counsel's knowledge, negotiations, and efforts to document it–information on which Brown's entire case hinged.

STATEMENT OF FACTS
RELEVANT TO THE NEW TRIAL MOTION

A. The Barge Transaction and the Phone Call of December 23, 1999.

In 1999, James A. Brown headed Merrill's Global Asset and Leasing Division. Brown's 2004 convictions for conspiracy, wire fraud, perjury and obstruction of justice arose from a transaction that Merrill completed with Enron at year-end 1999. Pursuant to the agreement, Merrill paid Enron $7 million and took a $28 million loan to purchase a minority equity interest in a company operating three barge-mounted electrical power generators. The barges were real; Enron sold them nine months later for a profit of $53 million. Ironically, Brown consistently urged his Merrill colleagues not to participate in the transaction because he believed that it was too risky. Tr. 1036, 1093-1103, 1114-17, 1147-50, 4444-45; Dkt.489, Exs. B and D. Merrill Counsel Zrike took the transaction to Brown's superiors for approval and continued negotiating the agreement which closed after Brown left for vacation. Tr. 4078-79, 4094, 4098-99, 4115-22, 4438, 4441, 4463-64; Dkt.489, Exs. B and D; Dkt. 1249.

The crucial disputed issue arose from a five-minute phone call on December 23, 1999, between Enron CFO Fastow, Treasurer McMahon and others at Enron, and Bayly, Tilney, and others from Merrill. According to the ETF, Fastow

and Merrill reached a secret side-deal, a guarantee that Enron would buy back the barges, thereby rendering the sale a sham and Enron's accounting false. The defense maintained that Fastow only represented that Enron would use its "best efforts" to remarket the barges–lawful conduct that would not affect the accounting gain. Brown was not a party to the phone call, and he possessed no first-hand information about what transpired.

B. Brown's Testimony Before the Grand Jury Regarding the December 23, 1999 Phone Call (in which Brown Did Not Participate).

In the investigation following Enron's collapse, Brown testified voluntarily before the grand jury, the SEC, and the bankruptcy examiner. Brown testified as to his understanding that Enron agreed to use "best efforts" to resell the barges. "Best efforts" was a term of art for these businessmen; even the ETF acknowledged that a "best efforts" or remarketing agreement was lawful. Tr. 1651-53 (Kopper: explaining best efforts); Tr. 4528 (Friedrich: "If it's just 'best efforts,' then it would have been okay."); *see also* Tr. 4520.

Although Brown did not participate in the crucial phone call with Fastow, and no evidence indicates what, if anything, he was told about it, Andrew Weissmann, soon to be Task Force Chief, encouraged Brown to provide the grand jury with as much information as possible–regardless of whether Brown's understanding was

"accurate or not because its not what [you] do or it's not something [you] know from direct knowledge."[2] Later, Weissmann indicted and convicted Brown for perjury and obstruction based on Brown's personal, hearsay-based understanding of the December 23 phone call.

> "Q: Do you have any understanding of why Enron would believe it was obligated to Merrill to get them out of the deal on or before June 30th?
>
> A: It's inconsistent with my understanding of what the transaction was. (GJ Tr. at 80, lines 6-11.)
>
> Q: . . . . Again, do you have any information as to a promise to Merrill that it would be taken out by sale to another investor by June 2000?
>
> A: In - - no, I don't - - the short answer is no, I'm not aware of the promise. I'm aware of a discussion between Merrill Lynch and Enron on or around the time of the transaction, and I did not think it was a promise though.
>
> Q: So you don't have any understanding as to why there would be a reference [in the Merrill Lynch document] [sic][3] to a promise that Merrill would be taken out by a sale to another investor by June of 2000?
>
> A: No. (*Id*. at 88, lines 9-23) (Dkt.311). Dkt. 489, Ex. B:87-88.

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[2] Grand Jury Transcript, Dkt.489, Ex. B: 32-33 .

[3] The indictment and the district court were wrong. Brown was asked about an Enron/LJM document–not a Merrill document. Grand Jury Transcript, Dkt.489, Ex. B:87-88; Ex. C: (last page DP036766) (discussing Grand Jury exhibit 18). Dkt.1239:2 [sic], 3 [sic], 10 [sic]; RE7.

The ETF ignored that Brown clarified his understanding that the transaction was not a "promise" or a "guarantee," but rather a "best-efforts" agreement:

> . . . . 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*. (Brown X980, 980B: 76, 77, 81, 82, 88, 91, 92; Tr. 3238-41) (emphasis added).

C. The ETF Repeatedly Denied It Possessed *Brady* Material and Foreclosed Access to Witnesses.

From before trial through appeal, the government repeatedly denied that it held any *Brady* material. Dkt.1227:Charts 1, 2 (cataloguing quotes). It produced only 19 pages of prosecutor-edited summaries of summaries. Dkt.1168, Exs. I, N, O. Meanwhile, the ETF adopted a three-pronged strategy to isolate the defense from crucial witnesses: (i) demanding a non-prosecution agreement with Merrill requiring that Merrill personnel not contradict the ETF's theory of the crime; (ii) threatening indictment of Merrill's counsel, Brown's colleagues, all participants in the crucial phone call with Andrew Fastow, and approximately twenty-nine others; and (iii) "requesting" that an ETF prosecutor attend all witness interviews. Dkt.1168, Exs. H,

T; Dkt.180. Ultimately, Brown had no access to any witness or evidence unless the ETF granted it.[4]

D. Brown's Convictions on All Counts Depended on the Government's Assertion that No "Best Efforts" Agreement Existed.

Cooperating government witness Fastow never testified. Instead, to prove that the five-minute phone conversation with Fastow provided an illegal secret side-deal, the ETF sponsored hearsay testimony of Fastow's subordinates Glisan, Kopper, and others. The ETF emphasized four main contentions that secured Brown's convictions: (i) Enron's former treasurer Jeff McMahon made an unlawful buy-back guarantee against loss to Merrill, which Fastow ratified in the phone call (Tr. 402-04, 6144, 6157-60, 6168, 6216-19, 6527-28); (ii) the Merrill defendants, including Brown hid information from Merrill counsel thereby destroying the defenses of good

[4] The district court's repeated assertions that witnesses and evidence were readily available to Brown are belied by the record and implicate its own complicity in failing to rule on *Brady* motions or even review all of the material submitted to it. *See* Dkt.1239:21-22, 33-34; RE7. In 2007, the district court did not recall there had ever been "any *Brady* claim being made against the government . . ." Dkt. 939:24; *contra*. Dkts. 117, 138, 125, 175, 180, 182, 197, 236-38, 244, 245, 285:35-43, 305, 494, 528, 541. The ETF's sharp tactics and open hostility to non-cooperating witnesses are well documented here and in *Skilling*. *See*, *e.g.*, Dkt. 1204, Ex. C. By either indicting or naming any individual remotely connected to the Barge transaction as an "unindicted co-conspirator," the ETF foreclosed exculpatory testimony and insured that Brown would be unable to mount a defense. Dkt. 1168, Ex. T. By entering into a cooperation agreement with Merrill (after the ETF indicted and destroyed Arthur Andersen) and precluding any Merrill employee from challenging the ETF's theory of the case (which pitted the defendant-employee against his employer), the ETF further distorted the playing field. Dkt. 1168, Ex. H. These tactics have since been repudiated by the Department of Justice. *See infra* notes 30 and 31 and accompanying text.

faith and reliance on counsel (Tr. 419-20, 6206-7, 6211, 6497, 6500-5, 6527); (iii) no best-efforts agreement existed (Tr. 1650-53, 3167-68, 3239-41, 4520, 4528, 6151-52, 6486); and (iv) an email Brown wrote 15 months later in an unrelated leasing transaction (in which a guarantee would have been perfectly lawful) proved that he lied to the grand jury about the "promise" (Tr. 6154, 6199, 6274-76, 6497, 6508-11, 6540). Accordingly, at least sixteen times, the ETF told the jury that McMahon made an unlawful guarantee that Fastow ratified.

> Ruemmler: "You know that Enron, through its treasurer [McMahon] and chief financial officer [Fastow], made an oral guarantee to these Merrill Lynch defendants, that they would be taken out of the barge deal by June 30th, 2000, at a guaranteed rate of return" (Tr. 6144).
>
> Friedrich: "[Y]ou know from the email, you know from the Tina Trinkle conversation [that McMahon made a guarantee] … that there was an agreement, there was a promise, and that Mr. Brown lied when he went into the Grand Jury." (Tr. 6510-11) (*See* Tr. 402-04, 6157-60, 6168, 6216-19, 6527-28; *cf*. Dkt.1217:Charts 2, 6, 7) (RE9).

E. At Trial, ETF Prosecutors Foreclosed or Refuted Brown's Core Defense That the Parties Reached a Lawful "Best-Efforts" Agreement to Remarket The Barges.

The ETF acknowledged that a "best-efforts" agreement to remarket the barges would have been lawful. Accordingly, the prosecutors fought vigorously at every turn to preclude and refute any testimony concerning the "best-efforts" agreement. First, the ETF solicited testimony from cooperating Fastow subordinates, Glisan and

Kopper, that no best-efforts agreement existed. Tr. 1508, 1650-53, 3618. The ETF vehemently objected when the defense attempted to cross-examine Kopper with his FBI 302 (produced as *Jencks*[5]) that stated that Enron "would do their best to get ML out in six months." Tr. 1484, 1506-08, 1695-96. Remarkably, the ETF then solicited testimony from FBI Agent Bhatia, that the words "do their best" in Kopper's 302 were actually Bhatia's words and that Kopper "did not say those words." Tr. 3403-11, 3521-22.

When Defendants tried to elicit from Herb Washer, former attorney for Merrill Lynch, that "Merrill Lynch had been told by Enron that they would use their best efforts to find a third party buyer to take out Merrill Lynch's interest," the ETF objected, and the evidence was excluded (Tr. 5701-2). Then, in closing, the ETF repeatedly emphasized to the jury:

> "The Merrill Lynch Defendants take the uniform approach . . . that all that was going on was just that it was a remarketing agreement. That's all it was. There was no buyback. It's just a remarketing agreement. But ask yourselves this simple question: 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? During the time the Merrill lawyers spoke to you for almost four hours, no one even addressed that question once. They don't have an explanation."
> Tr. at 6485-86 (Friedrich). *See also* Tr. 6151-52.

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[5] Once a witness has testified on direct examination, the Jencks Act requires the production of statements in the government's possession "which relate[ ]to the subject matter as to which the witness has testified." 18 U.S.C. § 3500(b).

Defendants claimed that Merrill counsel lawfully proceeded with full knowledge of the transaction, negotiated it further to insure its legality, and Defendants relied on counsel throughout.[6] In response, the government repeatedly contended that there was no "best-efforts" agreement, Defendants lied to corporate counsel, and Merrill counsel's "belief" that there was a "best-efforts" agreement was false. Tr. 419, 3493-94, 3950, 3962, 6206, 6497, 6500-3, 6515. In short, the government painted the entire defense as a lie (Tr. 6151-52) and argued that Merrill Counsel Zrike was simply "cut out" of the deal. Tr. 6504. "Things were hidden from her time and time again." Tr. 6503. The ETF ridiculed the defense for even suggesting that counsel was involved in all facets of the transaction. "This was a case, not about reliance on counsel; this was a case about defiance of counsel." Tr. 6500.

F. New Prosecutors' Recent Disclosures of Acknowledged *Brady* Material Directly Contradict the ETF's Evidence and Arguments at Trial.

Beginning in late 2007, a second and later a third team of new prosecutors began disclosing first-hand evidence from parties to the phone call. Ultimately, these

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[6] The final deal documents contain an integration clause that foreclosed reliance on any prior conversations among the parties and made the signed documents exclusively controlling of the transaction terms, but the court below refused to allow the defense to argue that the integration clause controlled. Tr. 6036. *See, e.g.*, Dkts.309, 392; Dkt.1217, Ex. C:82 (RE10). *See also* *Brown I*, 459 F.3d at 535-37 (DeMoss, J., concurring in part and dissenting in part).

new disclosures included interview notes of former Enron Treasurer Jeff McMahon and Fastow himself–demonstrating that both men made a lawful "best-efforts" agreement–just as Brown testified to the grand jury. This and other extraordinary exculpatory material existed in the raw notes of government interviews of McMahon in 2002, later interviews of Fastow, extensive testimony from Merrill's counsel, and a series of 302s.

The government's production in March 2010 revealed that the ETF itself had yellow-highlighted selected *Brady* material (and failed to highlight other clear *Brady* material) for the district court's *in camera* review in 2004. Meanwhile, from the inception of this prosecution until today, the government has denied that it possessed any *Brady* material. Dkt.1227:Charts 1, 2 (cataloguing *Brady* requests and responses). When ordered by the court to produce summaries of those thousands of pages to Defendants, who had no access to witnesses before trial, the ETF produced a nine-page "summary," Dkt. 1020, Ex. B, omitting the highlighted language and other evidence that contradicted its case. Dkt.1217:Charts 1, 2, 4, 7, 8, Exs. B-D (RE9).

Specifically, the notes, concealed from the defense for as long as 8 years, reveal that Fastow told the ETF that "it was [Enron's] obligation to [use its] 'best efforts' to find [a third] party [to] takeout" Merrill's equity interest. Fastow Raw Notes, Dkt.1160, Ex. A:000263, 000348-49 (RE11). And, as the ETF highlighted, but

withheld, McMahon confirmed that Fastow only "Agreed E[nron] would use best efforts to help them sell assets." McMahon Raw Notes, Dkt.1217, Ex. D:000447 (RE12). The material also reveals that the ETF was aware that Merrill Counsel Zrike knew far more than the ETF had disclosed. Zrike explained specifically that in later negotiations:

> "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:63-64, 69 (RE10).

They highlighted but withheld Zrike's evidence: "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." *Id*. at 75 (RE10).

SUMMARY OF THE ARGUMENT

Brown's convictions for perjury and obstruction were marginal, at best, based only on Brown's personal, hearsay-based "understanding" of a phone conversation to which he was not a party. One circuit judge would have acquitted him outright, even based on the tainted record in *Brown I*. With the extraordinary revelations in evidence produced by new prosecutors (as recently as June 2010), it is clear that a

serious injustice occurred. The district court's opinion completely ignores the material the ETF itself highlighted, but failed to give to the defense. This new evidence supports Brown's defense regarding "best-efforts," good faith, and reliance on counsel, and it contradicts or explains every specific argument by the ETF at trial. The ETF concealed the evidence of witnesses with personal knowledge of the actual December 23 conversation in which Fastow used the same words–"best efforts"–that Brown used in the grand jury. The ETF denied Brown the ability to prepare for trial, present evidence supporting his grand jury testimony, or impeach government's witnesses.

ARGUMENTS AND AUTHORITIES

I. THE CONTROLLING STANDARDS OF REVIEW ARE *DE NOVO*.

A. *Brady* Violations are Reviewed *De Novo* and Brown was Entitled to All *Brady* Material before Trial.

A prosecutors' suppression of requested evidence favorable to an accused violates the Fifth Amendment due process clause if the evidence is material either to guilt or to punishment. This is true irrespective of the good or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87-89 (1963); *Kyles v. Whitley*, 514 U.S. 419, 434, 437-40 (1995). *See also United States v. Sipe*, 388 F.3d 471, 485 (5th Cir. 2004) (evidence may be material even if inadmissible at trial). The rule emanates

from the government's "substantial resources [and] considerable other advantages" over defendants, and thus, the "system reposes great trust in the prosecutor to place the ends of justice above the goal of merely obtaining a conviction." *Kirkpatrick v. Whitley*, 992 F.2d 491, 496 (5th Cir. 1993).

The "Government must make [these] disclosures in sufficient time that [Defendant] will have a reasonable opportunity" " either to use the evidence in the trial or use the information to obtain evidence for use in the trial." *United States v. Rodriguez*, 496 F.3d 221, 226 (2d Cir. 2007). The defense is entitled "to use the information with some degree of calculation and forethought." *Leka v. Portuondo*, 257 F.3d 89, 103 (2d Cir. 2001). "To say that the government satisfied its obligation under *Brady* by informing the defendants of the existence of favorable evidence, while simultaneously ensuring that the defendants could neither obtain nor use the evidence, would be nothing more than a semantic somersault." *United States v. Salerno*, 937 F.2d 797, 807 (2d Cir.1991), *reversed on other grounds*, 505 U.S. 317 (1992).

This Court reviews *Brady* questions *de novo*. *See*, *e.g.*, *United States v. Hughes*, 230 F.3d 815, 819 (5th Cir. 2000). Claims for a new trial based on a *Brady* violation invoke a three-part test, under which the defendant must show that: "(1) the evidence was suppressed; (2) the suppressed evidence was favorable to the defense;

and (3) the suppressed evidence was material either to guilt or punishment." *United States v. Runyan*, 290 F.3d 223, 246-47 (5th Cir.), *cert. denied*, 537 U.S. 888 (2002). *Cf. Sipe*, 388 F.3d at 477-78.

Suppressed evidence is "material" if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 682 (1985). A "reasonable probability" is established when the failure to disclose the suppressed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id*. *Accord, United States v. Miller*, 520 F.3d 504, 514 (5th Cir.), *cert. denied*, 129 S. Ct. 185 (2008). Where, as here, multiple *Brady* violations occurred, this Court must "analyze whether the cumulative effect of all such" violations demands grant of a new trial. *Sipe*, 388 F.3d at 478. *Cf. Kyles*, 514 U.S. at 436 ("considered collectively, not item by item").

B. The Standard of Review for New Trial Is In "The Interest of Justice" and the District Court's Misunderstanding and Misapplication of Law Constitute an Abuse of Discretion.

Generally, this Court reviews the denial of a motion for new trial under an abuse of discretion standard. However, as this Court noted in *Sipe*, when alleged *Brady* violations are involved, this Court "review[s] the ultimate constitutional question afresh." *Sipe*, 388 F.3d at 479.[7] Ultimately, Rule 33 permits a new trial when the interest of justice so requires. *United States v. Wall*, 389 F.3d 457, 466 (5th Cir. 2004), *cert. denied*, 544 U.S. 978 (2005); *United States v. Robertson*, 110 F.3d 1113, 1120 n.11 (5th Cir. 1997). That is the only immutable criterion. *See*, *e.g.*, *United States v. Taglia*, 922 F.2d 413, 415 (7th Cir. 1991) (Posner, J.), *cert. denied*,

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[7] Little, if any deference is due the trial court's references to the facts in this case. *See*, *e.g.*, Dkt.939:24 (The court in 2007: "Well, this is the first I've ever heard of any *Brady* claim being made against the government in connection with this."); Dkt.1212:15 (The court in 2010: "And so, at least that's my recollection from the trial. It's been some years."); Dkt. 1239:62 ("The Court recalls no pretrial dispute between the government and Brown and his co-defendants about any conditions the government imposed on defendants' interviews with Fastow."). Defendants repeatedly begged the court for *Brady* material or even a hearing on the many *Brady* issues because no witnesses would talk to them, and the ETF did not view any evidence as exculpatory–leading defense counsel to question if the ETF understood *Brady* at all. Dkt. 285:35-43. All witnesses were either indicted, threatened with indictment or were cooperating with the government. Dkts. 158, 175, 180, 197, 237, 238, 244, 245, 285, 305, 348, 494, 528, 1227:Charts 1,2. Approximately six years passed between the original trial and disposition of Brown's Motion for New Trial. Under these circumstances, the district court's recollection should be entitled to less than the traditional level of deference. *Sipes*, 388 F.3d at 479. *See also United States v. Brennan*, 326 F.3d 176, 188-89 (3d Cir. 2003) ("Unlike an insufficiency of the evidence claim, when a [court] evaluates a Rule 33 motion, it does not view the evidence favorably to the Government, but instead exercises its own judgment in assessing the Government's case.").

McDonnell v. United States, 500 U.S. 927 (1991). This Court has said: "Every practicable precaution should be taken to insure that the verdict really speaks the truth, for if it does not, an innocent man may be imprisoned." *Newsom v. United States*, 311 F.2d 74, 79 (5th Cir. 1962) (reversing denial of motion for new trial). A district court "by definition abuses its discretion when it makes an error of law," *Koon v. United States*, 518 U.S. 81, 100 (1996), or bases its ruling "on a clearly erroneous assessment of the evidence." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). Here, the district court did both. Accordingly, this Court should review this appeal *de novo*.

II. BROWN IS ENTITLED TO A NEW TRIAL AS A MATTER OF LAW BECAUSE THE DISTRICT COURT IGNORED CRUCIAL EXCULPATORY EVIDENCE AND MISAPPLIED *BRADY*.

The district court's 63-page opinion adopts the government's view that any failures to disclose were not material or would have been cumulative. Error-ridden and self-contradictory, it relies heavily on the inapposite *Skilling* decision. It failed to consider: (i) the weakness of the government's case against Brown; (ii) the materiality of first-hand evidence of a "best-efforts" agreement *per se* to Brown's

grand jury testimony[8]; and (iii) the materiality of Merrill's counsel's superior knowledge and role in the transaction. Dkt.1239; RE 7.

Perhaps because of its own involvement, the court ignored the government's concessions of *Brady* violations, which in and of themselves, required a new trial. *See* Dkts. 1223:11; 1227. Additionally, the district court failed to address: (i) the ETF's misconduct in presenting the court with selectively highlighted materials *in camera*–highlighted evidence that the ETF knew undermined its case but nevertheless withheld from the defense[9]; (ii) the ETF's repeated misrepresentations to the jury, which led to Brown's convictions on all counts and which are now directly refuted by the exculpatory materials recently produced; and (iii) the interest of justice standard under FED R. CRIM. P. 33. It ignored the reality and the law that the government's incomplete or misleading "summaries" could wrongly "represent [] to

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[8] The newly disclosed evidence of actual participants in the transaction, some of whom were never indicted, was the most important evidence of all. What outside parties "understood" from hearsay was less significant than what the actual participants said and did. *See* Dkt.1217:Charts 1-11.

[9] The district judge admitted that he did not review all of the materials submitted to him *in camera*. *See* Dkt.1239:29-30 n.51; RE7. And despite its "exhaustive study" of the filings, the court thought Fastow was Enron's treasurer (he was CFO), *id*. at 4; repeatedly referred to Brown's perjury when discussing the "Merrill Lynch" document (it was a "Benefits To Enron" document to which the Fastow notes speak specifically (DP036766 (RE11)), *id*. at 2, 3; and ignores that the raw interview notes of Fastow and McMahon about the "best-efforts" agreement were the only evidence that each *made* that lawful representation. *Id*. at 15 n.24, 25, 30-31 and n.53. There was nothing cumulative about that evidence.

the defense that the evidence does not exist" and cause it "to make pretrial and trial decisions on the basis of this assumption." *United States v. Bagley*, 473 U.S. 667, 682-83 (1985); Dkt. 1226. The minimum remedy for *Brady* violations is a new trial–especially where, as here the district court conceded that the suppressed evidence "supports a hypothesis that the nature of the transaction was such that Brown's characterization of it turns out to be literally true." Dkt. 1239:3; RE7; *see also* Dkt. 1185:18-19.

A. The District Court's Finding that the Suppressed Evidence "Supports a Hypothesis that the Nature of the Transaction Was Such that Brown's Characterization of It Turns Out To Be Literally True" alone Requires Reversal.

That Brown's testimony was literally true is an absolute defense to perjury and obstruction. *Bronston v. United States*, 409 U.S. 352, 360 (1973). *Accord United States v. Abroms*, 947 F.2d 1241, 1245 (5th Cir. 1991).[10] The perjury statute may not be loosely construed, and if a witness tells the literal truth in response to the question asked, then he does not commit perjury. *United States v. Shotts*, 145 F.3d 1289, 1298

[10] To convict Brown of perjury, the government had to prove that Brown made a declaration under oath that was false, material, and not believed by the defendant to be true. 18 U.S.C. § 1623; *Abroms*, 947 F.2d at 1245. To prove obstruction, the government had to show: (1) a pending judicial proceeding, (2) about which the defendant had knowledge, and that (3) the defendant acted corruptly, (4) with the specific intent to obstruct or impede the administration of justice. 18 U.S.C. § 1503; *see United States v. Aguilar*, 515 U.S. 593, 600-1 (1995) (conduct must have the natural and probable effect of interfering with the due administration of justice).

(11th Cir. 1998), *cert. denied*, 525 U.S. 1177 (1999). Further, a perjury conviction "may not stand on a particular interpretation that the questioner places on an answer." *Id*. at 1298. Any evidence of literal truth also requires reversal of Brown's obstruction conviction for the same testimony. *See In Re Michael*, 326 U.S. 224, 227-28 (1945) (obstruction charge requires something more than perjury); *cf*. *Brown I*, 459 F.3d at 535-37 (obstruction conviction must fall with perjury conviction) (DeMoss, J., concurring in part and dissenting in part).

The district court's contrary conclusions notwithstanding, before trial, Brown lacked knowledge of or any means of access to the treasure-trove of *Brady* material that would have supported his defense. No witness would talk to him. The ETF, which disclosed none of this evidence, threatened indictment of all of Brown's colleagues and counsel. *See, e.g.*, Dkt. 1168, Ex. T. Undoubtedly, Brown would have used this exculpatory evidence had he possessed any knowledge of it. The previously concealed evidence establishes that every Merrill and Enron executive (indicted or not) who participated in the December phone call and who testified before the Grand Jury, or the SEC or who provided interviews to the Enron Task Force, supported the actual truth of Brown's grand jury testimony–including both of

the people the government alleged *made* the supposedly unlawful guarantee.[11] Because the suppressed evidence at the very least "support[ed] a characterization" that Brown's testimony was true (Dkt.1239:3), Brown is entitled to a new trial.

Before his trial, Brown had the Constitutional right to the following evidence that supported his defense, proved the reasons for his belief in the truth of his grand jury testimony, and proved its actual truth. The district court's opinion ignores that the ETF highlighted the statements below when it identified this material as *Brady* for the district court *in camera*, but then inexplicably withheld it from the defense:

(1) **Never indicted alleged guarantor McMahon told the ETF in 2002 regarding the December 23, 1999 phone call**: "Agreed E[nron] would use best efforts to help them sell assets." McMahon Raw Notes, Dkt.1217, Ex. D:000447 (RE12).

"Andy agreed E[nron] would help them remarket [the] equity w/in next 6 months–**no further commitment**" *Id*. at 000494 (RE12).

[11] This includes former Enron Treasurer and CEO Jeff McMahon, Enron employee Kelly Boots, and Merrill executive Schuyler Tilney–each of whom was never indicted. *See* Dkt.1217:Chart 11.

"Enron would use best efforts to help remarket the equity." *Id*. at 000513[12] (RE12).

"AF agreed that ENE would help them remarket in 6 mos." *Id*. at 000514 (RE12).

(2) **Merrill Counsel 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." Zrike Grand Jury, Dkt.1217, Ex. C:75 (RE10).

The ETF notes, grand jury transcripts, and 302s contained even more explicit evidence that the ETF knew was covered by *Brady* but the ETF did not highlight or disclose:

(3) Explicitly refuting Friedrich's closing argument portraying the "best-efforts" assertion as a lie because it did not appear in the documents, Tr. 6485-86, **Zrike** clarified her knowledge of the "best-efforts" agreement and displayed her extensive, continued role in the negotiations:

> "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

[12] The third new prosecutor apparently disclosed this material only by accident and still denies it is *Brady*. Dkt.1212:16 (government denying it made production of raw notes).

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." Zrike Grand Jury Dkt.1217, Ex. C:63-64, 69 (emphasis added) (RE10).

(4) **Fastow** stated unequivocally that "**it was [Enron's] obligation to [use its] 'best efforts' to find [a third] party [to] takeout" Merrill's equity interest**. Dkt.1160, Ex. A:#000263. This is precisely what he conveyed to Merrill. *Id*. at #000348 (Enron committed only "best efforts to get [Merrill Lynch] out").[13]

The district court misapplied the law by denying Brown a new trial once it recognized that this (and other) evidence could prove the truth of Brown's testimony. *Bronston v. United States*, 409 U.S. 352, 360 (1973). The district court persistently minimized and dismissed the evidence of "best efforts" as cumulative, but it was not. *See*, *e.g.*, Dkt.1239:21-22, 34-35. The court referred only to the evidence that was most consistent with the ETF's disclosures, glossing over or ignoring the evidence

[13] That the Fastow notes or 302s are contradictory *per se* only proves Brown's point that he was entitled to them before trial. The ETF was not free to disclose only the material that fit its Procrustean view of the hearsay "facts" while it withheld all the first hand evidence that contradicted its view and impeached its carefully selected witnesses. Furthermore, the district court erred in denying Brown an evidentiary hearing. *United States v. Espinosa-Hernandez*, 918 F.2d 911, 913-14 (11th Cir. 1990) (reversing for failure to hold evidentiary hearing on new trial motion based on prosecutorial misconduct). If the district court had any questions about the meaning of the notes or what was a question versus an answer, it should have granted Brown's repeated requests for an evidentiary hearing. *See* Dkts.1212:18-25, 1217, 1227; *see also* Dkt.1239:13 n.21; RE7. Despite repeated requests, the government has never given Brown the names of the persons who took the few pages of Fastow's raw notes which are crucial to Brown's defense.

that contradicted it. It ignored the explicit and consistent McMahon notes–which also corroborated the Fastow notes. Because this evidence contradicted the ETF's hearsay witnesses and specific arguments, and if credited, supported Brown's testimony as literally true, the ETF and the district court were not free to substitute their views for a jury's. No pretrial disclosure of McMahon or Fastow revealed that Fastow actually "*agreed* to use best efforts–no further commitment." Dkt.1217, Ex. D:000447, 000494 (RE12). At the very least, this evidence meets the *Brady* standard, creates a reasonable possibility that Brown's testimony was true, and undermines confidence in the verdict.

B. Before Trial Brown was Entitled to the Evidence from Fastow that the Agreement was Merely a Lawful, Best Efforts Agreement.

The recently disclosed raw notes of the government's interviews of McMahon and Fastow provide the only sources revealing that each made only a lawful "best efforts" agreement.[14]

[14] The government confessed error and dismissed the indictment against former Senator Ted Stevens for equivalent misconduct: the government's failure to produce notes taken by the prosecutors themselves in a witness interview that *Giglio* required to be produced for use at trial. *United States v. Stevens*, No. 1:08-cr-00231-EGS (D.D.C. April 7, 2009). Dkt.1217, Exs. A-2, A-3.

1. The ETF's Pretrial Summary of a Summary Regarding Fastow Did Not Even Mention "Best-Efforts," and the Raw Notes Provide the Only Evidence from Fastow Himself Regarding "Best Efforts".

For years, Brown sought to obtain the raw notes of the hundreds of hours of interviews the government conducted of former Enron CFO Andrew Fastow and any statements of McMahon. *See* Dkt.1227:Charts 1, 2. Instead of disclosing the relevant notes, or even the FBI 302s,[15] upon order of the district court, the government produced only a four-page "summary" of the government's highly irregular "composite 302s" edited by multiple parties. Dkt.1168, Ex. I. These four pages are remarkable for what they omit.

First, the summary does not mention "best efforts." Instead, it draws gratuitous inculpatory conclusions, such as: "It was reasonable for anyone listening to the call to think that it was Enron that was going to buy them out." *Id*. at 5. In contrast, the raw notes of Fastow interviews contain multiple explicit statements that Enron would use its "best efforts" to re-market the equity interest to a third-party purchaser. Referring to the same document discussed in the grand jury testimony for which Brown was indicted (DP036766), Fastow told the ETF that "it was [Enron's] obligation to [use its] 'best efforts' to find [a third] party [to] takeout" Merrill's equity

[15] Contrary to FBI policy, the FBI destroyed original 302s and all drafts of the "composite." Dkts. 948, 974, 993, 1029, 1039, 1041,1054, 1059.

interest. Dkt.1160, Ex. A, #000263 (RE11). This is precisely what Fastow conveyed to Merrill. *Id*. at #000348 (RE11).

The notes demonstrate that Fastow was well aware of the nature of such a transaction and that it differed completely from a guaranteed "buy back." In evidence the district court ignored, Fastow told the Task Force specifically that "best efforts" means that a party "must do everything that a reasonable businessman would do to achieve result," and a "best efforts [arrangement was] different from [a] guarantee" because "best efforts would be to find [a third] party to accomplish buyout." *Id*. at #000263 (RE11). Understanding this critical distinction, Fastow therefore "did not obligate [Enron] to buy out" Merrill's equity interest when he spoke with Bayly. *Id*.

Second, in contrast to the selectively edited four-page summary, the Fastow notes are explicit: Enron "could not buy back [the barge equity interest] [because] it would [have to] reverse the earnings." *Id*. at #000178. Indeed, "everyone involved considered this [a] bridge equity transaction." *Id*. at #000176. Therefore, Fastow stated that he "never used the word promise," *id*. at #00084A, couldn't "give a verbal or written guarantee," *id*. at #000262, and knew there could be no repurchase obligation. *Id*. ("There could not be a guaranteed put back to [Enron] [because they] would not get sale treatment."). Thus, Fastow confirmed long ago that there was

"every intention that Enron would find a [third-party] buyer" for Merrill's equity interest. *Id*. at #00084A.

The raw notes provide the only evidence from Fastow himself confirming the truth of Brown's testimony about the best-efforts agreement. Dkt.1160, Ex. A: #000263, #000348 (RE11). And as Brown also testified, Fastow said that any contrary description of the transaction was "not consistent" with Fastow's understanding and what he intended to convey to Merrill. *Id*. *Accord id*. at #000264 (Fastow "objected to word obligated" in Glisan emails.). Brown obtained these notes over repeated government objections only after this Court ordered the government to produce the notes in *Skilling*–years after Brown's trial. Orders, *United States v. Skilling*, No. 06-20885 (5th Cir. Nov. 1, 2007, Nov. 28, 2007, Dec. 20, 2007, Mar. 14, 2008). *See also* Transcript of Hearing, December 21, 2007, Dkt. 1234:25-28 (government refusing to commit to providing Fastow raw notes to defense despite Fifth Circuit Orders in *Skilling*).

2. The Raw Notes provide the only evidence that Fastow misrepresented the existence of an Enron Buy-Back Guarantee to "light a fire" under his subordinates, contradicting the Government's entire case.

Fastow informed the Task Force over six years ago that he had used different, specific language in discussing the deal with his subordinates at Enron from the

language he used in the actual telephone conference with Bayly. The existence of this difference alone was *Brady*. Fastow admitted that he deliberately misled his "'subordinates' by 'tell[ing] Enron people' this was a 'guarantee' to 'motivate' and 'light a fire' within Enron to remarket the barges to a third-party." Fastow Raw Notes, Dkt. 1160, Ex. A:000349 (RE11). Fastow explicitly confirmed to the Task Force that this desire to motivate his underlings explained the stronger language–a "guarantee" or "promise"–in the Enron documents (on which the ETF heavily relied). *Id*. Regardless of whether they believed Fastow, the ETF knew Fastow had said that he made no illegal promise or guarantee to Merrill, and that he used *different* language with his subordinates. Brown was entitled to this information which undermined the entire premise of the prosecution, particularly because Brown could obtain this vital evidence nowhere else. The ETF's pretrial summary says nothing about Fastow's representations to his subordinates at Enron, who became the ETF's primary witnesses against Brown.

C. The Fastow Raw Notes are Material and Contradict the Government's Theory of Criminality.

In discounting the materiality of the Fastow raw notes, the district court makes a series of fundamental errors. First, and as it does with regard to other evidence, the Court committed an error of law by employing a test of admissibility to evaluate the

materiality of the suppressed evidence. Dkt. 1239:30-31 n.53 (Brown "has failed to demonstrate that any of the interview notes would have been admissible at trial."). Evidence that is inadmissible at trial still constitutes *Brady* material if it is exculpatory, impeaching, and/or will lead to other evidence. *United States v. Sipe*, 388 F.3d 471, 485 (5th Cir. 2004); *United States v. Harrison*, 524 F.2d 421, 427 (D.C. Cir. 1975) ("the notes contain substantive information or leads which would be of use to the defendants on the merits of the case . . ."); *cf. United States v. Pelullo*, 105 F.3d 117, 118-22 (3d Cir. 1997). Brown was entitled to all such information to prepare his defense and to inform his decision whether to call Fastow as a witness and/or to call Fastow's interviewers.[16]

Additionally, the Fastow raw notes would have provided valuable avenues for impeachment of every Enron witness, all of whom worked under Fastow. Challenged with the idea that they may have been misled by Fastow, the witnesses, whose testimony was hearsay-based, would have been devalued or discredited in front of the jury. *United States v. Bagley*, 473 U.S. 667 (1985) (rejecting any constitutional distinction (for purposes of the government's *Brady* obligation) between

[16] The government called one of McMahon's interviewers (Timothy Henseler) to testify about interviews conducted with Dan Boyle and Robert Furst by the Senate Permanent Subcommittee on Investigations (PSI), but Brown knew nothing at the time about exculpatory evidence Henseler possessed or even that Henseler had interviewed McMahon. Dkt.1217, Exs. D, F.

impeachment evidence and exculpatory evidence); *Giglio v. United States*, 405 U.S. 150, 154 (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).

Second, the district court adopted the government's view that the importance of the raw notes to Brown was somehow resolved on the completely different record in *United States v. Skilling*, 554 F.3d 529 (5th Cir. 2009), *vacated in part and remanded*, 130 S. Ct. 2896 (2010); Dkt.1239:8-20. *Skilling* is inapposite to the discrete inquiry here: whether the suppressed evidence speaks to the truth of Brown's grand jury testimony. The *Skilling* decision does not even address the value of the suppressed evidence that Fastow (and McMahon) made a "best efforts" representation; however, that fact forms the crux of Brown's case.[17]

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[17] The panel in *Skilling*, 554 F.3d 529, reviewed only for plain error. Here, the standard is *de novo*. Fastow testified in *Skilling*. Only Fastow "subordinates" testified against Brown. In *Skilling*, Fastow discussed this ("light a fire") statement only in the context of Ben Glisan (government witness) and Chris Loehr (no involvement in the barge case). But Brown argued repeatedly below that Glisan, Fastow's deputy, was in on the deception of their subordinates. *See*, *e.g.*, Dkts.1160, pp. 9 n.9, 12, 21. This is demonstrated also by the Glisan email–so heavily relied on by the government at the first trial–wherein Glisan says Enron has no "ability to roll the structure," also designed to motivate their subordinates. Brown was entitled to this evidence to cross-examine Glisan–on the misrepresentation both he and Fastow made to *their* subordinates. This is not what Skilling argued before this Court. *Id*. at 590 ("Skilling bases his argument that Fastow 'lied' to Glisan . . ."). Brown could have used this information to impeach Glisan that he and Fastow, together, were in on this deception–as they were in the Southampton transaction where they actually stole millions from Enron. In addition, whatever Glisan may have known about the

Moreover, the district court's extensive quotation of *Skilling*, Dkt.1239:13; RE7, that the 302s "effectively disclosed the information" in these raw notes, is meaningless. Brown did not have the Fastow 302s before his trial, and they do not mention "best-efforts" anyway. *Id*. at 14. The government qualified its summaries as "non-verbatim recitations" of what was in the already composite 302–producing the dual result of misleading Brown and insuring there was no evidence from Fastow admitted by the district court (the summaries were not functionally the same as 302s). *Cf*. Dkt.1168, Ex. O:1. In the new trial inquiry (or *Brady* for that matter, *see United States v. Gutierrez*, 2007 WL 3026609, *5-7 (W.D. Tex. 2007)) a "composite" FBI 302–much less a summary even of that– cannot substitute for an actual first-hand witness statement.

The district court's hollow conclusion that Brown possessed the substance of this information in the ETF's disclosure letter, from which it quotes at length, ignores the fact that only the notes reveal that Fastow used *different* language with his subordinates. The court also ignores the ETF's vehement objections to the Defendants' repeated attempts to use the little information they did have–objections which this district judge *sustained*. Dkt.1239:14-15; RE7. Defendants collectively

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"light a fire" approach to Enron subordinates, the rest of the subordinates–Lawrence, Long, Kopper, Boyt–could have been thoroughly impeached with this evidence.

and repeatedly sought to uncover the government's information regarding Fastow via *Brady* requests. *See*, *e.g.*, Dkts.236; 248; 290; 528. Defendants also repeatedly attempted to use the "summary" of Fastow's statements (Dkts.236; 241; 528 (written motions); Tr. 1611-14, 2651-53 (oral motions); 2771-73 (Boyt); Tr. 3289, 3413-14 (Bhatia); 4863 (to impeach government witnesses' multi-level hearsay). The government strenuously and repeatedly objected to the use of hearsay to impeach hearsay despite FED. R. EVID. Rule 806, and the same district judge never allowed Brown to use the identical summary evidence on which the judge now relies to claim Brown's lack of "diligence" and deny him a new trial (Tr. 4863-66). Brown's "failure to uncover" the evidence that appears only in the raw notes resulted from government tactics and district court errors in *Brown I*–not from a lack of diligence by Brown. *See United States v. Mulderig*, 120 F.3d 534, 541 (5th Cir. 1997), *cert. denied*, 523 U.S. 1071 (1998); Dkt. 1227:Charts 1, 2.

The district court's assertions that the "government's substantial documentary evidence and witness testimony . . . supported the jury's findings" and that "what was not disclosed does not at all undermine confidence in the outcome of the trial" do not withstand scrutiny. Dkt.1239:48-49. The witness testimony on which the district court relies was all second- and third-hand, hearsay testimony by *Enron* employees with plea or non-prosecution agreements who knew nothing about what Fastow told

Merrill, much less what Merrill or Brown understood.[18] The notes of Fastow's interviews alone contradict every key government witness and corroborate a lawful and understandable explanation of Brown's grand jury testimony. Most importantly, the fact that Fastow himself had explained the "best-efforts" agreement to the government could exonerate Brown from charges of perjury or obstruction.

III. THE EVIDENCE CONCEALED IN CLEAR *BRADY* VIOLATIONS SQUARELY CONTRADICTS STATEMENTS BY ETF PROSECUTORS AND REQUIRES A NEW TRIAL.

Prosecutorial misconduct, like *Brady* violations, is grounds for a new trial under Rule 33. *United States v. Dixon*, 658 F.2d 181, 193 (3d Cir. 1981) (noting the "interest of justice" provision of Rule 33) (citation omitted); *accord United States v. Bianchi*, 594 F. Supp. 2d 532, 538 (E.D. Pa. 2009). This Court's "task in reviewing a claim of prosecutorial misconduct is to decide whether the misconduct casts serious doubt upon the correctness of the jury's verdict." *United States v. Kelley*, 981 F.2d 1464, 1473 (5th Cir.), *cert. denied*, 508 U.S. 944 (1993); *cf. United States v. Therm-All, Inc.*, 373 F.3d 625, 638 (5th Cir.), *cert. denied*, 543 U.S. 1004 (2004); *United States v. Morrow*, 177 F.3d 272, 298 (5th Cir. 1999). Specifically, the Court should

[18] The district court's resort to this so-called "evidence" indicates a fundamental failure to understand Brown's case. Nothing about the evidence against Brown was "substantial"; the ETF hid all of the contrary evidence from the defense, enabling the ETF to distort the record with impunity.

consider: "(1) the magnitude of the [misconduct]'s prejudice, (2) the effect of any cautionary instructions given, and (3) the strength of the evidence of the defendant's guilt." *United States v. Tomblin*, 46 F.3d 1369, 1389 (5th Cir.1995).

Applying *Tomblin*, first, the prejudice to Brown from the prosecutor's misconduct was overwhelming; Brown's defense was rendered impotent.[19] Second, the court provided no cautionary instructions and did not even recognize the misconduct. Third, and most important, the government's case was weak–as evidenced by this Court's split decision as to Brown's guilt on direct appeal. *See Sipe*, 388 F.3d at 492 (evidence is material for new trial purposes where it would

[19] The materials disclosed on March 31, 2010, compellingly demonstrate this point. A comparison of the materials the government highlighted for the court with the government's summary letter of July 30, 2004, demonstrates that the Task Force prosecutors selectively withheld exculpatory statements by key witnesses who possessed personal knowledge. The district court failed to acknowledge the *ex parte* nature of the highlighting of these materials, which improperly led the court to focus on only a few select passages out of 1005 pages of materials, diverting the court from the rest of the exculpatory evidence therein and may have contributed to the district court's failure to review all of the evidence submitted. *United States v. Earley*, 746 F.2d 412, 416 (8th Cir.1984), *cert. denied*, 472 U.S. 1010 (1985) ("There is concern not just with the danger that the trial judge may form an opinion as to the truth of the evidence before it may be answered and challenged, but also with the insidious nature of a court-prosecutor relationship which would allow such *ex parte* disclosures"; and "there is a danger that the district court will be in possession of a body of information that does not become a part of the record and is not known to the defendant and subject to cross-examination if, for example, a number of the witnesses whose 'testimony' is outlined *ex parte* are not called at trial or the witnesses who are called vary from their expected testimony.") (citations omitted). *Accord United States v. Barnwell*, 477 F.3d 844, 850-51 (6th Cir. 2007). This is exactly what happened to Brown who knew nothing of this highlighted material until 2010.

"have seriously unsettled an already weak case"). Furthermore, the inherent weakness of the ETF's case–especially after Fastow began cooperating–best explains why it concealed acknowledged *Brady* evidence.

A. The Withheld McMahon Raw Notes Directly Contradict Both the Prosecutors' Many Assertions that McMahon Made the Original Guarantee and that Fastow Ratified It; They Corroborate the Fastow Notes that the Agreement Was Only for Lawful Best-Efforts.

In March 2010, the government disclosed raw notes of former Enron Treasurer Jeffrey McMahon's interviews in 2002. Dkt.1217, Ex. D. McMahon was unavailable to Brown at trial (Tr. 5260-61), and the government made only a four-line, misleading disclosure of his statements.[20] Here also, prosecutors deliberately withheld clear declarative statements that the ETF had previously highlighted for the district court as *Brady* material. *See* Dkt.1217, Ex. D:000478, 493, 494, 513, 514, 560 (RE12). The ETF then capitalized on its misconduct, making at least sixteen representations in opening and closing arguments that McMahon gave, and Fastow ratified, an unlawful and secret buy-back guarantee (Tr. 402-4, 412, 6157-60, 6168, 6216-19,

[20] "McMahon did not recall any definite push to get the NBD done by year end. *Merrill wanted* Enron/Fastow's assurance that Enron would use best efforts to syndicate or find a buyer for these assets. It was not unusual for this type of agreement not to be in writing. McMahon *does not recall* any guaranteed take out at the end of the 6 month remarketing period." Dkt.1168, Ex. O:7 (emphasis added). The ETF made its disclosure from the notes of only one of six interviewers, Stephanie Segal, while it withheld the explicit declarative statements it had highlighted of the "best-efforts" remarketing agreement from four other interviewers. Dkt.1217, Ex. D:000529.

6222, 6527-28). *See* Dkt.1168:28-34. Having deprived Brown of McMahon's evidence to rebut these assertions, the ETF relied heavily on Glisan's and Kopper's testimony in its closing arguments. *See*, *e.g.*, Tr. 6159 ("And during that conversation, Mr. McMahon confirmed to Mr. Glisan that he had, in fact, given an oral guarantee to Merrill Lynch."); Tr. 6523 ("And [Bhatia] testified that Kopper had told him that Enron promised to do a buyback if a third-party buyer couldn't be found, which is exactly what Mr. Kopper testified to."). The government supported these representations via the false or wrong hearsay testimony of Glisan, Kopper, and other Fastow "subordinates" and shielded them from devastating impeachment by concealing McMahon's (and Fastow's) statements in the notes. By pointing to Glisan's testimony 52 times and to Kopper's 27 times, the government exacerbated the prejudicial effect of its concealment of this crucial *Brady* material.

ETF Prosecutor Hemann specifically elicited from Fastow subordinate Kopper what may have been perjured testimony, in light of Kopper's prior statement in the FBI 302.

> Hemann: Based on your understanding Mr. Kopper, was this a best efforts deal?
>
> Kopper: No, not on my understanding. (Tr. 1652-1653).

In fact, Kopper flatly *denied* at trial that he told FBI Agent Bhatia and the SEC back in October 2002, as recorded in a 302, that "what was told to [Merrill Lynch] was that Enron would do their best to get ML out in six months." Tr. 1508.

As evidence of the ETF's determination to deny Brown any shred of the "best-efforts" defense, the ETF then sponsored the testimony of FBI Agent Bhatia who told the jury that the phrase "Enron would do [its] 'best'" in Kopper's 302 were *his words*–not Kopper's. Tr. 3407-11.

Prosecutor Ruemmler then elicited from Glisan:

Glisan: I felt that we were obligated.

Ruemmler: And when you say "you felt," why did you feel that way?

Glisan: Based upon Mr. McMahon's oral guarantee, which, as I understood it, was ratified by Mr. Fastow as well. (Tr. 3608).

The McMahon raw notes, only disclosed in 2010, specifically contradict this evidence, were recognized as *Brady* by the ETF in 2004, and corroborate both the suppressed Fastow statements regarding "best-efforts" and Brown's grand jury testimony. McMahon, who was never indicted, was supposedly the original guarantor *and* participated in the December 23 phone call with Fastow and Merrill. At least four separate government interviewers confirmed, and the ETF highlighted, but withheld, McMahon's exculpatory statements. This *Brady* material appears

highlighted below, and other *Brady* material the ETF did not highlight appears in the same pages:

- Disc[ussion] between Andy [Fastow] & ML [Merrill Lynch]. Agreed E[nron] would use best efforts to help them sell assets. Dkt.1217, Ex. D:000447 (Roach) (RE12).
- Andy agreed E would help remarket equity w/in next 6 months. –**no further commitment**. *Id*. at 000494 (Kirschner). (RE12).
- Andy agreed E[nron] would help them mkt [market] the equity w/in 6 months after closing. > E[nron] and ML [Merrill Lynch] would work to remarket for the 6 months after. *Id*. at 000478 (Henseler) (RE12).
- Enron would use best efforts to help remarket the equity. *Id*. 000513 (Casette) (RE12).
- AF agreed that ENE would help them remarket in 6 mos. *Id*. at 000514. Don't recall any promise that ENE would get them out. *Id*. at 000515 (Casette) (RE12).
- Andy said–Enron help remarket in next six months. *Id*. at 000560 (Pitrizzi). Dkt. 1217:Chart 1.[21]

[21] McMahon also contradicted the government's representation–and the district court's reliance thereon (Dkt.1239:10-15, 18, 27)–that Fastow told Merrill Lynch that LJM2 was always available to take out Merrill's equity interest (Dkt.1168, Ex. I:3-4; Tr. 6150,

- AF [Fastow] agreed that E[nron] would help them [Merrill Lynch] remarket the equity 6 mo[nths] after closing. *Id*. at 000450 (Roach) (RE12).
- Enron "[n]ever made rep[resentation] to ML [Merrill Lynch] that E[nron] would buy them out or [] @ set rate of return." *Id*. at 000449 (Roach) (RE12).
- NO - never guaranteed to take out [Merrill Lynch] w/rate of return. *Id*. at 000493 (Kirschner) (RE12).

This explicit evidence from McMahon, based on his personal knowledge, undermines the ETF's recurring theory of Brown's crime: "that Enron, through its treasurer [McMahon] and chief financial officer [Fastow] made an oral guarantee." Tr. 6144; *accord* Tr. 402-04, 412, 6157-60, 6168, 6216-19, 6222, 6527-28.

This evidence appears only in the raw notes of McMahon's interviews. The government's pre-trial "summary" refers only to what Merrill *wanted*, and fails to state *what actually happened*: that Fastow *agreed* to lawful, best-efforts assurances on the December 23, 1999 phone call with Bayly–and that is all. The McMahon (and Fastow) raw notes (Dkt.1217, Ex. D; Dkt.1160, Ex. A) demonstrate the deceptiveness and inadequacy of the ETF's pre-trial production. McMahon, who was never indicted, said "NO - never guaranteed to take out [Merrill Lynch] w/rate of return."

6264). McMahon said LJM2 was not mentioned on the call. Dkt.1217, Ex. D:000515 (two lines down from highlighted omission). McMahon "[d]oesn't believe LJM was ever mentioned on th[e] [Fastow/Bayly] call." *Id* at 000530. *See id*. at 000561 (same).

Dkt.1217, Ex. D:000493 (RE12). "Agreed E would use best efforts to help them sell assets." *Id*. at 000447. "No further commitment." *Id*. at 000494 (RE12). Even if the prosecutors did not credit McMahon's numerous statements, they were not free to hide (for 8 years) this declarative evidence of the personal knowledge of the purported first guarantor *and* call participant.

The district court erroneously minimizes McMahon's participation in the transaction[22] and ignores that the suppressed McMahon evidence impeached Glisan and every government witness, squarely contradicted the government's theory and specific arguments, and wholly supported Brown's "best-efforts" defense to perjury and obstruction. The district court's failure to characterize fairly and understand the materiality of the withheld *Brady* evidence constitutes an abuse of discretion. As a matter of law, this evidence was material to Brown–regardless of whether the

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[22] The court refers repeatedly to the fact that McMahon was on vacation during the transaction and was "passive" on the crucial call (Dkt.1239:22-23, 25-26), while the court ignores the now undisputed fact that Brown was on vacation, had nothing to do with the transaction at all thereafter, and did not even participate in the phone call. The court below also ignored that the government's *Brady* obligation is continuing, and it should have given Brown McMahon's letters to the government which expressly state that Glisan lied at Brown's trial about this very issue of McMahon's guarantee. Brown was entitled to those letters when the ETF received them, before Brown went to prison and on appeal. McMahon Letter to the Department of Justice, April 25, 2005, Dkt.1168, Ex. C; McMahon Memorandum to the SEC, July 28, 2006, Dkt.1168, Ex. D. The letters also entitle Brown to a new trial–even the district court acknowledged the evidence was at least "impeaching" of Glisan. Dkt. 1239:28. *Cf. Giglio*, 405 U.S. at 154.

government or the court below believed it. Dkt.1239:25; RE7. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999) (evidence is favorable to the accused if it either tends to show that the accused is not guilty or it impeaches a government witness); *Sipe*, 388 F.3d at 482, 491 (evidence is material under *Brady* where it allows defendant "to attack the government's case from every angle").

B. The Concealed *Brady* Evidence of Zrike Directly Contradicts The ETF's Arguments that Defendants Lied About the "Best- Efforts" Agreement Because It Was Not Documented.

The district court's opinion ignores the fact that while the ETF concealed Zrike's grand jury testimony, they repeatedly told the jury "if all it is" is a remarketing agreement, "why was it not put in writing?":

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

Friedrich, on rebuttal, repeatedly posed the same question:

> "If it's a re-marketing agreement, if that's all it is, why was it not put in writing? . . . If that's all it was, why wasn't it put in writing? During the time

> the Merrill lawyers spoke to you for almost four hours, no one even addressed that question once. They don't have an explanation." Tr. 6485-86.[23]

Brown had "no explanation" for this argument because the ETF withheld Zrike's explicit answer to Friedrich's question (on pages near those highlighted).

> "Merrill–the Merrill Lynch lawyers in my group and myself did ask that we include a provision that–two types of provisions that we thought would be helpful to us. One would be to indemnify us or hold harmless if there was any sort of liability like a barge explosion or environmental spill, loss of life, or something like that was, . . . a disaster scenario. . . *The other thing that we marked up and wanted to add was a best efforts clause, . . . that they would use their best efforts to find a [third-party] purchaser* * * * [T]he response from the Enron legal team was that–both of those provisions would be a problem. *. . .they kept coming back to the fact that it really had to be a true passage of risk. * * * [W]e were not successful negotiating that [in] with Vinson & Elkins*." Dkt.1217, Ex. C: 55, 63-64, 66-70 (emphasis added) (RE10).

The ETF also withheld the fact–highlighted by the ETF as *Brady* in 2004–that Merrill counsel Zrike knew from her own role in further negotiations: "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 and were problematic." Dkt.1217, Ex. C:75 (RE10). The implication that the ETF's omission was purposeful is inescapable because the ETF included in its "summary" the next sentence that appeared on the same page.

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[23] *See also* Tr. 419 (Hemann: "There will not be evidence in this case that any lawyer was asked if it was all right for Enron to count this deal as income..."); Tr.6207 (Ruemmler: "And so what did they do, ladies and gentlemen? They cut her out. . . . Ms. Zrike was never present for these conversations in which this verbal guarantee was discussed.").

Brady requires a new trial even for innocent errors in failing to disclose evidence. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Here, however, it is difficult to imagine an innocent explanation for these tactics, whereby ETF prosecutors hid the evidence that explicitly contradicted their arguments and elicited hearsay testimony from their cooperating witnesses while concealing specific, first-hand contrary evidence.[24]

The defense could not interview Zrike before trial and was forced to call her "blind." Because the government did not call Zrike, the ETF did not produce Zrike's statements as *Jencks* material. The government's pre-trial *Brady* summary of Zrike's testimony did not contain a single word about her role in the contract negotiations with Enron's lawyers, which occurred long after Brown's minimal role ended. In

[24] Zrike's 302 and grand jury testimony make it difficult to see anything less than an intentional effort by these prosecutors to conceal the truth when they "summarized" Zrike's evidence–specifically omitting "best efforts." Six months before her grand jury testimony, Zrike told Weissmann that "[she] tried to insert a 'best efforts' clause but Enron said that it was too much of an obligation and that they could not have this clause in the agreement." Dkt.1168, Ex. E: 15. Zrike again told Weissman and the grand jury, on April 15, 2003: "The focus [of the negotiation] I remember is that they will use their best efforts to find a purchaser to close the transaction with a third party." Dkt.1217, Ex. C:70. After Zrike gave her completely exculpatory evidence to the grand jury, Weissmann changed her status from subject to target of the ETF's investigation. When she testified at trial, Zrike was still under threat of indictment and carried the fate of Merrill on her shoulders if Weissmann chose to deem her in breach of the Merrill non-prosecution agreement. Dkt.1168, Ex. H (Merrill Lynch non-prosecution agreement). Because of the ETF's now repudiated tactics and *Brady* violations, *see infra* notes 30 and 31 and accompanying text, Brown did not have the necessary tools to elicit her full testimony.

fact, Zrike took the transaction to Brown's superiors who approved it after the DMCC meeting. Dkt.1020, Ex. B:10-11. By contrast, Zrike's grand jury testimony explains in detail her knowledge, responsibility, actions, and further negotiations long after she and Brown outlined the risks to the DMCC. Dkt.1217, Ex. C:68, 75 (RE10). With this crucial evidence concealed and no mention of "best-efforts," the ETF was able to convert Zrike from a defense witness, whose personal knowledge could have impeached every government witness, into a witness Friedrich called "completely devastating" to the defense. Tr. 6500.

Ignoring the ETF's egregious argument to the jury, the district court's opinion suggests that the fact that Zrike was called by the defense and testified to her "understanding" at the first trial somehow cures any *Brady* violation. Dkt.1239:32-35; RE7. Again, this is wrong as a matter of law. Brown was not required to commit suicide-by-trial, and Zrike's concealed *Brady* material was far more concrete, detailed and dispositive than any "understanding" or "impression." Dkt. 1239:33 n.59; RE7. *Cf. United States v. Fisher*, 106 F.3d 622, 634-35 (5th Cir. 1997), *abrogated on other grounds by Ohler v. United States*, 529 U.S. 753 (2000) (new trial ordered for *Brady* error where defendant did not attempt to call witness; withheld testimony contradicted critical witness against defendant and government's failure to produce evidence was directly responsible for defendant's trial and evidentiary decisions.). *Cf.*

United States v. Garland, 991 F.2d 328, 330-35 (6th Cir. 1993) (missing witness' testimony "is obviously material"-"[i]t corroborates [defendant's] story and thus helps establish his defense"). *See also Leka v. Portuondo*, 257 F.3d 89, 103 (2d Cir. 2001) ("without substantive disclosure by the prosecution, the supposed failure by the defense to petition for leave to seek out [witness] cannot fairly be seen as a default or neglect, or even as an election.... to call a witness cold, [] would be suicidal.").

Zrike's extensive grand jury and SEC testimony explicitly exculpated Brown and could have been used by defense counsel to prepare Zrike's examination and Brown's entire trial strategy.[25] Zrike knew (better than Brown) the *actual* terms of

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[25] Zrike's testimony also exculpates Brown by detailing internal conversations and Brown's concerns for Merrill's risk before he left on vacation. Dkt.1168, Ex. Y:88-89, 92, 123-24, 192:

> We were making it clear to everybody [at DMCC and at Merrill], . . ., both Jim Brown and I, that this is an equity investment that we will own and that we have to have all the risks associated with that equity investment in order for them to take it as a sale and to book the gain or loss, whatever it happens to b – it happens to be gain in their case, on their financial statements. So for accounting purposes it had to be a true sale. And there could be no mitigation of that status."

See also id. at 196-207 (discussing thoroughness of the review in the DMCC meeting). Zrike's grand jury testimony also contradicts or renders irrelevant the "Trinkle phone call"–an internal Merrill conference on which the split panel of this Court relied to uphold Brown's convictions. Zrike's testimony clarifies that Merrill's consideration of the transaction and the evolution of its terms continued long after the Trinkle call, that Zrike was in charge, and that she convened the meeting of Merrill's DMCC to review the transaction to which she invited Brown to continue to highlight the risks. Tr. 3257-59, 3261, 6201. Significantly, on the basis of this Zrike interview and others conducted by the SEC, the SEC decided not to charge Brown in the civil complaint on the barge transaction. *S.E.C. v. Merrill*

the transaction and the course of the negotiations. Zrike and her team made sure the deal was lawful. She tried to document the "best -efforts" agreement and ultimately she had to concede even that–because Vinson & Elkins insisted that Enron retain no hint of risk that might invalidate its accounting. Further, this evidence would have provided Brown invaluable support for both a "good faith" and a "theory of the defense" instruction–both of which the district court denied.[26] Finally, the suppressed evidence from Zrike would have directly corroborated Brown's specific defense to perjury and obstruction and directly refuted Friedrich's arguments.

In another instance, Prosecutor Friedrich told the jury:

> "It's not like there was some subsequent negotiation to that [meaning after the Trinkle call], where somebody said, 'We can't do this.'" Tr. 6497. And later, "There is a suggestion . . . that what's going on is sort of a good-faith exchange between two parties as they try to negotiate different legal documents that sort of come back and forth, and sometimes language comes in, sometimes it's taken out, that kind of thing. This is not the average business case. This is not a case where people are trying to . . . put language into documents as some sort of good-faith negotiating process." Tr. 6493-94.

Lynch & Co., Inc., Daniel H. Bayly, et al., Civil Action No. H-03-0946 (S.D. Tex. February 12, 2003).

[26] The ETF vigorously opposed defendants' requested good faith instruction, and the district court denied defendants' request. Tr. 6032-52, 6091, 6135. The defendants also repeatedly requested a jury instruction on theory of the defense–a "re-marketing defense"–which was also vigorously opposed and denied. *See*, *e.g.,* Dkt. 415, 416, 439, Dkt.571:5; Tr. 4520, 6037, 6050-51, 6092. Zrike's grand jury testimony also supported Brown's reliance on counsel defense which was rendered meaningless in light of the ETF's conduct. A prior panel of this Court did not reach any of the instruction issues on appeal because it reversed on the fatally flawed indictment. *Brown I*, 459 F.3d 509.

Of course, Friedrich concealed Zrike's evidence that contradicted his assertion: Zrike's detailed and extensive grand jury testimony that the lawyers negotiated the transaction long after the "Trinkle call," the Fastow call, and specifically for a written 'best efforts' or re-marketing agreement, and Vinson & Elkins said Enron "can't do this." Dkt.1168, Ex. E (Zrike 302): 11, 15; Dkt.1168, Ex. Y (Zrike SEC): 109, 192, 304-9; Dkt.1217, Ex. C (Zrike GJ): 63-64, 67-70, 75 (RE10).

C. Individually and Cumulatively, the Concealed Exculpatory Evidence Refutes the Evidence that Led to Brown's Convictions.

The district court's reliance on "substantial documentary evidence" that Merrill agreed to some kind of secret guarantee or buy-back is refuted by the *Brady* evidence the ETF disclosed since Brown's trial. Specifically, Zrike's concealed grand jury testimony states that the Appropriations Request Form ["APR"] on which the ETF (and the panel in *Brown I*, 459 F.3d at 526-31) relied was simply wrong, and she terminated that avenue of review. Dkt.1168, Ex. Y:284 ("We are not documenting or formalizing our approval through an appropriation request and [] this was moot and irrelevant. So I did not take any action. I didn't feel like I had to take any action because this was going to be chucked, you know. It was not what we were doing"). On the Enron side, the ETF's choice of documents are explained by the previously concealed Fastow raw notes revealing that he used stronger language with his

subordinates than he did with Merrill. Fastow specifically told the ETF that is why some internal documents would contain the word "guarantee." Dkt.1160, Ex. A:000349 (RE11). In fact, in the raw notes, Fastow explained and contradicted the very Enron document that Brown supposedly lied about in the grand jury–a document to which Brown's indictment and the court below wrongly refer as a "Merrill document." *Id*. at 000263. Dkt.1239:3,10; RE7; Dkt. 489, Ex. C (last page DP036766–Brown GJ Ex. 18).

The government and the district court wrongly relied on the only remaining shred of evidence–an email Brown wrote 14-15 months later in an unrelated transaction. In that email, Brown addressed a question about a possible leasing transaction for the Continental Airlines terminal awaiting construction at Houston's airport–a situation in which a guarantee would be lawful. Considering the possibility that there was only time for an oral assurance from a high level Continental executive before bulldozers arrived at the terminal site, Brown referred to a "similar precedent last year with Enron" and "we had Fastow get on the phone with Bayly and lawyers and promise to pay us back no matter what." GX240. This email is too thin a reed to support Brown's conviction–particularly in light of the overwhelming *Brady* evidence and the ETF's misconduct. *See Brown I*, 459 F.3d at 535-37 (DeMoss, J., concurring in part and dissenting in part). As multi-level hearsay of dubious

admissibility even against Brown,[27] the inaccurate email is now also contradicted by belatedly disclosed *Brady* material from Zrike, Fastow, and McMahon.[28] Moreover, the email is a red herring: the government cannot prove perjury with an unsworn statement, and where the sworn testimony is true. *United States v. Jaramillo*, 69 F.3d 388, 390-91 (9th Cir. 1995) (defendant charged with perjury by inconsistent statements must have made both under oath). *See also Bronston*, 409 U.S. at 362; *United States v. McAfee*, 8 F.3d 1010, 1014-15 (5th Cir. 1993).

The ETF's concealment of all of the exculpatory evidence of the "best-efforts" agreement to remarket the barges and its misuse of the email at trial exacerbated the prejudice of the email in *Brown I*.[29] The government's continued reliance on the

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[27] *See In re Pequeno*, 126 Fed. Appx. 158, 164-65 (5th Cir. 2005); FED. R. EVID. Rules 403, 802 and 805.

[28] Zrike was not on the call, but recently disclosed *Brady* evidence reveals that several call participants believed that she was, thereby corroborating Brown's belief that the agreement was lawful. *See* Dkt.1217, Ex. F, at 000678 (Tilney). *See id*. at 000677 (listing call participants, including Zrike); 000726 (same).

[29] The prosecution repeatedly focused on the email, flagrantly violated an *in limine* restriction, and disregarded the Rule 404(b) prohibition on propensity evidence. Tr. 6578-79. Using the email, the ETF argued that "Brown [was] proposing a fraud in a completely separate transaction later. He's proposing the exact same thing in another deal . . . This is someone who proposes oral side deals if that's what it takes to get the ball across the goal line." Tr. 6516. *See* Tr. 6274-75. *See also United States v. Jimenez*, 613 F.2d 1373, 1375-77 (5th Cir. 1980) (reversible error when subsequent extrinsic offense is submitted to jury). *See United States v. Quattrone,* 441 F.3d 153, 180-81 (2d Cir. 2006) (reversing convictions for obstruction and witness tampering). Here, as in *Quattrone*, the erroneous admission of the email and the government's rank abuse of it "could unduly inflame the passion of the jury, confuse the issues before the jury, or inappropriately lead the jury to convict on the basis of

email makes Brown's need for his constitutionally-guaranteed evidence even more imperative. Brown needs all evidence of the "best-efforts" agreement to prove that his grand jury testimony was true. Given the new *Brady* evidence, the government's evidence of Brown's guilt has evaporated. The withheld evidence went to the heart of Brown's defense to all charges. Credibility determinations and assessments of the weight of the evidence are jobs for the jury–not for the ETF or the trial judge. Without any or all of this evidence, we can have no confidence that the jury's verdict was correct. *Kyles v. Whitley*, 514 US 419, 434 (1995).

CONCLUSION

For these reasons, the government should put an end to the nightmare for Brown and confess error here as it did in *United States v. Stevens*. *See* Dkt.1217, Ex. A-1-A-3. If it does not, then this Court should reverse the decision of the district court. As in a recent Ninth Circuit opinion:

> This case has consumed an inordinate amount of taxpayer resources, and has no doubt devastated the defendant's personal and professional life. . . . And, in the end, the government couldn't prove that [any of] the defendant[s] engaged in *any* criminal conduct. This is just one of a string of recent cases in which courts have found that federal prosecutors overreached by trying to stretch criminal law beyond its proper bounds.

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conduct not at issue in the trial." *Id*. at 186 (citation omitted). The Government subsequently dropped all pending criminal charges against Quattrone. *Quattrone: 'The Opera Is Over'*, N.Y. TIMES, Aug. 30, 2007, at B2.

United States v. Goyal, — F.3d —, 2010 WL 5028896, *9 (9th Cir. 2010) (Kozinski, J., concurring) (citing to *Brown I* and *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005) among other cases).

Brown is entitled to a fair trial to restore his reputation and reclaim his career. The ETF's suppression of *Brady* evidence and questionable tactics have been rejected recently by the Department of Justice both in the context of corporate investigations and prosecutions,[30] and in new guidelines enforcing prosecutors' *Brady* obligations.[31] The Department of Justice has effectively acknowledged that its prior policies and tactics violated due process, especially where corporate employees were caught between the Department and the corporate entity threatened with indictment.[32]

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[30] *See* Thompson Memorandum, January 20, 2003 at 7-8, *available at* http://www.justice.gov/dag/cftf/corporate_guidelines.htm (last visited December 13, 2010);superceded by the McNulty Memorandum, *available at* http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf (last visited December 13, 2010); *See* Press Release, Department of Justice, Justice Department Revises Charging Guidelines for Prosecuting Corporate Fraud, *available at* http://www.justice.gov/opa/pr/2008/August/08-odag-757.html (last visited December 13, 2010).

[31] On January 4, 2010, after the debacle in *United States v. Stevens*, No. 08-cr-231 (D.D.C. April 7, 2009), and the reversal of every Task Force trial, the Department of Justice issued new discovery guidance for federal prosecutors. Memorandum from David Ogden, January 4, 2010, available at http://www.justice.gov/dag/discovery-guidance.html (last visited December 13, 2010).

[32] *See also United States v. Stein*, 435 F. Supp. 2d 330, 345-46, 349 (S.D.N.Y. 2006) (*Stein I*), *aff'd*, *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008)*; United States v. Stein*, 495 F. Supp. 2d 390, 393 (S.D.N.Y. 2007) (*Stein II*), *aff'd*, *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008).

A new trial is imperative to maintain the integrity of our criminal justice system. Prosecutors cannot simply ignore Constitutional mandates and rights of the accused. A new trial or outright dismissal are the only ways for this Court to prevent the prosecution from benefitting from its illegal and unethical behavior. To ensure just results and restore confidence in our system of justice, the government must be required to provide a level playing field–as the Constitution demands.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

The undersigned counsel certifies that this brief of Defendant-Appellee James A. Brown complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) because it contains 13,885 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

The undersigned counsel further certifies that this brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word Perfect OfficeX5 for Windows in Times New Roman typeface and 14-point font size.

Respectfully submitted,

/s/ Sidney Powell
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Attorney of record for Appellant
James A. Brown