UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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

DEFENDANT JAMES A. BROWN'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF HIS MOTION FOR NEW TRIAL, DKTS. 1004, 1020, 1030, 1061, 1160, 1201.

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On March 30, 2010, Brown received a production of 1005 pages of *Brady* material from Mr. Stokes.[1] Careful review of the electronic copy disclosed that the disk contains highlighting of *Brady* material selected by the ETF itself in 2004. The highlighted material was the basis for the ETF's "summaries" that this Court ordered to be given to the defense in 2004–over government objection–after its *in camera* review. Additional scrutiny disclosed startling misconduct: **the ETF withheld from the court-ordered summaries irrefutable *Brady* material of Zrike, Dolan, Tilney and McMahon–that the ETF had itself highlighted in these documents**. This could only have been a strategic and deliberate decision to keep this material from the defense before trial, and it raises a host of new questions that mandate an evidentiary hearing.

The conclusion is now inescapable that the ETF engaged in a calculated, multi-step process to deprive Brown of his constitutional right to Due Process. **(1)** They repeatedly denied the existence of *Brady* material, told this court they had met their *Brady* obligations and fought vehemently against producing anything (Dkt.1168, Charts 1, 2). **(2)** They highlighted only selected material in a veritable garden of *Brady* evidence–much of their selections being vague, tangential or marginal–while working around clear, declarative, relevant exculpatory material even in the same page, paragraph or document. **(3)** When *ordered* by the Court to produce summaries to the defense, they *further redacted* even the *Brady* material they had themselves highlighted and withheld the crucial facts that *they* had highlighted as *Brady*. **(4)** They egregiously capitalized on their

[1] New prosecutors began dribbling out real *Brady* material to the defense in December 2007 and again as recently as June 2010. Each time there is a production, startling new *Brady* violations come to light. *See* Dkt. 1168, Charts 1-10. The hearing will expose more. In the March letter, Stokes stated: "The disk contains scanned copies of the witness statements, notes and grand jury transcripts submitted to the court, pursuant to its request, on June 1, 2004. These documents formed the basis of the government's July 30, 2004, disclosure letter."

misconduct at trial by making assertions that were directly belied by the exculpatory evidence they withheld. **(5)** And, to this day, despite Judge Sullivan's actions in *Stevens* and "changes" in DOJ discovery policy, current prosecutors still deny any *Brady* violation or misconduct here and adamantly oppose a hearing on the issues.

The prejudice at trial from the ETF's misconduct was palpable and overwhelming. Defense counsel were like "deer in headlights." In just one example of many, Merrill counsel Zrike went from being the witness who could have and should have exonerated all defendants (had her *Brady* material been disclosed pre-trial as required)[2] to the witness who Friedrich told the jury was "devastating to the defense." This was possible only because the Task Force concealed that Zrike knew about the buy-back issue, tried to incorporate the best efforts agreement in the documents, and that Enron's counsel, V & E, rejected it because it could be deemed a buy-back and they would not allow Enron to retain any risk that would mitigate Enron's gain on the sale.

These 1005 pages of documents produced electronically this March *prove beyond refute* that the Task Force prosecutors selectively withheld declaratory, exculpatory statements by key witnesses with personal knowledge that went to the heart of the defense and exonerated all defendants on all charges. Instead of seeking *truth*, prosecutors obtained convictions built purely on hearsay, misrepresentations, and deliberately-created misunderstandings or outright lies that were belied by the first-hand evidence they withheld. *See* Chart 1 (deliberate omissions from the highlighted material); Chart 2 (misrepresentations refuted), *infra*. These egregious Due Process violations caused the wrongful conviction and imprisonment of four men who were innocent of all charges.

[2] As soon as Zrike left the grand jury, having given truthful *Brady* evidence which the ETF withheld, the ETF notified her counsel that her status changed from subject to "target."

All are now free of prosecution except Brown.[3] Prosecutorial misconduct deprived Brown of any semblance of a fair trial. Brown spent *a year in prison* while the government hid the truth. At a minimum, Brown is entitled to a new trial and to a hearing on this motion.

Sunlight is a powerful disinfectant. The reason the government so strongly opposes a hearing on this motion is because it does not want its misconduct exposed–as it has been recently in *Broadcom*, *Stevens* and other cases. Yet, the *Brady* violations here are as egregious as in the *Stevens* prosecution, in which the government ultimately confessed its *Brady* violations and dismissed rather than face a hearing.[4] Judge Sullivan referred *the prosecutors* for criminal investigation.[5] As Judge Sullivan's decisive acts exemplify, this Court's Article III independence and status as an equal branch of government were created to *protect Brown's* constitutional rights *against* the government's wrongdoing–*not* to protect the government from its constitutional obligations and violations.

The government's misconduct violated at least two separate constitutional rules, either of which requires a new trial. First, under the dictates of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963), "suppression of material evidence justifies a new trial irrespective of the good faith or bad faith of the prosecution." *Giglio v. United States*, 405 U.S. 150, 153, 92 S. Ct. 763, 766 (1972) (citations omitted); *United States v. Andrews*, 532 F.3d 900, 905 (D.C. Cir. 2008) ("If the undisclosed evidence is material, a new trial is required.") (*citing Kyles v. Whitley*, 514 U.S. 419,

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[3] Fuhs was acquitted by the Fifth Circuit after serving 8 months in a maximum security prison. All charges were recently dismissed in full against Bayly.

[4] Matthew Friedrich was involved in both cases. *See* http://www.c-spanvideo.org/program/282050-3 (last visited July 9, 2010) (Friedrich, bragging about the work of the *Stevens* prosecutors).

[5] Neil A. Lewis, *Tables Turned On Prosecution In Stevens Case*, N.Y. TIMES, April 7, 2009, attached hereto as Exhibit **A-1**. *See also* Order (Exhibit **A-2)**, and Transcript of Hearing, *United States v. Stevens*, No. 1:08-cr-00231-EGS (D.D.C. April 7, 2009) (vacating jury verdict and ordering dismissal of indictment), excerpts attached hereto as Exhibit **A-3**.

421-22, 115 S. Ct. 1555, 1560 (1995)). "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." *Kyles*, 514 U.S. at 434, 115 S. Ct. at 1566. "*Brady* violations are just like other constitutional violations. Although the appropriate remedy will usually be a new trial, *a district court may dismiss the indictment* when the prosecution's actions rise . . . to the level of flagrant prosecutorial misconduct. *Chapman*, 524 F.3d at 1086. *Cf. United States v. Ramming*, 915 F. Supp. 854 (S.D. Tex. 1996); *United States v. Dollar*, 25 F. Supp. 2d 1320 (N.D. Ala. 1998).[6]

Second, the Due Process Clause forbids the government from introducing or failing to correct testimony that it knows or reasonably should know to be false. *Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 1177 (1959) (noting "[t]he principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, [is] implicit in any concept of ordered liberty"); *Giglio*, 405 U.S. at 153, 92 S. Ct. at 766 (The Supreme "Court [has] made clear that deliberate deception of a court and jurors by the presentation of known false evidence is

[6] "Evidence is material if 'the undisclosed information could have substantially affected the efforts of defense counsel to impeach the witness, thereby calling into question the fairness of the ultimate verdict.'" *United States v. Cuffie*, 80 F.3d 514, 517 (D.C. Cir. 1996) (*quoting United States v. Smith*, 77 F.3d 511, 515 (D.C. Cir. 1996)). Brown is also entitled to a new trial and a dismissal of the indictment under this Court's supervisory powers. Even where government misconduct is not sufficiently "outrageous" to violate due process, the Court under its supervisory powers may impose various sanctions, including dismissal. *United States v. Chapman*, 524 F.3d 1073, 1084 (9th Cir. 2008) (affirming dismissal pursuant to the court's supervisory powers due to government's violation of discovery obligations and flagrant misrepresentations to court). "Repeated instances of deliberate and flagrant misconduct justify dismissal of the indictment," *United States v. Omni Intern. Corp.*, 634 F. Supp. 1414, 1438 (D. Md. 1986), both "to vindicate a defendant's rights in an individual case" and "primarily to *preserve the integrity of the judicial system*." *Id*. (citations omitted) (emphasis added). Brown has exhaustively set forth the legal authority for (1) a new trial because of *Brady* violations and/or under the five-factor *Berry* test, Dkts.1004, 1020, 1030, 1061, 1160, 1201, and (2) dismissal of the indictment for prosecutorial misconduct. Dkts. 1168, 1204. He is entitled to a new trial under either or all of the standards. Brown's prior briefing on these matters is incorporated herein by reference.

incompatible with rudimentary demands of justice.") (citation omitted); *accord Tassin v. Cain*, 517 F.3d 770, 776 (5th Cir. 2008).[7] "Because the integrity of our justice system relies on the presentation of truthful evidence for a jury to evaluate, 'the prosecution's knowing use of false testimony entails a veritable hair trigger for setting aside the conviction.'" *United States v. Quinn*, 537 F. Supp. 2d 99, 120 (D.D.C. 2008) (Bates, J.) (citation omitted).[8]

I. The ETF-Highlighted Dolan 302 Produced March 30, 2010, Shows That The ETF Deliberately Withheld Clear Exculpatory Evidence of Dolan's Knowledge And Actions.

Attached as Exhibit **B-1** is the Dolan 302 as it was *highlighted by the ETF itself*. Those highlights surround–but omit or the disclosure alters–the crucial facts, *inter alia*, that: (1) Dolan himself deleted the buy-back language from the engagement letter; (2) Dolan explained his notes which reflected his knowledge of the deal, the fees to ML, and the gain to Enron; (3) he told Wilson to make changes to the engagement letter; and, (4) it was *his* handwriting on the document. Prosecutors therefore flat-out lied when they accused Fuhs and Brown's group of deleting the buy-back language to hide it from the lawyers and auditors. Dolan had told them he did it. Ex. **B-1**, **B-2**, Chart 2, *infra*.

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[7] "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue*, 360 U.S. at 269, 79 S. Ct. at 1177.

[8] *See also United States v. Williams*, 233 F.3d 592, 594 (D.C. Cir. 2000) ("[t]he phrase – 'reasonable likelihood,' 'could have affected' – mandates a virtual automatic reversal of a criminal conviction") (citation omitted). "*Napue* sets forth a very defense-friendly standard. A defendant need only show that false testimony was presented at trial, that the government knew, or should have known, that the testimony was false, and that there is reasonable likelihood that the false testimony could have affected the judgment of the jury." *Quinn*, 537 F.Supp.2d at 120. *See also Drake v. Portuondo*, 553 F.3d 230, 241 (2d Cir. 2009) ("if it is established that the government knowingly permitted the introduction of false testimony, reversal is virtually automatic") (quoting *United States v. Wallach*, 935 F.2d 445, 456 (2d Cir. 1991)). This Court (and the government) relied exclusively on *Wallach* to deny Brown's Motion to Dismiss for facial insufficiency of the indictment. *United States v. Bayly*, 2008 WL 89624, *4-5 (S.D. Tex. 2008). Hopefully, the Court will rely on the same opinion when *Wallach* requires granting Brown a new trial.

In an even more egregious and flagrant constitutional violation, in crafting her "*Brady* summary," Ruemmler *further omitted* the *Brady* material the ETF itself had highlighted–the clear statement explaining why Dolan changed the engagement letter and deleted the buy-back language: "such an agreement would be improper because such a transaction could be viewed as a 'parking' transaction." Exhibit **B-2** [Dolan 302]. And, she omitted: "Dolan's understanding was that ML purchased an interest in the Nigerian Barges with the expectation that Enron would help ML find a buyer for ML's interest in the barges." She also deleted the word "subsequent" in reference to a conversation between Dolan and Brown which proved Brown never agreed with Merrill's participation in the transaction. See Ex. **B-2**, *infra*.

II. The ETF-Highlighted Production Proves Ruemmler Deliberately Withheld From the Court-Ordered Summary Zrike's Exculpatory Statements About The Best-Efforts Representations And Why It Was Not In the Documents.

The ETF highlighted, but Ruemmler withheld the crucial statement that Zrike made to the grand jury: "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." Zrike GJ, Dkt.1168, Ex. F, at p. 75; Exhibit **C**, *infra*. Ruemmler could have only purposely omitted this from the "summary" because *she included the sentence after it on the same page*. In addition, **the ETF withheld all Zrike's testimony and statements regarding the best-efforts assurances and her attempts to document it from nearby pages**. Dkt.1168, Ex. F, at pp. 55, 63-64, 66-70. After hiding the truth, the prosecutors then made outrageous misrepresentations to the Court and jury that were directly refuted by the evidence they concealed–including that Zrike was "devastating to the defense" and arguing that the defendants were all liars because there was no best efforts agreement in the documents and defendants could not

explain why. Charts 2-5, *infra*.[9] There is no innocent explanation for this flagrant misconduct, and it was extremely prejudicial to Brown. Zrike's grand jury material, SEC testimony (never disclosed), not to mention her 302, could have been used by defense counsel to prepare to examine Zrike and to *prepare the entire defense*–from opening statement throughout the trial. It was the crux of the defense. Zrike knew everything that was discussed and negotiated, beyond the defendants, and the deal was lawful. This evidence alone or in combination with other egregious omissions–exacerbated ten-fold by outrageous representations by the ETF at trial and belied by what they withheld–screams *injustice*, and leaves no confidence in the jury's verdict. Charts 1-11, *infra*.

III. The ETF-Highlighted Brady Materials Prove That The Task Force Deliberately Withheld Exculpatory Evidence Of McMahon That Proves Brown's Innocence And ETF Misconduct At Trial.

The recently disclosed raw notes of McMahon's interviews in 2002 exonerate Brown on all counts. Exhibit **D**. McMahon was unavailable to Brown at trial (Tr. 5260-61), and the government made only a four-line, misleading disclosure of his statements.[10] As with the Dolan "summary," Ruemmler deliberately withheld statements the ETF had previous highlighted in obvious recognition that it was *Brady* material. *See* Ex. D, at 000478, 494, 513-515, 544, 560. The following highlights and other excerpts from the same notes show that the ETF has known and withheld these crucial exculpatory facts since as early as 2004:

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[9] The ETF did not even list Hoffman as possessing *Brady* evidence. The withheld evidence of Hoffman establishes that Hoffman also saw the buy-back language in the draft engagement letter, discussed it with Dolan, and knew it was deleted. *See* FBI 302 of Alan Hoffman, October 12, 2002, Dkt. 1204, Ex. A.

[10] "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, Exhibit O, at p. 7. This disclosure was taken from the notes of only one interviewer, Stephanie Segal. Exhibit **D**, at DOJ-ENRONBARGE-000529, *infra*.

1. Enron Never Promised Or Made Any Guarantee To Merrill That It Would Receive A Rate-Of-Return, Buy-Out, Or Specific Sale Price.

Highlighted by the ETF–but withheld: No recollection of a promise (to re-buy) outside best-efforts promise in the phone call. Ex. D, DOJ-ENRONBARGE-000544 (Alex DeMots). Andy said – Enron help remarket in next six months. *Id*. at 000560 (Jim Pitrizzi). In addition, they also withheld from the same notes that McMahon affirmatively told the government:

- Enron "[n]ever made rep[resentation] to ML [Merrill Lynch] that E[nron] would buy them out or [] @ set rate of return." Ex. B, DOJ-ENRONBARGE-000449 (Bob Roach).
- NO - never guaranteed to take out [Merrill Lynch] w/rate of return. *Id*. at 000493 (Ross Kirschner).

2. Fastow Actually *Agreed* To Oral Assurances That Enron Would Use Its Best Efforts To Assist In Re-Marketing Merrill's Equity Interest To A Third-party.

At least four separate government interviewers confirmed, and the ETF highlighted but withheld both the highlighted exculpatory evidence below *and* the other statements below:

- Disc[ussion] between Andy [Fastow] & ML [Merrill Lynch]. Agreed E[nron] would use best efforts to help them sell assets. Ex. D, DOJ-ENRONBARGE-000447 (Roach).
- AF [Fastow] agreed that E[nron] would help them [Merrill Lynch] remarket the equity 6 mo[nths] after closing. *Id*. at 000450 (Roach).
- Andy agreed E would help remarket equity w/in next 6 months. –**no further commitment**. 000494 (Kirschner).
- 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).
- Enron would use best efforts to help remarket the equity. *Id*. 000513 (Casette).
- AF agreed that ENE would help them remarket in 6 mos. 000514. Don't recall any promise that ENE would get them out. 000515 (Casette).
- Andy said–Enron help remarket in next six months. *Id*. 000560 (Pitrizzi). Chart 1.[11]

[11] Contradicting the government's representation that Fastow told Merrill Lynch that LJM2 was always available to take out Merrill's equity interest (Dkt.1168, Ex. I, at pp. 3-4; Tr. 6150, 6264), McMahon said LJM2 was not mentioned on the call. **McMahon "[d]oesn't recall LJM being mentioned at all" regarding the transaction**. Ex. B, DOJ-ENRONBARGE-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). Kelly Boots, who was forced to take the Fifth Amendment during the trial

These highlighted yet withheld (and non-highlighted and withheld) raw notes prove Brown's innocence and contradict the government's concocted hearsay case on all counts. Remarkable in its omissions, Ruemmler's pre-trial "summary" refers only to what Merrill *wanted*, and fails to state *what actually happened*–the crux of the defense: **that Fastow *agreed* to these lawful, best-efforts assurances on the phone call with Bayly–and that is all.** This is the fact upon which the entire case turned and what Zrike tried to document. The McMahon (and Fastow) raw notes (Ex. D; Dkt.1168, Ex. B) contain startling revelations which implicate all of the pre-trial production and prove its inadequacy: the **government concealed the fact that McMahon, the unindicted, alleged guarantor, told them that no one guaranteed Merrill Lynch a rate-of-return, buy-out, or specific price for the asset**. The raw notes are unequivocal–McMahon, who was never indicted, said "**NO - never guaranteed to take out [Merrill Lynch] w/rate of return**." Ex. D, at 000493. "**No further commitment**." *Id*. at 000494. It is now beyond dispute that the ETF reviewed this material long ago, recognized its significance to the defense in 2004, and deliberately withheld it for 6 years. *See also* Dkt.1168, Ex. D, at p. 4. This evidence confirms Brown's "understanding" and testimony that Enron had only agreed to use its "best efforts" to find another buyer. Chart 6, *infra*.

The ETF egregiously capitalized on its *Brady* violations by making at least twenty (20) representations in opening and closing arguments (alone) portraying as a crime that McMahon gave Merrill an unlawful and secret guarantee to buy back the barges which Fastow then ratified (Tr. 6157-59, 6216-17, 6527-28). *See* Dkt.1168, at pp. 28-34; Chart 7 *infra*. The government was able to make these representations only by concealing McMahon's statements, then soliciting, over

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after the government decided not to call her as a witness, Tr. 4336, was definitive that LJM2 was not even mentioned. Dkt.1004, Ex. I, at p. 3. Boots was in Fastow's office for the phone call. *Id.*

objection, the false or wrong hearsay testimony of Glisan, Kopper, and other Fastow "subordinates" whom Fastow had admittedly mislead–a fact also concealed from Brown.

IV. Evidence Prosecutors Concealed Proves That Key Government Witnesses Gave Wrong Or Perjured Testimony.

Glisan was the government's star witness in *Brown I*,[12] with Kopper running a close second. Evidence concealed for years proves that Kopper and Glisan's testimony in *Brown I* was wrong or perjured. *See* Dkt. 1168, Exs. B, at Bates #000263-264, 349; D, at pp. 4-6; J, at pp. 1532-33; K, at p. 7189. **The fact that long-concealed first-hand evidence from Fastow and McMahon both directly contradicts the government's hearsay-only case and flat-out declares as false the testimony of the Task Force's hearsay witnesses is alone sufficient to entitle Brown to a new trial**. *Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 1177 (1959).[13]

It is beyond dispute that the testimony of both Kopper and Glisan–the only two upper-level executives from Enron who testified–"affected the judgment of the jury." *United States v. Wall*, 389 F.3d 457, 473 (5th Cir. 2004), *cert. denied*, 544 U.S. 978, 125 S. Ct. 1874 (2005); *accord United States v. Manners*, — F.3d —, 2010 WL 2546109, *3 (5th Cir. 2010). *See* Dkt. 1004 at p. 7; *supra*

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[12] Mary Flood, *Star Witness in Enron Trial Could Testify Tuesday*, HOUS. CHRON., October 4, 2004, attached hereto as Exhibit **E**. *See also* John C. Hueston, *Behind the Scenes of the Enron Trial: Creating the Decisive Moments*, 44 AM. CRIM. L. REV. 197, 200-02 (2007) (ETF prosecutor; outlining critical nature of Ben Glisan in the Enron trials).

[13] McMahon stated: He "reviewed the transcript of Mr. Fastow and former Enron treasurer Ben Glisan's testimony in the Lay-Skilling trial, Mr. Glisan's testimony in the trial of the Nigerian Barge case, and the FBI's Form 302 of Mr. Fastow's statements regarding the transaction. Based on that review and his knowledge of what actually occurred,[he] concluded that both men testified falsely." Dkt.1168, Ex. D, at pp. 4-6. Fastow, too, has now testified that Kopper's testimony at *Brown I* was contrary to his own "in many respects." Dkt.1168, Ex. J, *Newby*, at pp. 1532-33. And in the *Skilling* trial, Fastow said that Glisan and Kopper's testimony in the Barge trial was "largely contradictory to my recollection of events." Dkt.1168, Ex. K, *Skilling*, at Tr. 7188-89. The long-concealed Fastow raw notes make clear why their testimony was wrong or false. *See* Dkt.1168, at pp. 12-28.

pp.1-4. The Task Force relied heavily on their testimony in closing arguments.[14] By pointing to Glisan's testimony 52 times and to Kopper's 27 times, the government exacerbated the egregious concealment of the contradictory first-hand evidence of the Merrill-Enron call participants in this hearsay-only case–where life and liberty hung on the words in a ten-minute phone conversation. It is obvious why the Task Force chose not to have a single participant in the Merrill-Enron call testify: they all contradict the Task Force's contrived, hearsay, falsely-premised and falsely-presented case–and the Task Force knew it. *Cf.* Dkt.1004, at pp. 7 n.10, 16 n.26.

V. The ETF-Highlighted Evidence Proves That Prosecutors Deliberately Withheld The Exculpatory Evidence Of Merrill Executive Schuyler Tilney Since 2004.[15]

The government finally disclosed its raw notes of Schuyler Tilney's interviews, which the government has concealed since *July 2002* and highlighted in 2004. Exhibit **F**, *infra*. Tilney flatly contradicts the ETF's case and corroborates Brown's testimony that *Enron had only made best-efforts assurances to find a third-party purchaser for Merrill's equity interest*. Chart 9, *infra.* Despite highlighting *around* certain facts, and omitting even its own highlighted ones noted below, the Task Force withheld that Tilney told the government affirmatively that Fastow *told* Merrill Lynch that Enron "will find a new home" for Merrill's equity interest. Ex. F, at 000704. *See id*. at 000681 ("a strong verbal understanding [that] they would find a home for this"); 000704 (same); 000726 (same). Tilney said that "ML had no legal recourse to Enron" and that "ML [was willing to] place

[14] *See*, *e.g.*, Tr. 6159 ("And during that conversation [between Glisan and McMahon], Mr. McMahon confirmed to Mr. Glisan that he had, in fact, given an oral guarantee to Merrill Lynch."); Tr. 6218-19; Tr. 6523 ("And he 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.").

[15] The government's pre-trial, 6-sentence "*Brady*" "summary" regarding Merrill Executive Schuyler Tilney (participant in the Fastow/Bayly phone call) *omits any reference to the best-efforts agreement*. Dkt.1168, Exhibit O, at p. 8.

$7 million at risk to build its relationship with Enron." *Id*. at 000679. A "**"commitment to guaranty' [reflected in the APR] conflict[ed] w[ith]/his understanding of what would take place under [the] transaction**." *Id*. at 000706. **Fastow's representations *did not include a guarantee–orally or in writing***. *Id*. at 000680.[16] There was "no legal obligation for E[nron] to do anything." *Id*. at 000727. This is almost *verbatim* what Brown told the grand jury. Chart 9, *infra*. There is no excuse or innocent explanation for the government to have withheld this information.

By failing to disclose any and all of this crucial evidence, the government wilfully distorted the truth-seeking process. The defense was entitled to know well before trial and to prepare with full knowledge of the exculpatory evidence, *and* Brown was entitled to have a jury hear that: **(1) the attorneys were fully aware of the discussions and tried to document the best efforts agreement but, ultimately, Enron refused even to do that so that there was no possibility Enron was retaining any risk that would undermine the accounting of the transaction as a sale; (2) the actual call participants told the government long before trial that it was only a lawful, best-efforts agreement–no promise or guarantee; (3) Fastow and McMahon (never indicted) both contradict the government's Barge witnesses; (4) Fastow's raw notes disclose that even he told the government he made only a best efforts assurance; (5) Fastow's raw notes explain why the**

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[16] Tilney told the government (and the ETF withheld) that this sort of *best efforts assurance* was commonplace within the industry, and not unusual. *Id*. at 000683. *See id*. at 000727 (best efforts deal). Zrike 302, Dkt.1168, Ex. E, at p. 11. The newly produced notes also disclose that Barry Mandel, general counsel for Merrill Lynch, stated: "That is why we evaluated it as 7mm investment and prepared to lose it." Ex. F, at 000679. *See id*. at 000705 ("looked @ investment–was ML [Merrill Lynch] prepared to lose $7m[illion]"); 000745 (same); 000678; 000727 ("**ML placed $7million @ risk to E[nron] w/no guarantee"**); 000743; 000744; 000745. Tilney believed that Katherine Zrike, in-house counsel for Merrill Lynch was on the Bayly/Fastow phone call. Ex. F, at 000678. *See id*. at 000677 (listing call participants, including Kathy Zrike); 000726 (same). Kelly Boots, who was in Fastow's office for the entirety of the phone call, also believed and told the ETF in 2004 that Merrill counsel, a female, may have been on the call. Dkt. 1004, Ex. I, at p.3. *See* Chart 11, *infra*.

testimony of government witnesses was wrong or perjured; (6) McMahon declared Glisan's testimony false; (7) the attorneys deleted the buy-back language because Merrill would not participate in a parking transaction; and, (8) Merrill counsel deemed Brown and Fuhs to be ethical bankers who brought issues of concern to his attention. The ETF's own highlighting demonstrates what can only be deliberate conduct. The suppression of each and any of these pivotal exculpatory facts constitutes a flagrant constitutional violation, directly contradicts ETF assertions at trial, and could have and should have resulted in the acquittal of each defendant or a dismissal of the case pre-trial.[17]

VI. Brown Is Entitled To Discovery, An Evidentiary Hearing, and A Dismissal.

A hearing is essential because of the evidence of prosecutorial misconduct which bears directly on Brown's entitlement to a new trial. *United States v. Hamilton*, 559 F.2d 1370, 1373 (5th Cir. 1977) ("Where evidentiary hearings are ordered, it is because of unique situations typically involving allegations of ..., prosecutorial misconduct."); *cf. United States v. Espinosa-Hernandez*, 918 F.2d 911, 913-14 (11th Cir. 1990) (reversing for failure to order evidentiary hearing on prosecutorial misconduct). Defense counsel in *Brown I* could not prepare for trial or make a reasoned decision as to witnesses–much less decide what to ask–without substantive disclosure by the prosecution. *Leka v. Portuondo*, 257 F.3d 89, 103 (2d Cir. 2001); *United States v. Carmichael*,

[17] Brown has requested all of this material, *with specificity*, for years, while the government repeatedly and falsely claimed that it had met its *Brady* obligations. *See*, *e.g.*, Dkt. 948, at pp. 29-31; Dkt.1157, at p. 9. *See* Dkt. 1168, Charts 1, 2.

269 F.Supp.2d 588, 597 (D.N.J. 2003). And the first-hand exculpatory evidence the ETF concealed left the defense helpless to rebut the government's distortions, misrepresentations, lies, and hearsay.[18]

In denying Brown's Speedy Trial Act motion, Dkt. 1208,[19] the Court stated that "it expected to conduct initial hearings or additional hearings on these motions[,]" including Brown's Motion for New Trial. Dkt.1208, at pp. 11-12. The court relied on 18 U.S.C. § 3161 (h)(1)(D), and excluded "all time between the filing of a motion and any *required hearing* thereon." Dkt.1208, at p. 12 (emphasis added). Indeed, the Court went on to state that "Brown's counsel expressly requested the Court to set a hearing date for Brown's motion for new trial, which has yet to be heard." *Id*. at p. 13 (citation omitted). The court cannot now, with the other edge of the same sword, deny Brown an evidentiary hearing on his Motions for New Trial and To Dismiss.

This is far too important an issue *to the integrity of the Court itself* to whitewash or sweep under the rug. *United States v. Omni Int'l.Corp.*, 634 F. Supp. 1414, 1438 (D.Md. 1986) (courts cannot "become accomplices to such misconduct") (citation omitted). Despite Judge Sullivan's

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[18] As in *Stevens*, Brown needs discovery into all communications between the government and all witnesses, raw notes of all witness interviews, including those of prosecutors, to subpoena witnesses to provide first-hand non-hearsay evidence that the government concealed, to elicit testimony from witnesses about abusive government tactics, and to subpoena and interrogate the former members of the Enron Task Force–who highlighted and surgically redacted the original *Brady* production. Brown is entitled to all this evidence to understand the depth and severity of the *Brady* violations and misconduct in this case; including (1) to determine who made the redactions, according to what principles and whose instructions, and why the Task Force repeatedly told this Court it had met its *Brady* obligations but consistently (and still) opposes further productions; (2) to make known all the details regarding the ETF's determinations to withhold this information; and (3) to evaluate the nature and full extent of the Department of Justice's knowledge and complicity in the misrepresentations made to the Court and jury during *Brown I*. *See United States v. Burnside*, 824 F. Supp. 1215, 1258 (N.D. Ill. 1993) (government has affirmative duty to disclose mere indications of improper conduct by witnesses and government personnel "so as to enable counsel to undertake the inquiry which the government deliberately avoided").

[19] Brown urges the court to reconsider its erroneous Speedy Trial Act determination and does not waive any existing or further challenges thereto (including as to the "sham" nature of any hearings).

actions, the Dept. of Justice still cannot recognize *Brady* material and admit its wrongdoing. As in *Stevens*, strong action must be taken to deter the government from engaging in misconduct that mocks our system of justice. Here, as in *Stevens* and *Omni Int'l Corp.*, this Court cannot credit the government's vehement opposition to a hearing and continued denials of past and current *Brady* violations and obligations. As in *Omni*,

> The AUSA's failure to be fully candid could have had tragic consequences. The Court was faced with the issue of whether or not to permit an evidentiary hearing. If the Court had blindly relied on the AUSA's representations, no hearing would have been held . . . In light of all the testimony adduced at the [28-day-long] evidentiary hearing, it is clear that this case rises to the high threshold imposed for invocation of the supervisory power [to dismiss]. The Court condemns the manner in which the Government proceeded, and cannot now stand idly by, implicitly joining the federal judiciary into such unbecoming conduct.

Omni Int'l Corp., 634 F . Supp. at 1434, 1438-39. If this court has not learned enough to date to grant a new trial and dismiss this case, it should judicially mandate full discovery, including the raw notes of all Barge witness interviews, prosecutors' notes, and all government communications regarding witnesses, and hold a full evidentiary hearing to seek the truth.

CONCLUSION

As in *Stevens*, the Department of Justice should confess error in its *Brady* violations, move to vacate Brown's wrongful convictions on Counts IV and V, and dismiss all charges against Brown. If it does not, Brown's motions for new trial and to dismiss the entire indictment should be granted.

Dated: July 9, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served upon Patrick Stokes, counsel for the United States, via the ECF system on July 9, 2010. It has also been served electronically on all counsel of record.

/s/ Sidney Powell
Sidney Powell