05-20319

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee/Cross-Appellant
v.

JAMES A. BROWN,
DANIEL BAYLY,
ROBERT S. FURST,
WILLIAM R. FUHS,
Defendants-Appellants/Cross-Appellees

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-Appellant James Brown certifies that the following persons and entities have an interest in the outcome of this appeal, No. 05-20319:

1. United States of America, Plaintiff-Appellee;

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

3. Stephan Oestreicher, Joseph Palmer, Attorneys for Plaintiff-Appellee (Department of Justice);

4. Daniel Bayly, Defendant-Appellant;

5. James A. Brown, Defendant-Appellant;

6. William R. Fuhs, Defendant-Appellant;

7. Robert S. Furst, Defendant-Appellant;

8. Sidney Powell, Deborah Pearce, Counsel for Defendant-Appellant James A. Brown (Powell & Pearce);

9. Heller Ehrman, Counsel for Defendant-Appellant James A. Brown (Lawrence J. Zweifach, Holly Kulka, Warrington S. Parker, III, of counsel);

10. Robbins, Russell, Englert, Orseck & Untereiner LLP, Counsel for Defendant-Appellant Daniel Bayly (Lawrence S. Robbins, Gregory L. Poe, Alan Untereiner, Alice W. Yao);

11. Gardere Wynne Sewell, LLP, Counsel for Defendant-Appellant Daniel Bayly (Thomas A. Hagemann, Marla Thompson Poirot, of counsel);

12. Richards Spears Kibbe & Orbe L.L.P., Counsel for Defendant William R. Fuhs (David Spears, Christopher W. Dysard, of counsel);

13. Wilmer Cutler Pickering Hale & Dorr LLP, Counsel for Defendant William R. Fuhs (Seth P. Waxman, Paul A. Engelmayer);

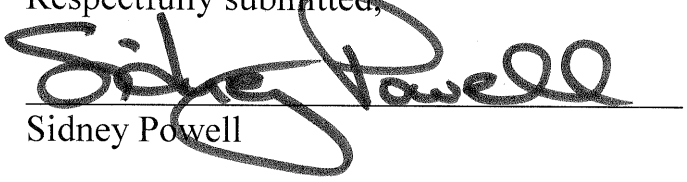
14. Carter Ledyard & Millburn LLP, Counsel for Defendant Robert S. Furst (Ira Lee Sorkin, Daniel J. Horwitz, of counsel);

15. Howrey Simon Arnold & White, LLP, Counsel for Defendant Robert S. Furst (John W. Nields, Jr., William L. Webber);

16. Merrill Lynch & Co., Inc.; and

17. Enron Corp.

Respectfully submitted,



Sidney Powell

RECOMMENDATION ON ORAL ARGUMENT

Jim Brown is innocent and requests oral argument. An employee without authority to bind Merrill Lynch, he opposed Merrill's participation in a 1999 year-end transaction with Enron and identified numerous business risks to Merrill, including that Enron had no repurchase obligation for the three Nigerian power barges, and that Merrill could lose its entire investment. He followed Merrill's procedures, took his concerns to corporate counsel, and as the district court noted, was "acting in his ordinary role" at Merrill. The heightened focus of oral argument will assist the Court in deciding this appeal.

This was the second case tried by the Enron Task Force. The first was unanimously reversed by the Supreme Court for errors similar to those raised here. *Arthur Andersen LLP v. United States*, 125 S.Ct. 2129, 2136 (2005). This appeal raises issues of first impression and, *inter alia*, challenges the government's creative and unprecedented use of several statutes and its elimination of "intent to violate the law" and "materiality" from critical jury instructions. The record is enormous, consisting of 148 volumes of pleadings, 36 volumes of transcript, 9 sealed envelopes and thousands of pages of exhibits. This is a Class IV case that warrants extended oral argument. Brown requests 20 minutes for the presentation of his own issues in addition to the time allotted other defendants.

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INTRODUCTION

This case arises from a relatively small business transaction between Merrill Lynch and Enron at year-end 1999. At that time, Enron was a highly respected company with revenues of $40 billion and $957 million in profits. Upon Enron's solicitation, Merrill invested $7 million cash to purchase a minority interest in a company that would profit from three electrical power barges stationed off the coast of Nigeria. After a telephone conversation between Andrew Fastow of Enron, Daniel Bayly of Merrill, and others, assuring that Enron would market Merrill's interest in the barges to another party within six months, Vinson & Elkins finalized documents for the sale that expressly excluded any prior oral conversations or representations.

None of the Merrill Defendants personally profited from this transaction, and none engaged in any conduct that was unlawful on its face. This was a corporate transaction that served only corporate purposes, by businessmen engaged in the daily performance of their jobs. Even assuming the government's best case, the district court noted, "the Nigerian Barge assets were real, the negotiations with Nigeria for the sale of power generated from the barges were real, and a bona fide sale ultimately was consummated in the year 2000, producing an authentic profit for Enron of more than $50 million" (1stSR41:19)

The government prosecuted the Merrill employees on its version of a telephone conversation, to which no government witness was a party, in which Andrew Fastow allegedly guaranteed that Enron would buy the barges back within six months at a specified rate of return. Jim Brown was neither a party to this conversation nor did he make Merrill's decision to enter this transaction. In fact, it is undisputed that he opposed it because of the business risks it raised. Enron represented that its outside auditors approved this deal, and in-house counsel at Merrill walked the transaction through Merrill's approval process.

When the investigation arose, Brown voluntarily produced documents and testified in multiple proceedings. He did not profit a dime from this transaction, nor did he seek to do so. A businessman with an outstanding reputation, Brown engaged in facially innocent conduct, was convicted of doing his job on pure hearsay, and under statutes that no court has ever read to criminalize this business conduct. The government produced no objective evidence–expert or otherwise–that the accounting for this complex transaction was actually wrong, and the jury instructions obviated any need for the government to prove any *intent to violate the law* or that a *materially* false statement was even made in Enron's books. Reversal and acquittal are required.

STATEMENT OF JURISDICTION

This is an appeal from a conviction rendered in the Southern District of Texas charging conspiracy to commit wire fraud, to deprive Enron of "honest services," and to falsify Enron's books; and, the substantive offenses of wire fraud, perjury, and obstruction of justice. 18 U.S.C. §§ 2, 371, 1343, 1346, 1503, 1623; 15 U.S.C. §§ 78m(b)(2)(A) and (B), 78m(b)(5), 78ff, and Title 17 C.F.R. § 240.13b2-1. 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.762-64; RE6). The government cross-appealed (Dkt.813).

STATEMENT OF THE ISSUES

1. Whether the unusual and creative charges are legally insufficient, and the evidence is factually insufficient, to sustain the convictions?

2. Reviewing the instructions, *de novo*, whether the district court's deviation from this Circuit's pattern instructions on intent and willfulness, and its omission of materiality from the books and records charge require reversal?

3. Whether the legally and factually insufficient perjury and obstruction convictions must be reversed because: (a) Brown's testimony was truthful, and corroborated by Fastow and the government's own witnesses; (b) perjury cannot be based on ambiguous questions calling for a witness' understanding; (c) the email on

which the government relied was incorrect–as the government itself knew from Fastow; and (d) the court erroneously excluded Brown's complete testimony?

STATEMENT OF THE CASE

A. Course Of Proceedings And Disposition Below.

On July 22, 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 James Brown with perjury and obstruction of the Enron Grand Jury (Dkt.311; RE2).[1] After a six week trial, a Houston jury returned a guilty verdict against Merrill employees James Brown, Daniel Bayly, William Fuhs, and Robert Furst, and Enron employee Daniel Boyle (Dkt.628; RE3). Brown was sentenced to imprisonment for 46 months and paid restitution of $368,750 and a fine of $250,000 (Dkt.769; RE4).

B. Statement Of Facts

1. Defendant Brown Followed Merrill's Procedures.

In December 1999, Jim Brown managed Merrill's Strategic Asset and Lease Finance Group in New York City (23:4198, 4212). Tom Davis, Merrill's President of the Corporate and Institutional Client Group ["CICG"], issued a memo on

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[1] **Because of the enormity of the record, pleadings are referred to by Docket number [Dkt.]. All trial transcript citations are to the 4th Supplemental Record unless otherwise indicated. We underline the volume number as it is marked by this Court.**

December 1, 1999, explicitly (i) warning of gain-oriented, year-end client transactions and allegations of any "broker-dealer aided and abetted" rules transgressions; (ii) requiring upon penalty of **dismissal** from Merrill, that any proposed transaction potentially raising any issue "**must** immediately be brought to the attention of counsel;" and (iii) making clear that "the transaction may **not** be undertaken until it has been reviewed and approved by division management and counsel." (GX200.4) (emphasis original).

Approximately three weeks after receiving this memo, Brown received a call from Schuyler Tilney, a more senior Merrill officer and head of Investment Banking in Houston (13:1040). Tilney requested Brown's assistance with a transaction with Enron, then the seventh largest company in the United States, and a substantial client of Merrill Lynch (13:1037; 16:2186-87; 17:2397, 2587).

The deal, as it was posed to Brown, solicited Merrill's investment of $7 million[2] to buy a minority interest in three barges equipped with electrical power generating capability, stationed off the coast of Nigeria (12:799, 814-15). Enron would provide 75% seller financing while investing over $40 million itself. Merrill would receive cash flow from the barge operations with an approximate return to be

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[2] Merrill's out of pocket investment was actually $6.75 million after its receipt of a $250,000 fee, and Garrett ran his calculations on that basis (12:814-15; 19:3264).

capped at 22.5% (12:799, 809, 813, 854-55, 863, 890). Enron was in negotiations with other investors, wanted to close by year-end, and would expect Merrill to hold the investment for less than six months (GX206). Tilney asked Brown to forward the proposal (13:1037; 23:4197).

Brown and others received a 26 page memorandum from Enron with estimated projected earnings for thirteen years. Assumptions were conveyed with the understanding that the rate of return was the maximum projected, and that Merrill would be making an equity investment and assuming the risk of loss of the barges. This memorandum further represented that the proposal had been approved by Enron's internal and outside auditors (11:544, 563, 565; 12:664-65, 818, 834, 848, 853-57, 863, 872, 883; 13:950, GX207; RE7). Enron would maintain control of the barges in the proposed stock structure (12:864, 870, 872-74).

Government witness John Garrett, an Enron analyst, prepared the financial models sent to Merrill. He testified under a non-prosecution agreement that nothing in the schedule indicated a buy-back by Enron, and that the schedule projected a thirteen-year cash flow (12:797, 811-13, 815-16, 848, 853-57, 863, 870-72, 887-90; 13:1010-11; FuhsX47). Garrett, who transmitted the information to Merrill, understood that Merrill was buying an equity interest and could be stuck with the

barges indefinitely, or lose its money if they sank, failed or were damaged (12:811-15, 834-35, 871-74, 901-02; 13:950, 952, 1003, 1015; GX511; BrownX683).

2. Brown Alerted Counsel And Superiors To The Risks.

Cognizant of the Davis memorandum, Brown was concerned with all the business risks of owning an interest in floating power barges in Nigeria, as well as the year-end timing of Enron's request. Following Davis's clear directives, Brown outlined all conceivable business risks, and faxed his list and the Enron memorandum to Tina Trinkle (analyst) and Paul Wood (Trinkle's boss) (13:1053, 1059, 1109; GX208.1).

Brown made clear that he strongly opposed the transaction and outlined the risks: political (from Nigeria's instability), environmental, expropriation, operational (supply and mechanical issues), completion (barges were not completely on-line), performance (continued operations controlled by Enron), foreign currency, taxes in Nigeria, credit risk/performance (if something happened to Enron as the barge operator), reputational (damage to Merrill in the press if it were perceived to be involved in aiding and abetting any income statement manipulation by Enron),[3] and

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[3] "Reputational risk" or "headline risk" is a standard business consideration and is reviewed at every Debt Markets Commitment Committee ["DMCC"] meeting. It includes any possibility of "negative publicity regarding the institution's business practices, whether true or not" that could "cause a decline in its customer base, costly litigation, or revenue reductions." Almost anything can affect the reputational risk of a financial institution.

the fact that Enron had no repurchase obligation (13:1036-37, 1084-88, 1094-1103, 1109-17, 1147, 1149-50; 16:1968, 1971-2, 2034-35; GX200.4, 207, 208). Brown met personally with Wood and Trinkle, reviewed these risks, and again expressed his opposition. He then met with in-house counsel Gary Dolan and Katherine Zrike, chief counsel for investment banking, to raise his concerns[4] (13:1035-36, 1090-1105, 1145, 1149-50; 22:4053-54, 4060-62, 4074; 23:4202-04). Trinkle, the government's only witness from Merrill, confirmed that Brown was very negative on the deal because of the many risks that Merrill would lose its investment. The vehemence of Brown's opposition was so "striking" to her that she did not believe the deal would go through (13:1037, 1149-50).

Trinkle phoned in from vacation for a Merrill conference call the morning of December 22, with Bayly, Furst, Tilney, Cox and others.[5] In this call, Tilney, who

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Trinkle acknowledged that Merrill could have a headline risk even if it did nothing wrong (13:1064-65, 1066-67, 1074-78, 1084-88). Davis' memo raised the concern of aiding and abetting (GX200.4). Zrike confirmed that reputational risk was fully vetted and she saw nothing wrong with proceeding (22:4125-26; 23:4203-04).

[4] Zrike and Dolan then had a lengthy call with Furst in which Brown did *not* participate (23:4206).

[5] Trinkle testified that the call was on the 23rd–a day later than it really was–and that Brown was on it (13:1068-70). As it turned out, records confirmed the call was on the 22nd–*before* the DMCC meeting where Brown again voiced his objections, and phone records produced *after* the trial showed that Brown did *not* call in from his office that morning (Dkt. 723; 19:3257-59, 3261; 30:6201).

was pushing the deal, said that Enron would help Merrill find a third-party buyer for the barges or would buy back the barges (13:1038-1045, 1072). Trinkle testified that Tilney or Furst said Enron had given its "strongest assurances" that Merrill would not own the barges past June 30. According to Trinkle, in response to a question from Bayly or Cox about the possibility of getting a written guarantee from Enron that Enron would buy back the barges, either Furst, Tilney, or Brown (she could not remember who) said that Enron could not do that and get the accounting treatment it wanted. Otherwise, if Brown was on this call, he said nothing (13:1046, 1068-70). Bayly did not have approval authority for this transaction, and no agreement was then reached (13:1047, 1071-72; 22:4099). Although Trinkle thought there was "something wrong with the deal," she left this phone conference without any concern of illegality, but rather, only concern for the serious risk of loss to Merrill (13:1057, 1134, 1147-48).

3. Corporate Counsel Led The Approval Process.

Also on December 22, corporate counsel Zrike discussed the deal, including the risks Brown had raised, with Carlos Morales, General Counsel for CICG (22:4075). Zrike decided the proposal should be presented to Merrill's Debt Markets Commitment Committee ["DMCC"] for further review (19:3257-59; 22:4078-80). Tilney pitched the proposal to the DMCC, and Brown again raised the business risks

and his objections to Zrike and the senior executives present (16:1968; 22:4085, 4087, 4090-92; 23:4208-09, 4235-36: GX200.4; BaylyX351.1). The DMCC neither approved nor rejected the proposal (22:4094-94).

Zrike left the DMCC meeting to confer with Bayly, accompanied by Mark McAndrews (Chief Operating Officer for Investment Banking), Mark DeVito (Managing Director, Debt Markets), and Brown. Tilney and Furst joined by phone. Zrike informed Bayly of the DMCC discussion, and Brown voiced his concerns yet again (22:4096-97, 4209). With knowledge of oral assurances from Enron to find a third-party buyer within a few months, Zrike opined to Bayly, Brown and the others that: (i) Merrill was at risk; (ii) it was a true sale; (iii) the agreement was for Enron to remarket it to a third party; (iv) it was not a material or unusual transaction for Enron; (v) Enron's inside and outside accountants and lawyers were aware of the assurances and the temporary nature of the deal, and had approved it; and (vi) there were no legal impediments to proceeding (22:4101, 4103, 4106, 4108-13, 4115-16, 4118, 4136-38; 23:4238-39, 4241). Zrike suggested that it be reviewed by President Tom Davis, and she continued to shepherd the transaction through the Merrill review process (22:4094, 4098, 4127).

4. Davis Approved The Deal, And Brown Did Nothing More Than Try To Protect Merrill's Interests.

Brown did not participate in Zrike's meeting with Davis or in the Fastow call (22:4115-16; 23:4210).[6] The next thing Brown knew, Zrike told him the investment had been approved, and that it was ready to be documented by outside counsel (22:4128, 4132-33).

In February or March 2000, when Brown saw publicity on Nigeria's civil unrest, he expressed concern again about Merrill's risk of loss on the investment (24:4554). LJM2 bought the barges in late June 2000, but Brown was not involved. Emails between Fuhs and Brown show the widespread recognition of Brown's dislike for the barges and his chagrin upon hearing of LJM2's purchase[7] (24:4571; GX235). Brown responded dryly to Fuhs: "thanks bill . . . wanna buy a barge?"

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[6] Zrike, Bayly, Cox, DeVito and McAndrews, met with President Tom Davis, who then approved the deal and directed Bayly to speak personally with Fastow (22:4116, 4094-98). Defendant Bayly, Merrill's head of Investment Banking, and several others from Enron and Merrill, conferred with Enron CFO Andrew Fastow to obtain personal assurances that Enron would find a third-party buyer for Merrill's interest in the barges and that the barges would be on-line on schedule. The government produced no witness who participated in this call. (Davis was not indicted.) (19:3070; GX105).

[7] Brown, Bayly, Furst, Tilney and approximately 95 other Merrill employees, and Merrill itself, invested in a Merrill partnership that then invested in LJM2 along with numerous other financial institutions. Brown's investment was only $32,500 of the $400 million LJM2 fund. Merrill did extensive due diligence before investing in LJM2, and the only evidence is that Merrill believed LJM2 to be a valid third-party entity, independent of Enron, approved by Arthur Andersen and by Enron's board–as they were told (14:1364-65; 15:1685-88; 19:3092-93, 3253-54; 21:3800-01;GX235; GX252).

An email written 14-months later ["the Brown email"] on an unrelated transaction evidences Brown's misunderstanding that corporate counsel was involved in all aspects of this deal, after his involvement ended, and in what he believed to be a lawful transaction (GX240). Brown comments: "[W]e had Fastow get on the phone with Bayly and lawyers and promise to pay us back no matter what." The email is understandably inaccurate in several respects, since Brown had no personal knowledge of the call with Fastow, in which he did not participate. Most importantly, as Fastow's own *Brady* material reflects, he did not make such a guarantee.[8] The government's own witnesses also disavowed the language of the email (14:1487-88). Further, the email reflects that it was written hastily more than a year later, after Brown returned from a business trip, and about an unrelated transaction. It recites his belief that Bayly *and the lawyers* had participated in the phone call with Fastow, thereby evidencing his understanding that counsel and others had complied with Davis' memo and Merrill's policy (GX240).

Brown *never* (i) advocated this transaction; (ii) participated in any decision–making conversation; (iii) spoke with Fastow; (iv) finalized any documents;

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[8] The district court noted this significant fact at Furst's sentencing (Furst Sentencing Tr. 17, 21).

(v) knew or agreed to keep a secret; or (vi) participated in the sale to LJM2.[9] The only evidence is that he opposed the deal because it posed significant business risks, and was less than pleased when, after-the-fact, he learned that LJM2 had purchased the barges.

Brown followed Merrill's directives from Tom Davis, warned of the risks he saw, and pursuant to Merrill's policy, turned the matter over to corporate counsel who took it to President Davis, and with all of Brown's concerns outlined–just as the memo required. He heard counsel tell everyone that there was no legal impediment to proceeding. To Brown's knowledge, both corporate counsel and Davis authorized the transaction to proceed after extensive review (22:4110, 4112-13, 4118, 4124-26, 4128; 23:4202-04, 4230, 4259, 4269, 4272-73, 4303-04; GX204).

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[9] Enron told Merrill it had arranged a sale to a third party (21:3721, 3741). LJM2 bought the barges in late June 2000 because they had become even more valuable and Enron wanted to profit from a package sale to AES. Enron had negotiated and signed a significantly expanded (nine-barge) power purchase agreement and obtained a $60 million letter of credit from Citibank. The nine-barge sale to AES was approved by Enron's board while Merrill still owned the three barges (16:2236-39, 2242; 21:3810-11). LJM2 unilaterally bought the barges from Merrill, without giving Merrill any of this information or an opportunity to profit from the letter of credit, power purchase agreement, or the lucrative deal with AES. Long claimed that he tried to persuade Kopper to wait and let Merrill sell the barges to AES, but the decision was made to avoid any chance of Merrill obtaining an advantage in the sale to AES (14:1284-88, 1304, 1347, 1362, 1471, 1523-24, 1569; 15:1626, 1643, 1671, 1674, 1677; 16:2135, 2248, 2252; 17:2469; 20:3625; 21:3738-39, 3745-3801).

SUMMARY OF THE ARGUMENTS

From its initial decisions on the persons and charges to indict, to its determination to remove "intent to violate the law" and materiality from the most critical jury instructions, the Enron Task Force has expanded federal criminal law beyond precedent to criminalize, what was at worst, a business decision made without criminal intent or for personal gain.

This conviction works a sea-change in the law of honest services wire fraud and prosecutions under 15 U.S.C. § 78ff. It is a case of first impression for the application of the books and records provision to an employee of an unrelated company *and* without a finding that any alleged falsification of those records was even material. This prosecution imposes severe criminal penalties on a businessman who followed his company's procedures and warned of the business risks. After Brown repeatedly raised his concerns, corporate counsel took the proposal through the decision-making process, navigating with senior executives amid complex legal and accounting rules.

The law already provides considerable disincentives for ignoring securities, accounting, or tax regulations.[10] This conviction abandons clear and long-standing

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[10] There is no need to stretch the wire fraud honest services statute or the books and records provision to protect the market or investors. For example, the SEC has broad regulatory and enforcement authority over companies within its jurisdiction. 15 U.S.C. § §

precedent and imposes criminal liability where *no* reasonable businessman would expect it. The contours of this new criminal liability have no basis in the statutes, their history, or precedent.

I.

Brown did not deprive Enron of the honest services of its employees. The statute neither reaches this conduct, nor gives fair warning of what is prohibited. Brown did not engage in bribery, self-dealing, or any conduct within the scope of the honest services statute. This Court's decisions in *United States v. Brumley*, 116 F.3d 728, 734 (5th Cir.) (*en banc*), *cert. denied*, 522 U.S. 1028 (1997), and *United States v. Ballard*, 663 F.2d 534, 540 (5th Cir. 1981), *modified*, 680 F.2d 352 (5th Cir. 1982), require reversal of Brown's convictions on Counts I, II and III, and call into question his convictions on Counts IV and V, which also have independent grounds for reversal.

78o-1-5. It can: (1) issue injunctions, 15 U.S.C. § 77h; (2) impose disciplinary sanctions against broker-dealers; (3) pursue a panoply of administrative remedies; (4) issue cease and desist orders, including ex parte, 15 U.S.C. § 77h-1(a); (5) pursue "equitable remedies," *Mitchell v. Robert Mario Jewelry*, 361 U.S. 288 (1960); (6) order monetary sanctions, 15 U.S.C. 77t(d); and (7) create "novel" sanctions or "ancillary" remedies, so long as those sanctions are not "arbitrary and capricious" as assessed under the Exchange Act. 15 U.S.C. § 78o(b)(4). 15 U.S.C. § 78i prohibits "manipulation of security prices." § 78j broadly prohibits "manipulative and deceptive devices." This authority is intended to (1) vindicate the public interest in an orderly and honest securities market; (2) acknowledge the issuer's interest in mitigating liability and other private harms which might flow from violations; and (3) vindicate purchaser's interest flowing from the improvident purchase.

Similarly, the government has boldly grafted a conspiracy charge onto the books and records provision of 15 U.S.C. § 78m(b). This provision applies only to those who have a "bookkeeping" duty to the issuer and who can actually falsify its books and records; it is not a proper object of this conspiracy charge. The government did not charge Brown with the substantive offense because, as a matter of law, he is not among the class of persons who could be charged with such a violation. *United States v. Castle*, 925 F.2d 831 (5th Cir. 1991). Moreover, Brown did not obtain money or property as required for a wire fraud conviction. Because the court gave a *Pinkerton* charge, the legal insufficiency of any one prong requires reversal of Counts I, II and III. *Yates v. United States*, 354 U.S. 298, 77 S.Ct. 1064 (1957). The factual insufficiency requires an acquittal.

II.

The jury instructions were fundamentally flawed. Selecting from the least demanding of various provisions, the instructions required the lowest level of intent and knowledge. The instructions then omitted materiality for any allegedly false statements in Enron's books and records. Conspiracy, wire fraud, and aiding and abetting require proof of specific intent to violate the law, but the instructions omitted that element. In fact, the only time the judge defined "willfully," he told the jury that the government was *not* required to prove that Brown knew his conduct was

unlawful. Here, as in *Andersen*, "it is striking how little culpability the instructions required." 125 S.Ct. at 2136.

III.

Brown's perjury *and* obstruction convictions depend on an incorrect, ambiguous email and isolated snippets of his testimony. Brown's sworn testimony was true, corroborated by the government's witnesses, by Fastow's *Brady* material, and by Fastow's lieutenant, Kopper. Brown testified freely and voluntarily before multiple tribunals. He never denied there were oral representations. Rather, he was wrongly convicted on both counts because he told the Grand Jury, in response to ambiguous questions, that he *understood* (through unidentified hearsay as to a conversation to which he was not a party) that Fastow's representations were an *assurance*–not a *promise*, which is exactly what Fastow said. The court exacerbated the government's distortions of Brown's intent and the materiality of his answers by erroneously excluding all of Brown's testimony. Had Brown's more complete testimony been admitted, the jury could have seen, in context, that his expansive answers reveal no intent to impede the Grand Jury. He truthfully shared his understanding, albeit hearsay–based, of the Fastow conversation, and there was no evidence that he thwarted or derailed the Grand Jury.

ARGUMENTS AND AUTHORITIES[11]

I. THE CONVICTIONS FAIL BOTH FOR LEGAL INSUFFICIENCY ON EACH PRONG OF CONSPIRACY AND WIRE FRAUD AND FOR FACTUAL INSUFFICIENCY OF THE EVIDENCE.

In its zeal for convictions in the wake of Enron's collapse, the Enron Task Force filed an unprecedented set of creative charges against these Merrill defendants. Unlike any other Enron prosecution, it charged a three-pronged conspiracy to: (i) deprive Enron of its intangible rights to honest services; (ii) obtain money and property from Enron by false and fraudulent pretenses; and (iii) falsify the books and records of Enron. The two substantive counts alleged a wire fraud and deprivation of honest services. There was no substantive books and records charge.

The judge gave a *Pinkerton* instruction, allowing the jury to convict Brown of the substantive offenses merely because he was convicted of conspiracy. The jury returned a general verdict, and it cannot be determined which prong resulted in a conviction. Accordingly, upon the legal insufficiency of any one prong of the conspiracy charge, the convictions on all three counts must be reversed. *Yates*, 354 U.S. at 312, 77 S.Ct. at 1073, *overruled on other grounds*, *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141 (1978). Here, each prong is legally insufficient, and the evidence is factually insufficient to sustain the convictions.

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[11] Brown adopts the briefs of Appellants Bayly and Furst.

A. The Standard Of Review.

The issues of legal insufficiency of the charges are reviewed *de novo*. The facts must be reviewed in the light most favorable to the verdict. *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469 (1942).

B. Counts I, II, And III, Alleging Honest Services Violations, Are Legally Insufficient, Do Not Reach This Conduct, And Brown's Convictions Must Be Reversed.

The Merrill employees were indicted for conspiring to commit, and aiding and abetting, wire fraud via "a scheme or artifice to defraud another of the intangible right of honest services." 18 U.S.C. §§1343, 1346. These statutes, even in light of existing precedent: (i) cannot be expanded to criminalize Brown's conduct in this private commercial transaction where he had no independent duty to Enron, there was no material nondisclosure, and there were no bribes, kickbacks or self-dealing; *and*, in any event (ii) are unconstitutional, if applied, because Brown had no fair notice of their boundaries. Brown engaged in no conduct that was itself unlawful. The business transaction served only corporate purposes, followed all corporate procedures, and implicated only reasonable corporate gain.

1. There Was No Honest Services Violation As A Matter Of Law.

This Court's decisions in *Ballard*, 663 F.2d at 540 (reversing honest services convictions); *Brumley*, 116 F.3d at 734 (requiring something like bribery), and *United States v. Caldwell*, 302 F.3d 399 (5th Cir. 2002) (blatant self-dealing; taking $1 million), mandate reversal of Brown's honest services wire fraud convictions–*even assuming* the government proved its best case by competent legal evidence.

In *McNally*, the Supreme Court described the intangible right to honest services as requiring "a fiduciary duty to the public, and misuse of [ ] office for private gain . . ." *McNally v. United States*, 483 U.S. 350, 355, 107 S.Ct. 2875 (1987) (reversing conviction as outside the scope of the statute). Congress reinstated the "intangible right" to "honest services" in response to *McNally* by enacting 18 U.S.C. §1346, to protect the public from officials abusing their offices for personal gain. This Court, *en banc*, held that something close to bribery was required even when the defendant violated a state statute. *Brumley*, 116 F. 3d at 734.

Rarely and cautiously extended to a private transaction, an honest services fraud requires a legal duty to the employer, breach by non-disclosure of material information, *and* self-dealing, conflicts of interest, or bribery or kickbacks, by which the defendant acts or causes someone to act for his personal gain, and to the detriment

of the employer. It simply does not apply here. *Ballard*, 663 F.2d at 543-44 (kickbacks); *Caldwell*, 302 F.3d at 409-10 (conversion); *see Brumley*, 116 F.3d at 734 ("something close to bribery"); *United States v. Rybicki*, 354 F.3d 124 (2nd Cir. 2003) (*en banc*). Not every breach of fiduciary duty in the private sector constitutes a federal fraud. Indeed, this Court carefully applies this principle in the private sector, where *there is a real risk of every employee wrong* becoming a federal crime. *Ballard*, 663 F.2d at 540; *accord, United States v. Bloom*, 149 F.3d 649 (7th Cir. 1998) (affirming dismissal of indictment; no personal gain). In *Ballard*, this Court reversed the convictions despite the fact that the defendants had received in excess of $2 million in kickbacks in envelopes of cash. 663 F.2d at 544.

Numerous cases have reversed convictions under this provision, which has been misused by prosecutors attempting to expand the statute to criminalize business conduct.[12] Recognizing that "all fiduciary breaches, it seems, could be found to involve the loss of an intangible–an employee's faithful and honest services," this

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[12] *Cochran,* 109 F.3d at 667 (even *assuming* §1346 *reaches private actors in a commercial transaction*, "it would give us great pause if a right to honest services is violated by every breach of contract or every misstatement made in the course of dealing"); *United States v. Murphy*, 323 F.3d 102, 104, 109-18 (3rd Cir. 2003) (reversing conviction for lack of duty despite kickbacks and bribes); *United States v. Czubinski*, 106 F.3d 1069, 1077 (1st Cir. 1997) (reversing; no bribes, no personal gain to defendant); *Bloom*, 149 F.3d at 656-7 (reversing; no personal gain); *United States v. Jain*, 93 F.3d 436 (8th Cir. 1996) (reversing despite kickbacks paid to doctor), *cert. denied*, 520 U.S. 1273 (1997).

Court previously has *rejected* the government's theory because it "sweeps too broadly and does not correctly reflect the quantity and quality of fraud necessary to invoke the criminal sanctions" of an honest services violation. *Ballard*, 663 F.2d at 540-41.

The duty of honest services runs from the employee directly to the employer. *See Caldwell*, 302 F.3d 409-10 (proof of duty under state law is required). No case has affirmed a conviction outside a direct employment relationship without bribes, kickbacks, self-dealing or personal gain by which an outsider caused the employee to act adverse to the interest of the employer. *See Rybicki*, 354 F.3d at 127 (attorneys bribed insurance adjusters to obtain favorable treatment for their clients).

Brown did not corrupt Enron employees to act for anyone's personal gain. Brown followed Merrill's procedures diligently and served only corporate purposes for corporate gain.[13] There were no bribes, no kickbacks, no conflicts of interest, no self-dealing, and no personal gain by any employee in the barge transaction. Only fully disclosed fees and profits were paid to each corporation. There is no precedent to uphold an honest services conviction of someone in Brown's attenuated position. In some cases, such as *Ballard*, even use of bribes or kickbacks were held insufficient

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[13] Merrill Lynch made $775,000 (17:2471). Enron's profits on the Nigerian Barge deal exceeded $53 million. The district court recognized this fact, noting that Brown was "engaged in his regular job," and further, that "he was playing his ordinary role in this matter as an employee at Merrill Lynch" (41:27).

to inculpate people outside the direct employer-employee relationship. 663 F.2d at 540; *Cochran,* 109 F.3d at 667 (reversing despite undisclosed fees); *Murphy*, 323 F.3d at 109-18 (reversing despite bribes and kickbacks). Brown's actions do not constitute an honest services fraud.

2. The Statute Has Never Been Applied Like This, And Brown Had No Fair Notice.

The government achieved this conviction by torturing the honest services provision, and by disregarding two bedrock Due Process principles: that ambiguities in criminal statutes must be resolved in favor of the defendant, and that no one may be convicted of a crime without fair warning that his conduct was criminal.[14] *United States v. Bass*, 404 U.S. 336, 92 S.Ct. 515 (1971). If the statute applies to Brown, it is unconstitutional because Brown had no fair notice of its perimeter.

This Court, *en banc*, has held that the honest services statute must be construed in a manner that does not leave its outer boundaries ambiguous. *Brumley*, 116 F.3d at 733; *see Bass*, 404 U.S. 336 at 347-48, 92 S.Ct. at 522-23. No prior decision has

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[14] "[A] fair warning should be given to the world in language that the common world will understand of what the law intends to do if a certain line is passed. To make the warning fair, so far as is possible, the line should be clear;" and, "because of the seriousness of criminal penalties and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts, should define criminal activity. This policy embodies 'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said that they should.'" *Bass*, 404 U.S. 336 at 347-48, 92 S.Ct. at 522-23 (internal citations omitted).

reached so far to inculpate facially innocent commercial conduct. This Circuit has rejected broad application of the statute; reversed convictions even where there were undisclosed kickbacks; and, has held that not every breach of a fiduciary duty works a criminal fraud, *Ballard*, 663 F.2d at 540, 544, and not every violation of a Texas criminal statute will support an honest services charge. *Brumley*, 116 F.3d at 734; *accord Bloom*, 149 F.3d at 655-57 (affirming dismissal of indictment charging honest services violation by attorney/alderman who advised his client to defraud the city of property taxes). In this uncharted legal landscape, Brown could not have divined unwritten law and conformed his conduct to it.

Further, the unprecedented expansion of these statutes allowed a jury to convict Brown of conduct that was not criminal.[15] Therefore, the conspiracy and wire fraud convictions must be reversed. *Yates*, 354 U.S. at 327, 77 S.Ct. at 1081; *Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180 (1946); *United States v. Pettigrew*, 77 F.3d 1500 (5th Cir. 1996); *United States v. Smithers*, 27 F.3d 142, 146-47 (5th Cir. 1994).

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[15] The statute as applied by the government here would convict the practical joker who emails his friend a message that sends him away from his desk at work for an hour on a "wild goose chase." As the Seventh Circuit has noted, "The idea that practical jokes are federal felonies would make a joke of the Supreme Court's assurance that § 1341 does not cover the waterfront of deceit." *United States v. Walters*, 997 F.2d 1219 (7th Cir. 1993) (reversing mail fraud conviction of a sports agent who violated NCAA Rules but did not obtain property).

C. The Books and Records Statute Applies Only To Those Who Can Actually Falsify The Books And Records Of The Issuer And Cannot Be Applied To Brown Through A Conspiracy Charge.

As briefed fully by Appellant Bayly, Title 15 U.S.C. § 78m(b) applies to *issuers* and limits liability (in pertinent part) to those who "*knowingly falsify* any book, record, or account." Brown was not charged with the substantive offense of falsifying Enron's books, and he is not among those persons Congress intended to reach with this provision. Even the government's reading of *Castle* would require a conspiracy charge to be limited to those persons who actually keep or maintain the issuer's books–not to someone in Brown's attenuated position at Merrill. *Castle*, 925 F.2d at 831.

D. Brown Did Not Obtain Money Or Property As Required In Even A Traditional Wire Fraud Prosecution.

Brown obtained no money or property as a result of this transaction. Indeed, there was no personal gain by any defendant. *United States v. Griffin*, 324 F.3d 330, 353-54 (5th Cir. 2003) (tax credits in the hands of the state are not property; reversing mail fraud convictions), applying *Cleveland v. United States*, 531 U.S. 12, 15, 121 S.Ct. 365 (2000), requires reversal on this issue, as briefed fully by Appellant Bayly.

E. The Evidence Is Factually Insufficient To Prove That Brown Joined A Conspiracy Or Aided And Abetted Any Fraud.[16]

While this Court must view the evidence in the light most favorable to the verdict, even a conspiracy conviction cannot rest on suspicion and innuendo or be built "on inference upon inference." *United States v. Menesses*, 962 F.2d 420, 427 (5th Cir. 1992) (reversing conviction). This Court has overturned a conspiracy conviction when it was based solely on inferences from conversations "susceptible of either an illegal or legal interpretation." *United States v. Wieschenberg*, 604 F.2d 326, 331-32, 334-45 (5th Cir. 1979). It has also held that: "If the evidence tends to give equal or nearly equal circumstantial support to guilt and to innocence . . . reversal is required: When the evidence is essentially in balance, a reasonable jury must necessarily entertain a reasonable doubt." *United States v. Ortega Reyna*, 148 F.3d 540, 543 (5th Cir. 1998); *accord, United States v. Reveless*, 190 F.3d 678, 687-88. n. 16 (5th Cir. 1999) (reversing because when "the evidence is in equipoise, as a matter of law it cannot serve as a basis of a finding of knowledge"). Here, the

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[16] Brown moved for judgment of acquittal when the government rested and closed, and post-verdict (21:3908, 3918, 3920, 3930, 3937, 3966; 24:4809; 31:6575; Dkts.492; 645). Because the court deferred ruling on the motion when the government rested, only the evidence adduced in the government's case in chief may be used in its attempt to support the verdict. See FED.R.CRIM.P. 29, Advisory Comm. Notes (1994 Amendments); *United States v. Wahl*, 290 F.3d 370, 374-75 (D.C. Cir. 2002).

government proved neither Brown's knowledge of an illegal conspiracy nor his intent to join it, and there is no evidence of his criminal intent–however it is defined.

Jim Brown opposed Merrill's participation in this transaction. He did so from the time it was first brought to his attention. He put his concerns in writing, and he voiced them repeatedly before and *after* the Trinkle call. It was a risky business proposition, and to his understanding, Enron "had no repurchase obligation" (GX207). Acting in good faith and following Merrill's procedures outlined in Tom Davis' recent memo, Brown alerted Paul Wood, Tina Trinkle, corporate counsel, the DMCC, and his superiors to all the risks, including (1) the reputational risk, discussed in Davis' memo, of being perceived as aiding and abetting income statement manipulation, and (2) the fact that Enron was not obligated to repurchase the barges and Merrill could get stuck with them. With all the risks, Brown was very concerned that Merrill would lose its investment.

It was undisputed that Brown opposed this deal. Trinkle testified that Brown was so opposed to the transaction that she believed it would not go through. The DMCC did not veto the transaction. Instead, Zrike personally shepherded the proposal through the Merrill approval process. With Zrike's knowledge of oral assurances that Enron would find a third-party buyer soon, Zrike approved and completed the transaction with Davis in meetings conducted without Brown

(13:1099; 22:4017, 4121). The very fact that Brown kept harping on these risks evidences his belief that Merrill's investment was *not guaranteed*, but rather, there was a real and continuing risk that Merrill's entire investment would be lost.

Brown did not participate in the meeting with Davis or the conference call with Fastow. The next information Brown received, after he last expressed his concerns, was from corporate counsel, who told him the deal was approved and to have Merrill's outside counsel proceed with documentation. Brown did not instigate or advocate this transaction, nor did he have the authority to approve it. Brown had no role in LJM2's purchase of the barges. He acted in good faith throughout the transaction. There is no evidence that he participated in any conversation where any unlawful course was charted. No one on the Trinkle call even had the authority to agree to anything, and when the possibility of a guarantee was raised, it was rejected. Most importantly, Brown continued to voice his concerns *after* the call–at the only two meetings in which he was included. Brown concealed nothing from Merrill or from Enron.

Brown *consistently* believed that Merrill's equity was at risk–even long after the deal closed. He told Fuhs to make certain Merrill did not risk losing more than its $7 million (13:1015-16; 24:4569, 4630). Brown told others at Merrill that he did not want this transaction on his group's books because he thought it would lose

money[17] (FuhsX23; GX215). In February or March 2000, upon seeing a news report of civil unrest in Nigeria, Brown again expressed concern for Merrill's risk of losing its investment (24:4554). Had there been a *guarantee*, Brown could not have had any concern about risks.

1. If There Was An Illegal Agreement, Brown Did Not Join It.

There is no evidence that Brown hid anything; and he did not know of– or join–an illegal agreement, *if* one existed. A conviction for conspiracy cannot stand on an ambiguous agreement. *United States v. Dyar*, 574 F.2d 1385, 1389 (5th Cir. 1978). Here, not a single government witness in the alleged unlawful agreement testified. Rather, using various synonyms, witnesses gave their hearsay-based understandings of the nature of Fastow's representations but the terms varied. The evidence, at least in equipoise, established that there was an agreement for Enron to market the barges to a third party within six months, and even the government had to admit (albeit outside the presence of the jury), that such an agreement was not unlawful. Nor is there any evidence that Brown agreed to conceal anything. *United States v. Blankenship*, 382 F.3d 1110, 1128 (11th Cir. 2004) (reversing where

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[17] The only part of the transaction that even appears on the books of the Asset and Leasing Group was the $250,000 fee Enron paid to Merrill, which effectively reduced Merrill's risk to $6.75 million (12:814; 19:3264).

evidence was insufficient to demonstrate intent to conceal). To the contrary, Brown was talking to everyone about his concerns.

The essence of a conspiracy is shared criminal intent premised on a meeting of the minds. *United States v. Levy* 969 F.2d 136, 141 (5th Cir. 1992). The agreement must be proved as to each defendant. *United States v. Treadwell*, 760 F.2d 327, 336 (D.C. Cir. 1985); *see also Levy*, 969 F.2d 136, 141 (5th Cir. 1992). Indeed, this Court's sister circuit reversed a criminal conviction for conspiracy because the government failed to prove a meeting of the minds in similar circumstances. The appellants "certainly directed their efforts toward the common goal of making money for themselves and their employer," but the government did not prove a "common agreement to violate the law." *United States v. Parker*, 839 F.2d 1473, 1478 (11th Cir. 1988). Without evidence to prove the meeting of the minds to commit an unlawful act, reversal was [and is] required. *Id.*

2. One Cannot Join A Conspiracy By Silence.

Acknowledging that Brown opposed the transaction, the best the government could argue was that Brown joined the conspiracy by his silence on the Trinkle phone call (11:422; 30:6199). In this internal Merrill conference call, however, no illegal plan was formed, and no agreement was reached (13:1155). Bayly did not even have authority to approve the deal (13:1047, 1071-72, 1148). Nothing was secret

(13:1073). There was the statement that Enron would help remarket the barges to a third party or perhaps buy them back, and that someone had given his "strongest assurances" that Merrill would not own them past June 30, but any guarantee was affirmatively rejected.[18] Trinkle could not positively identify Brown as a speaker, but in any event, being on a routine conference call as part of one's job does not make one a member of a criminal conspiracy (13:1043-44, 1046-47).

If Brown did speak on the call, he was the one who said that Enron could *not* give a guarantee because of the accounting treatment it wanted (13:1046, 1068-70). If Brown was on the call and said nothing, as a matter of law, mere silence cannot sustain a conviction for conspiracy, aiding and abetting, or intent to defraud. *Dyar*, 574 F.2d at 1388-89; *Armco Indus. Credit Corp. v. SLT Warehouse* Co., 782 F.2d 475, 486 (5th Cir. 1986); *see United States v. Continental Group, Inc.*, 603 F.2d 444, 465-66 (3rd Cir. 1979). In any event, Brown was not silent *before or after* the call. *Before* the call, and in writing, Brown had thoroughly outlined the risks and already expressed his opposition to Trinkle and Wood who were on the call, and to corporate counsel Dolan and Zrike. *After* the call,[19] Brown went to the DMCC meeting to

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[18] Witnesses consistently confirmed Brown's opposition to this transaction (13:1036-37, 1094-96, 1117, 1145, 1149-50; 22:4106, 4108; 23:4458, 4462; 24:4554, 4569, 4630).

[19] Trinkle had the time of this call wrong–an important fact to which the government belatedly stipulated (19:3251-52, 3257-59, 3261; 30:6201). It argued to the jury that Brown

continue to voice his objections to Zrike and several senior executives (23:4208-09). It is undisputed that Brown was neither present at the meeting where Davis approved the transaction nor on the phone conference with Fastow (19:3288; 22:4121-22; 23:4209-10; 25:4961-62). There is no evidence that he joined any illegal agreement, by silence or otherwise.

3. Brown Understood The Issues Had Been Resolved According To Law.

By taking his concerns to corporate counsel and his superiors, Brown followed Merrill's instructions completely, per Davis' memo, and demonstrated his good faith. Zrike said that the business risks were discussed, and knowing of Enron's assurances to find a third-party buyer within six months, she opined: (i) Merrill was at risk; (ii) it was a true sale; (iii) the only assurance was for Enron to remarket the investment to a third party; (iv) Enron's inside and outside accountants were aware of the assurances; (v) this was not a material or extraordinary transaction for Enron; and (vi) there was no legal impediment to proceeding (22:4101, 4103, 4110-13, 4115-16, 4118, 4136-38; 23:4238-39, 4241). She personally walked the deal through the approval process with President Davis.

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just went along with the conspiracy from then on, when actually, the record reflects that he continued to object at the DMCC meeting and the meeting with Bayly, both of which *followed* Trinkle's call (19:3251-52, 3257-59, 3261; 30:6199).

It was Zrike who told Brown the deal would proceed. To his understanding and belief, the business concerns he identified had been fully considered and resolved with legal counsel. The transaction had been approved by both corporate counsel and Tom Davis, the person who had written the very memo that prompted Brown's list of risks (GX200.4). Brown did his job, indeed, he did all he could do. All he knew was that those who had knowledge and information (beyond what he had) had resolved the issues he raised, with the help of legal counsel, and decided to proceed. He heard Zrike advise that even with her knowledge of oral assurances, there was no legal impediment to proceeding, and she had taken it from there.

Even after the deal closed, Brown's concerns about Merrill's risk of loss lingered. Brown told Fuhs to try to make sure Merrill did not lose more than the $7 million it initially invested. His concern about the civil unrest in Nigeria months later evidenced his persistent fear that Merrill's investment was *not* guaranteed and could be lost. The email fourteen months later reflected Brown's consistent understanding that lawyers had been involved at all stages.[20] In sum, there is no evidence that

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[20] The government relies heavily on Brown's email, written fourteen months later in a proposed, unrelated Continental transaction which recites that "We had Bayly and the lawyers get on the phone with Fastow and promise to pay us back no matter what" (GX240). However, the email, fraught with factual inaccuracies as proved by the government's own witnesses–and Fastow (affirming that there was no such promise), evidences Brown's consistent understanding that *the lawyers* had worked out an acceptable and lawful agreement (19:3243; GX240). Brown adopts Bayly's brief on, *inter alia*, the many

Brown knew of an illegal conspiracy, intended to join it, intended to violate the law, or concealed anything. He did not embrace any illegal conduct, and he did not agree or scheme to defraud anyone at Merrill or Enron under any government theory. A judgment of acquittal should be entered on all counts. *Ballard*, 663 F.2d at 543.

II. *DE NOVO* REVIEW OF THE JURY INSTRUCTIONS REQUIRES REVERSAL FOR OMISSIONS OF THE ESSENTIAL ELEMENTS OF MATERIALITY AND INTENT WHICH ALLOWED CONVICTION FOR CONDUCT THAT WAS NOT CRIMINAL.

In a second unprecedented aspect of this prosecution, the government obtained these convictions without being required to prove *either* Brown's *intent to violate the law* or that any false statement in Enron's books or records was *material*. Creatively picking and choosing from the most minimal requirements of statutes and charges not previously applied to conduct like this, the Enron Task Force pieced together and obtained a series of instructions that not only omitted *materiality* from the books and records charge, but also omitted the requisite *mens rea* from the conspiracy and other charges. In addition, the court repeatedly directed the jury that the government *did*

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infirmities of the email, which Fastow himself contradicted. Moreover, even at trial, Kopper, Fastow's lieutenant, testified that Enron *never* said "We promise to find a third-party buyer, but if we can't, we will buy it back ourselves" (14:1487-88). The fact that Brown thought lawyers were on the call is evidence that the email was not an admission against his penal interests.

not *have to prove that Brown knew his conduct was unlawful.*[21] As in *Andersen*, "the jury instructions at issue simply failed to convey the requisite consciousness of wrongdoing. Indeed, it is striking how little culpability the instructions required." *Andersen*, 125 S.Ct. at 2136.

A. The Standard Of Review Is *De Novo*.

The failure of the jury instructions to include essential elements is a legal issue which this Court reviews *de novo*. *United States v. Guevara*, 408 F.3d 252, 256 (5th Cir. 2005) (court reviews jury instructions *de novo* where there is the possibility that the jury instruction misstated an element of the crime).

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[21] From the inception of this case, the government took the position that willfulness was not required and that to be guilty of conspiracy, the government need only show that the defendants "intend to accomplish an objective. *They do not have to show that the objective is illegal.*" (Dkt. 283, Pretrial Conf. 6/25/04 Tr. 65). The district court entered a pretrial order precluding defendants even from arguing that the government had to prove that defendants knew their conduct was illegal (Dkt. 290; RE5). The defendants have long and consistently challenged this position (Dkt. 118, 119, 162, 307, 439; 30:6092). Brown was entitled, at least, to the common law concept of intent to violate the law under §§ 371 and 2, as embodied in this Circuit's Pattern Instructions. For the offenses that did not implicate the Exchange Act, specific intent to violate the law was required. For the books and records offense, implicating the Exchange Act, materiality was required. *See infra*.

B. The Court Erroneously Eliminated The Essential Element Of Materiality From The Books And Records Charge.[22]

If Brown can be charged with a felony conspiracy to violate only the books and records provisions, then materiality must be an element, and its omission here requires reversal.[23] Brown's conviction was obtained without the jury being required to find that *any* false statement that he allegedly conspired to make in Enron's books was *material* to *anyone*, and the instruction encompassed innocent conduct. Despite decades of federal securities law, the government has cited *no case* that does not include *materiality* in a discussion of the elements for a conviction for any kind of false statement under the Exchange Act. If, after 20 years of virtual oblivion, the provision under which Brown was convicted is to become a federal felony *per se*, then materiality must be imposed as an essential element.[24] Misapplying the text and

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[22] Brown adopts Appellant Bayly's brief and makes this argument as an alternative, additional argument requiring reversal.

[23] The indictment also cited the internal accounting control provisions, hereinafter collectively referred to as "books and records."

[24] There is indication in the legislative history of the amendment adding § 78(m)(b)(5) that falsifying books and records is not to be construed as a separate felony. "The amendment adopted by the Conferees accomplishes this by providing that criminal penalties shall not be imposed for failing to comply with the FCPA's books and records or accounting control provisions." H.R. Conf. Rep. 100-576, P.L. 100-418, Omnibus Trade And Competitiveness Act House Conference Report No. 100-576, April 20, 1988. Accurate books and records are the foundation for other provisions.

Materiality is implicated throughout the Exchange Act and required for conviction

intent of the FCPA, the Task Force has also turned the Exchange Act upside down to create a new genre of criminal securities fraud unprecedented in federal jurisdiction. Indeed, if a books and records violation is plucked from its place as an SEC tool to require the *issuer's employees* to correct entries *internally*, and it is elevated to a discrete criminal securities fraud under § 78ff, it would be punishable by twenty years in prison and a $5 million fine. Under these circumstances, materiality *must* be required. To hold otherwise would lead to an absurd result: *Brown himself* could have announced Enron's gain on the barge deal *directly to the public*[25] *or personally signed Enron's 10-K*[26] and *not committed a crime*, but he is in prison for almost four years because a *bookkeeper* at *Enron* recorded an *immaterial* gain on *Enron's books*. Whether this Court resolves this injustice by agreeing with our argument that Brown could not be convicted of a conspiracy to falsify Enron's

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when false information is disseminated–either in a filing, to the public, or to the issuers' auditors and accountants. As evident in the text of 78m(b)(2), the books and records provision was intended to apply as an *internal* control, reasonably allowing for corrections to be made. For example, a division head at XYZ Corp. could deliberately book a gain or a loss that is unwarranted, but such an entry, even though made with the purpose of falsifying, would necessarily be reviewed on other levels at XYZ Corp. and may be modified or disregarded *internally* based on the determination of an accountant. The provisions are drafted to encourage and require such *internal* review and correction without expanding federal criminal jurisdiction to immaterial violations.

[25] Rule 10b-5 requires materiality.

[26] The "filings clause" of § 78ff(a) prohibits the filing of statement that is "false or misleading with respect to any material fact."

books and records, *or* because materiality must be grafted onto this offense *if* Brown can be charged with this violation (*or both*), these convictions must be reversed.

The indictment charges, via conspiracy, a knowing and willful falsification of books and records by an issuer required to file reports–a violation punishable only under § 78ff of the Exchange Act.[27] Section 78ff in the contexts in which it has been applied in criminal prosecutions, involved *filings* or some other *dissemination* of false information. However, this case was *not* brought under the filings clause of

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[27] Brown was charged in Count I with, *inter alia*, conspiracy to "(b) knowingly and willfully falsify books, records and accounts of Enron in violation of Title 15, U.S.C. § 78m(b)(2)(A) and (B), 78m(b)(5) and 78ff and Title 17 C.F.R. § 240.13b2-1."

> 15 U.S.C. § 78m(b)(2) requires: "Every issuer . . . which is required to file reports . . . shall (A) make and keep books, records and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer;
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> ***
>
> (5) No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record or account described in paragraph (2)."
>
> The applicable portion of §78ff(a) states:
>
> "Any person who willfully violates any provision of this chapter . . . shall upon conviction be fined not more than $5,000,000, or imprisoned not more than 20 years, or both."

§ 78ff or as a Rule 10b-5 violation.[28] It was brought, instead, in the form of *only* a books and records violation.

Over defendant's objections,[29] and at the government's urging, the court did not require the government to prove *materiality*. Just as the prosecutors said they did not have to prove intent to violate the law because it was a "misleading," "additional" element, they also told the judge and jury "the *government doesn't have to prove materiality with respect to Enron's* books and records. . . . that's *not* something we have to prove for you to return a verdict of guilty" (30:6526). However, the Exchange Act implicates materiality throughout.[30] If the books and records provisions is to be elevated to this stature, then materiality must be read into the

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[28] Despite the government's claim that Appellants conspired to conceal information from Arthur Andersen, the government did not charge the Merrill defendants for false statements to auditors under § 78m(a) and 17 C.F.R. § 240.13b2-2, which *would* require proof of materiality.

[29] Defendants requested and should have received an instruction requiring the government to prove that any statements alleged to be false or misleading in Enron's books, records or accounts, pertained to a *material* fact. All defendants requested a correct instruction on the essential elements of the books and records offense: "such falsification was with respect to a material fact . . . . A fact is material if it has a natural tendency to influence, or is capable of influencing, the decision of investors." (Dkt. 415: No. 27; 416: No. 27; RE8). Brown also objected to the court's failure to give this instruction (Dkt.439; 30:6092).

[30] A material fact in this context is one that "has a natural tendency to influence, or is capable of influencing, the decision of investors." *United States v. Gaudin*, 515 U.S. 506, 509-23, 115 S.Ct. 2310, 2313-20 (1995).

statute to maintain consistency in the Exchange Act, with congressional intent, precedent, policy, and prudence in the exercise of federal criminal jurisdiction.

Existing criminal precedent under the Act involves filings or some form of dissemination of misleading information in which materiality is always required. *See Touche Ross & Co. v. Reddington*, 442 U.S. 560, 570 n.10, 99 S.Ct. 2479, 2486 (1979) (15 U.S.C. § 78ff authorizes criminal sanctions for violations of statutes and rules for materially misleading statements in filings); *United States v. Tarallo*, 380 F.3d 1174 (9th Cir. 2004) (requiring "intentionally acting with reckless disregard for the truth of *material* misleading statements in a filings case"), *amended*, 2005 WL 1523553 (9th Cir. 2005); *United States v. Stringer*, 2005 WL 1231183 (D.Or. 2005) (implying requirement of material misstatements); *United States v. Wilson*, 2001 WL 798018 (S.D. NY 2001) (quoting §78ff in pertinent part). Indeed, there appears to be no precedent for the government's assertion that materiality is not required to prosecute a criminal violation–regardless of the clause of § 78ff(a) that may be implicated.

Significant federal precedent and policy confirm the justness of requiring materiality for this business crime. It is an essential element of federal fraud or false statement offenses–even when "materiality" does not appear in the statutory text. *Neder v. United States*, 527 U.S. 1, 5, 119 S.Ct. 1827, 1832 (1999) (materiality is an

element of federal mail fraud, wire fraud, bank fraud, and tax fraud). Thus, regardless of whether it appears in the text, materiality is and must be, an essential element of this type of crime.[31] Indeed, this case appears to be the *only* criminal prosecution involving the Exchange Act and the books and records provision that has not required materiality.

Failing to instruct on materiality as an essential element of the books and records violation was not harmless. Materiality surfaced throughout the trial (18:2668, 2753; 19:3196; 20:603). From its opening statement forward, the government sought to inflame this Houston jury with the losses suffered by Enron shareholders. Prosecutors said this case was about "cheating and lying to shareholders," and Merrill helping Enron "cook its books" (11:389; 21:3952; 30:6141; 31:6511-12). To buttress its point, the government paraded evidence of Enron's SEC filings, press releases, and earnings reports (each of which would require a material misstatement to evidence a crime) (18:2768-71, 2876, 2893-96,

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[31] Myriad federal criminal offenses involving falsehoods in various contexts require materiality. Materiality is required for violations of: 11U.S.C. § 523(A)(2)(B) (bankruptcy); 18 U.S.C. § 1001 (false statements to a federal agency); 15 U.S.C. § 1125(a) (trade libel or product disparagement); 5 U.S.C. § 8507 (unemployment); 5 U.S.C. § 8902a: (false health insurance claims); 7 U.S.C. § 754 (agricultural regulations); 8 U.S.C. § 1101 (immigration representations); 8 U.S.C. § 1182 (inadmissibility and aliens); 8 U.S.C. § 1207 (deportability and aliens); 12 U.S.C. § 161 (misrepresentation in currency reports); 15 U.S.C. § 77k (false registration statements); 18 U.S.C. § 1503 (obstruction of justice); 18 U.S.C. § 1623 (perjury); 26 U.S.C. § 7206(1) (tax fraud).

2902; 20:3570, 3575-77; GX806 - Enron 10-K for 1999). *Cf. Neder*, 119 S.Ct. at 1838-39 (omitted element of materiality was uncontested).

However, this case involved at most, the timing of a $12.5 million *pre-tax* gain ($7.8 million actual gain)[32] by a company (for which Brown did not work) that had revenues of $40 billion, $957 million in net profits, and was "a massive user of capital," closing more than fifty financing deals annually totaling $20 *billion* or more (20:3620; 21:3769-70; GX801, 806). The barge deal was not material under any legal standard.[33] In short, the prosecutors wrapped themselves in the mantle of "Enron shareholders" and "investors," and they pleaded with the jury in defense of "the

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[32] When Enron and LJM2 sold the nine-barge package to AES in 2000 for a profit of $53 million, Enron reduced the gain for 2000 by the gain it had reported from the sale to Merrill in 1999 (21:3712-13, 3716, 3718, 3721). Thus, it never overstated the amount of gain. *The only issue was one of timing.*

[33] In *Basic, Inc. v. Levinson*, 485 U.S. 224, 108 S.Ct. 978 (1988), the Supreme Court adopted the materiality rule of *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 96 S.Ct. 2126 (1976), and noted that, "a plaintiff must show that the statements were misleading as to a material fact. *It is not enough that a statement is false or incomplete, if the misrepresented fact is otherwise insignificant.*" *Basic*, at 238; *see ABC Arbitrage Plaintiffs Group v. Tchuruk*, 291 F.3d 336 (5th Cir. 2002) (misstatements concerned amounts of money too small to have been material); *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 547 (8th Cir. 1997) (2% valuation change in total assets was immaterial); *Glassman v. Computervision Corp.*, 90 F.3d 617, 631-32 and n.22 (1st Cir. 1996) ("The relevant numbers are $2.5 million in domestic sales bookings as of week seven of the third quarter of 1992 and $3.3 million for the same period in 1991– a difference of $800,000, or less than 1% of the budgeted revenues for that quarter. This difference was immaterial as a matter of law."); *Greenhouse v. MCG Capital Corp.*, 392 F.3d 650, 656 (4th Cir. 2004) ("if the specific fact misrepresented is immaterial, a suit cannot succeed.")

integrity of our publicly traded markets and companies," as if this were a securities fraud prosecution (30:6141, 6143, 6144; 31:6557).

The government creatively selected charges, fought to keep materiality out of the jury instruction, and told the jury it did not have to prove materiality, because it knew it *could not* prove this element. Defendants were entitled to this instruction as a matter of constitutional law. *Gaudin*, 115 S.Ct. at 2312-13[34] (materiality is an element that must be decided by the jury beyond a reasonable doubt); *Sullivan v. Louisiana*, 508 U.S. 275, 277-78, 113 S.Ct. 2078, 2080-81 (1993).

If the statute were *not* construed to require materiality for this conviction, then it is unconstitutional as applied because there would be no fair warning of its reach. No Merrill employee could reasonably believe that he could be criminally liable for

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[34] *United States v. Wells*, 519 U.S. 482, 117 S.Ct. 921 (1997), does not hold to the contrary. In assessing whether materiality was a required element of 18 U.S.C. § 1014, the court determined that neither the plain language of the statute, the common law that "came with it," nor statutory history implicated materiality as an essential element of making false statements to a federally insured bank. *Gaudin*, 519 U.S. at 490-98, 117 S.Ct. at 926-30. Similar analysis of discrete statutes leads to different results. *See Neder* 527 U.S. 1 at 20, 119 S.Ct. at 1827 (court applied the *Wells* framework and concluded that the federal crimes of mail fraud, wire fraud, and bank fraud, include a materiality requirement, despite the absence of that term in the statutory text); *United States ex rel. A+ Homecare, Inc. v. Medshares*, 400 F.3d 428, 442-43 (6th Cir. 2004) (materiality is an essential element under 31 U.S.C. § 3729(a)(1), 31 U.S.C. § 3729(c), and 31 U.S.C. § 3729(a)(7), even though not stated in the text of these statutes); *United States v. Nash*, 115 F.3d 1431 (9th Cir. 1997) materiality requirement for 18 U.S.C. § 1344 survives *Wells* even though not stated in the text).

any accounting wrong at a company with which Merrill does business[35]–much less an *immaterial* entry. *Neder*, 527 U.S. at 5; *Touche Ross*, 442 U.S. at 570; *Andersen*, 125 S.Ct. at 2134; *Bass*, 404 U.S. at 347-48, 92 S.Ct. at 522-23. Further, these fatally deficient instructions allowed conviction for innocent conduct. Any deliberate error in the books and records of a corporation was criminalized under this instruction. Brown could have been convicted for the actions of a bookkeeper for a company with $40 billion in revenues, who intentionally rounded numbers for his own convenience, in any deal with Merrill. The omission of materiality from the essential elements of the books and records charge independently requires reversal of Counts I, II and III. *Yates*, 354 U.S. at 327, 77 S.Ct. at 1081.

C. The Instructions Did Not Include The Requisite *Mens Rea*.

Conspiracy is a separate crime, and when, as here, a *Pinkerton* instruction is given, a conspiracy conviction alone enables conviction of substantive offenses. Conspiracy to commit wire fraud, wire fraud, and aiding and abetting are specific

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[35] Government witnesses admitted it was Enron's responsibility to calculate the gain and make appropriate disclosures, and that Enron lied to Merrill (former treasurer Glisan: 21:3716, 3718, 3721). Boyt said it was the "job of every CPA to make sure that the books and records of the *company* they work for are *materially* correct" (17:2531-32).

intent crimes, requiring an instruction that the defendant willfully intended to violate the law. Conspiracy requires *at least* the degree of criminal intent necessary to commit the substantive offense itself.

1. The Conspiracy Charge Omitted The Fifth Circuit's Pattern Instruction On Willfulness And Intent To Further An Unlawful Objective Of The Conspiracy.

A conspiracy under 18 U.S.C. § 371 requires proof of: (i) an agreement between the defendant and a co-conspirator to violate the law of the United States; (ii) an overt act by one conspirator in furtherance of the conspiracy; and, (iii) that the defendant *willfully joined a conspiracy*, *knowing its unlawful purpose*, and *with the intent to further the unlawful purpose*. *United States v. Richards*, 204 F.3d 177, 205 (5th Cir.), *cert. denied*, 531 U.S. 826 (2000) (specific intent to defraud); *United States v. Rochester*, 898 F.2d 971, 976-79 (5th Cir. 1990) (government must show that defendant willfully participated in mail fraud scheme with specific intent to achieve scheme's illicit objectives; "willfully" means "an act committed 'voluntarily and purposefully' with specific intent to disobey or disregard the law," and specific intent requires the government to prove "the defendant in question knowingly did an act which the law forbids, purposely intending to violate the law"); *United States v. Storm*, 36 F.3d 1289, 1294 (5th Cir. 1994), *cert. denied*, 514 U.S. 1084 (1995) (following *Gelais*); *United States v. Gelais*, 952 F.2d 90, 93-94 (5th Cir.), *cert. denied*,

506 U.S. 965 (1992), (defining knowingly and willfully and requiring specific intent in wire fraud case, as Brown specifically requested here); *United States v. Hunt*, 794 F.2d 1095, 1100 (5th Cir. 1986) ("'willfully' means that the act was committed voluntarily and purposely with the specific intent to disobey or disregard the law. *** To establish specific intent [to defraud], the government must prove that the defendant in question knowingly did an act which the law forbids, purposely intending to violate the law").[36]

The *Fifth Circuit Pattern Instruction* clearly states the second essential element of conspiracy: "**That the defendant knew the unlawful purpose of the agreement and joined in it willfully, that is, with the intent to further the unlawful purpose.**" *Criminal Instruction* No. 2.20 [Conspiracy] (2001).[37] Over objections and ignoring

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[36] Other circuits agree. *See United States v. Poirier*, 321 F.2d 1024, 1031 (11th Cir.), *cert. denied*, 540 U.S. 874 (2003) (instructions for offense of wire fraud must clearly require finding that defendants acted willfully, and with "the specific intent to deceive someone, ordinarily for the purpose of causing some financial loss to another or bringing about financial gain to one's self"); *United States v. Giraldi*, 86 F.3d 1368, 1376 (5th Cir. 1996) (charge required "intent to injure or defraud," and willfully defined as "the act was committed voluntarily and intentionally, that you did it because you wanted to do it and with a specific intent to do something that the law forbids"); *United States v. Rivera*, 295 F.3d 461, 466 (5th Cir. 2002) (to convict of aiding and abetting wire fraud, jury must find defendant willfully assisted in scheme with the specific intent to defraud and deceive).

[37] This Court has held that the *Fifth Circuit Pattern Instruction* adequately addresses the requirement of a specific intent to violate the law. *Richards*, 204 F.3d at 205.

correct instructions,[38] these prosecutors somehow convinced the district court to delete the critical *mens rea* from the standard conspiracy and aiding and abetting instructions and give the watered-down Exchange Act version instead (but without requiring materiality either) (Dkt. 557). Just as in *Arthur Andersen*, this error mandates reversal. *Andersen*, 125 S.Ct. at 2136.

Instead of giving the straightforward *Fifth Circuit Pattern Instruction* on conspiracy quoted above, the court re-wrote it entirely. It broadened "conspiracy" by adding "*or understanding*"[39] and broadened its reach by omitting the requisite intent:

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[38] Defendants requested correct instructions and objected to these failures to instruct on the requisite *mens rea* and materiality (*see inter alia,* Brown's Objections, Dkt. 439: 16-22, 29-32, and proposed correct instructions Dkt. 416: Nos. 24, 25, 27, 40 and 42; Dkt. 415: Nos. 22, 27, 29, 35, 36; Government Motion in Limine No. 4 - Dkt. 207, opposed by Fuhs Dkt. 227 and Brown Dkt. 232; 29:6037-44, 6050-52; 30: 6092).

[39] The government repeatedly requested to broaden the charge (29:6026-27, 6051-52; Dkt. 557). This was especially prejudicial to Brown because the limited excerpts of his Grand Jury testimony selected by the prosecution contain repeated references to his *understanding* of various subjects. As discussed, *infra*, Brown's understanding of the Fastow call was entirely dependent on hearsay, and there is no evidence from whom or when that understanding was acquired. By definition, an "understanding" can be entirely unilateral, and it does not evidence the meeting of the minds necessary for a conviction for conspiracy. *Wieschenberg*, 604 F.2d at 334-45 (All conspiracy law is directed only at persons who have intentionally agreed to further an illegal object. To convict, the government must prove that there was an *agreement* to accomplish an illegal act. It is not enough for the government merely to establish "a climate of activity that reeks of something foul."). In this sense, Brown's "understanding" was regarding a conversation to which he was not a party. This was *not* an *understanding between* Brown and Fastow *or* Brown, Bayly, Furst or Fuhs, nor was there an *understanding entered into* by Brown to commit a crime.

> "That at some time during the existence of the conspiracy, agreement *or understanding*, the defendant you are considering knew the [*unlawful*] purpose of the agreement and, with that knowledge, deliberately [*willfully*] joined the conspiracy, agreement or understanding [*intending*] to further its purpose which purpose was unlawful." (30:6115).

The government's convoluted instruction does not even mention "willfully" and *omits* the critical bracketed words. Anxious to convict the first individuals tried after the Enron debacle, the Task Force lawyers specifically sought this result. They opposed giving this Court's Pattern Jury Instruction. The prosecutors proposed the language that the court used, claiming "intent to violate the law" was a "*misleading*," "*additional*" element (Dkt. 557:15, 17).

Again at the prosecutors' request, the court made the situation worse, by also instructing outside the Pattern:

> A defendant who knowingly agrees with another or others to engage in conduct the law prohibits has knowingly joined a conspiracy, *regardless of whether the defendant knew that the conduct was, in fact, unlawful.* (30: 6117, emphasis added). (Dkt. 556: Request No. 25)[40]

The court continued:

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[40] "The government requested: "Knowledge of Illegality Not Required: To prove the charges in the Indictment, the government need not prove that a defendant knew that his conduct was illegal. This is true of the conspiracy charge as well. A defendant who knowingly agrees to engage in conduct, which conduct the law prohibits, has knowingly joined a conspiracy, regardless of whether the defendant knew that such conduct was, in fact, unlawful" (Dkt. 557:36).

> In considering the conspiracy charge . . . the *government is not required to prove . . . that any crime was committed by anybody*. The foregoing explanations of the substantive offenses of the wire fraud–I misread that–or that the crime, that is the crime of falsifying the corporate books and records, was actually committed by anybody (30:6121, emphasis added).

As in *Andersen*, the court's deviation from the *Fifth Circuit Pattern* on the essential element of *mens rea* is fatal and mandates reversal.

2. The Court Eliminated "Intent To Violate The Law" From The Fifth Circuit Pattern Aiding And Abetting Instruction For The Substantive Offenses.

The *Fifth Circuit Pattern Instruction*, No. 2.06 [Aiding and Abetting] includes the requirement:

> ". . . you may not find any defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that the defendant voluntarily participated in its commission *with the intent to violate the law.*"

Instead of following this instruction, the court again acceded to the government's request and deleted "intent to violate the law" (Dkt. 556:54). In doing so, the court permitted the jury to convict so long as a defendant voluntarily participated "with the requisite criminal intent" (30:6132).

Thus, the court repeatedly instructed the jury that Brown, despite (i) being charged with specific intent crimes, (ii) arising out of facially lawful business

conduct, (iii) in a complex area of tax law and accounting, and (iv) while just doing his job, should be convicted without "intent to violate the law."

3. The Court's "Willfully" Instruction Told The Jury That The Requisite *Mens Rea* Was *Not* Required.

The government sought defendants' convictions on every count without any requirement of knowledge that their conduct was unlawful (Dkt. 556, 557:19). Much like the reversible error with which the same prosecutors infected *Arthur Andersen*, they urged the judge here to instruct: "*Acting 'willfully' **does not require**, however, that the actor knew specifically that the conduct was unlawful.*"(30:6121, emphasis added; Dkt. 557:25).[41]

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[41] The court ignored defendants' correct instructions and gave the weaker definition of "willfully" *only* in connection with the books and records object of the conspiracy as if this indictment charged *only* a *securities fraud* (30:6121; Dkt. 557). This Court's traditional definition of willfully applied, however, to the conspiracy to commit wire fraud, the substantive counts, aiding and abetting, and obstruction of justice (Dkt. 416, 439: Instructions 24, 27, 35; Dkt. 415: Instructions 22, 27, 35, 43; see n. 42 *infra*.).

The government defined *willfully* the same as this Court's pattern instruction defines *knowingly*, merely meaning "that the act was done voluntarily and intentionally, not because of mistake or accident." (Dkt. 556: Nos. 23, 25); *Fifth Circuit Pattern Instruction* No. 1.37 ["KNOWINGLY" - TO ACT]. *See United States v. Jobe*, 101 F.3d 1046, 1059 (5th Cir. 1996), *cert. denied*, 118 S.Ct. 81 (1997) (defining knowingly). In giving the books and records charge, the court did add "with knowledge by the actor that the act was wrongful," meaning with knowledge that the books and records would be false (6120-21). However, it did not augment the definition of "knowingly" to give it meaning precise to the books and records statute, and it also omitted the critical requirement of materiality.

However, with respect to conspiracy, the substantive counts, and aiding and abetting, Brown was entitled to the definition of "willfully" that this Court has applied in numerous conspiracy, wire fraud, and aiding and abetting cases. Indeed, this is the definition of intent that the Supreme Court has applied in similar cases involving facially innocent business conduct. The correct definition requires, at a minimum, the government to prove "*that the defendant acted with knowledge that his conduct was unlawful.*"[42] *Hunt*, 794 F.2d at 1100 (mail fraud; requiring specific intent to disobey or disregard the law); *Richards*, 204 F.3d at 210 (mail and wire fraud); *Rochester*, 898 F.2d at 178-79 (mail fraud); *see Bryan v. United States*, 524 U.S. 184, 191-92, 118 S.Ct. 1939, 1946-47 (1998) (court erred in instructing jury in sale of firearms case that the defendant need not know his conduct was unlawful); *Ratzlaf v. United States*, 510 U.S. 141, 145, 114 S.Ct. 655, 657-58 (1994) (currency

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[42] "Willfully" historically has included "an act committed voluntarily and purposely with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law." *See* No. 138 ["WILLFULLY" - TO ACT] *Fifth Circuit District Judges Association Pattern Instructions (Criminal Cases)*(recognizing that the mental state is better defined by each statute); *United States v. Charroux*, 3 F.3d 827, 831 (5th Cir. 1993) (defining willfulness as a "voluntary, intentional violation of a known legal duty" in a gasoline excise tax case); *United States v. Massat*, 948 F.2d 923, 931-32 (5th Cir. 1991), *cert. denied*, 113 S.Ct. 108 (1992) (same in tax evasion). Even under § 78ff, the Second Circuit held that willfully (in the securities fraud context where materiality is required) must also convey that the defendant had "some evil purpose." *See United States v. Dixon*, 536 F.2d 1388, 1397 (2nd Cir. 1976) (noting also there was "no justification" for "straining" the mail fraud statute to reach the conduct alleged; reversing mail fraud convictions).

structuring); *United States v. Oreira*, 29 F.3d 185 (5th Cir. 1994);[43] *United States v. Davis*, 132 F.3d 1092, 1094 (5th Cir. 1998) (kickbacks for Medicare referrals); *Giraldi*, 86 F.3d at 1376 (money laundering). Over defendants' objections, the instructions not only eliminated any need for the government to prove the requisite intent to violate the law (to convict Brown of conspiracy, aiding and abetting, and wire fraud), but affirmatively and erroneously instructed the jury that it was *not* required. *Andersen* and this Court's decisions require reversal.

D. The Court Erred In Refusing To Instruct On Good Faith.

Good faith is a complete defense to these conspiracy and fraud charges, and the court's failure to give that instruction is an independent basis for reversal. Brown repeatedly requested this instruction and objected to the court's failure to give it (Dkt.416; 29:6044-46, 6051). Failure to instruct on good faith is especially egregious, where, as here, the jury was not required to find that Brown had the specific intent to violate the law. *United States v. Cavin*, 39 F.3d 1299 (5th Cir. 1994) (reversing conviction where defendant was entitled to instruction that jury *must* acquit

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[43] In *Oreira*, a financial structuring case, the trial judge not only gave an incomplete definition of the requisite criminal intent, but, as here, "incorrectly told the jury that the government need *not* prove the defendants knew their conduct was illegal." This Court reversed. Unlike *Oreira*, however, it would not be appropriate to retry this case because the evidence is insufficient to support a finding of guilt had the jury been properly charged. *United States v. Scott*, 437 U.S. 82, 91 (1978) (ruling of insufficiency by reviewing court bars reprosecution).

if it found he acted in good faith). *Cf. Rochester*, 898 F.2d at 978 (failure to instruct on good faith is not fatal when the jury is given a detailed instruction on specific intent).

In view of the lack of evidence of Brown's knowledge of any illegal agreement or intent to join it, the consistent evidence of his opposition to the investment, and his good faith adherence to Merrill policies, it cannot be said that the failure to give this instruction was harmless. Nor can it be said that the charge otherwise stated the requisite level of intent. *Cf. Hunt*, 794 F.2d at 1098 (defendant was not entitled to a specific good faith instruction where the trial court "gave a detailed instruction on the prerequisite of specific intent"). As in *Cavin*, Brown was entitled to an instruction that the jury must acquit if it found he acted in good faith.[44]

E. The Erroneous Instructions Were Not Harmless And Allowed Conviction For Innocent Business Conduct.

Materiality of any false statements in the books, and the "intent to violate the law" in a conspiracy or wire fraud are critical elements in this context of business crimes, and they were the essential elements on which this entire prosecution teetered.

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[44] Brown adopts the brief of Appellant Furst on the court's failure to instruct on the theory of the defense. There is no question that an agreement merely to find a third-party buyer *is* entirely lawful, and the evidence supported this (29:6050-51). Indeed, the government conceded as much (23:4520). Reversal is required on this ground alone. *United States v. Therm-All, Inc.*, 373 F.3d 625, 638 (5th Cir.), *cert. denied*, 125 S.Ct. 632 (2004).

Both elements were contested throughout the trial, and good faith was an important defense. The instructions placed the Merrill defendants in an unprecedented "Catch-22," allowing their conviction for three federal felonies for conspiracy to make *non*-material false entries in *another* corporation's books while having *no intent* to violate the law. These omissions were not harmless, but rather, insured conviction.

This was a commercial transaction, structured and designed by lawyers and accountants attempting to maximize tax, accounting, and income advantages. No defendant sought or received any personal gain. Brown engaged only in facially innocent business conduct. Business depends on clear rules and well-defined legal duties within which to operate.[45]

The deal was pre-packaged by Enron to maximize its advantages to control and still profit from the barges, while reducing its own financial risk. The written

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[45] Brown and Fuhs requested correct instructions on their duties to Merrill not Enron (Dkt. 416 : No.21; Dkt. 415: No. 26). The trial court first said it would give that instruction, then at the last minute, took it out of the charge (29:6037-42; 30:6091). It is undisputed that the Merrill employees had no legal or contractual duty to Enron, and the government has conceded as much (Dkt. 694:42; 31:6487).

"In our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law," and "it is not the purpose of the law to penalize frank difference of opinion or innocent errors despite the exercise of reasonable care." *United States v. Bishop*, 412 U.S. 346, 360-61 (1973). Here, Brown went to corporate counsel and his superiors with his concerns. Corporate counsel admitted walking the deal through Merrill's approval process. The transaction was approved by Brown's superiors *in his absence*, and it was documented by attorneys without his involvement. There is nothing more Brown could have done here to exercise reasonable care.

documents, finalized by Vinson & Elkins, with an integration clause that excluded any prior oral representations, were the only means by which Enron and Merrill were legally bound. Whatever the substance of the telephone conversation between Fastow and Bayly, to the Merrill businessmen who consistently depended on lawyers and written documents, it provided nothing legally reliable, but merely provided a small measure of *personal* "comfort" that Merrill's investment would not be abandoned in Enron's pursuit of its unilateral interests. However, Merrill knew–and Enron knew–that *only the documents were enforceable* (19:3163-65, 3168; 20: 3608).

Businesses are entitled to structure their transactions to take advantage of favorable tax and accounting regulations. *Ratzlaf*, 510 U.S. at 136-40, 114 S.Ct. at 657-58 ("willfully" requires intent to disobey the law). Indeed, the Supreme Court and others have noted "many occasions" on which persons, without intending to violate any law, may structure transactions to avoid the impact of some regulation or tax. The timing of taking gains or losses, of buying or selling assets, or of making or receiving payments; creating corporate entities for tax, insurance, and liability purposes; and structuring business deals for various regulatory advantages, are all means that businesses use routinely for lawful purposes. *Ratzlaf*, 510 U.S. at 145-147 (citing examples); *see Andersen*, 125 S.Ct. at 2135, 2137 (citing examples of innocent conduct wrongly reached under the instructions there). This is not facially nefarious

or unlawful conduct. *Ratzlaf*, 510 U.S. at 145-146. Even more innocuous than the conduct in *Andersen* or *Ratzlaf,* Brown's conduct was not even for his own interests–much less "inherently malign." *Andersen*, 125 S.Ct. at 2134.

Ratzlaf rests heavily on the importance of avoiding criminalizing conduct that a reasonable person would believe to be lawful. 510 U.S. at 144-149.[46] Even if knowledge of a *specific* statute is not required in this conspiracy or wire fraud (despite the nature of conduct the government stretches to reach here), at a minimum, Brown was entitled to the standard instruction that required the government to prove he knew his conduct was unlawful and that he intended to violate the law. Brown did not receive such an instruction.[47]

The statutes, as indicted and charged to the jury, have been stretched so broadly as to inculpate innocent business decisions and legally immaterial transactions.

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[46] *See also, Liparota v. United States*, 471 U.S. 419, 426, 105 S.Ct. 2084, 2088 (1985) (interpreting the term "knowingly" to require knowledge of illegality when to interpret the statute otherwise would criminalize a broad range of apparently innocent conduct).

[47] Not only does this conduct that the government seeks to punish as wire fraud arise in the complex area of tax and accounting where its unlawfulness is not apparent, but to this day, the government has not proved Enron's accounting was wrong. The court wrongly excluded defense evidence on this point, and the government offered no expert, forensic accounting testimony to challenge the validity of Enron's accounting. (See briefs of Appellants Furst and Bayly). Long, a Columbia law graduate and former Skadden Arps lawyer at Enron, even with his knowledge of the entire transaction, Enron's perspective, Ken Lay's "ear," and a non-prosecution agreement, did not believe there was anything wrong with the Nigerian Barge deal (17:2336-37, 2429).

Under the conspiracy instructions given, anyone at Merrill who knew of the Nigerian barge deal and processed any paper or had any phone conversation about this transaction, from the mail clerk who received correspondence and "deliberately" delivered it as addressed, to the receptionist who "knowingly and voluntarily" forwarded messages, could have been convicted for Enron's bookkeeping and its employees' honest services.

Oral discussions, personal understandings, structuring transactions, and re-marketing agreements are not unlawful (23:4520). It is also standard practice to reduce transactions to written agreements that exclude prior oral representations. When conduct is not "obviously evil" or "inherently nefarious," the government should be required to prove *at least* that a defendant intended to violate the law–as this circuit's pattern instruction requires. In addition, any kind of false statement prosecuted in conjunction with the Exchange Act must be material. *See Gaudin*, 115 S.Ct. at 2312-13.

More so than in *Ratzlaf* and *Cheek v. United States*, 498 U.S. 192, 201, 111 S.Ct. 604, 610 (1991),[48] this transaction involved highly technical areas of law and accounting that threaten to ensnare businessmen engaged in innocent business

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[48] In *Cheek*, the court reversed the conviction of tax protestor because "willfully" requires a "voluntary, intentional violation of a known legal duty."

conduct for no personal gain. Omitting either intent to violate the law from the conspiracy, wire fraud, and aiding and abetting instructions, *or* materiality from the books and records instruction, criminalized a vast range of innocent conduct, and requires reversal.

III. AS A MATTER OF LAW, BROWN'S CONVICTIONS FOR PERJURY AND OBSTRUCTION MUST BE REVERSED.

Brown was wrongly convicted of perjury and obstruction of justice for his statement to the Enron Grand Jury that he did not *understand* Fastow's telephone representation to Bayly to be "*a promise.*" However, Brown's testimony was true. He testified that he understood Fastow's representation to be an "*assurance.*" This understanding was confirmed by Fastow[49] and government witnesses.

Brown was invited to the Grand Jury as a witness, not as a target. He was encouraged to and did speak freely of his thoughts and understandings. Brown also voluntarily appeared and testified before the SEC and a bankruptcy examiner at length (19:3078). Brown sought to admit more of his testimony to establish necessary context, clarify his intent, and complete his answers, but the court

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[49] The trial judge apparently did not realize this critical fact until the sentencing of Appellant Furst when he noted that Fastow's *Brady* material said Fastow did not use the term "guarantee." The judge then sustained Furst's objection to the Presentence Report's assertion of obstruction. Appellant Fuhs' perjury and obstruction counts were severed and later dismissed by the government (Furst Sentencing Tr. 17).

erroneously excluded them.[50] (19:3095-97, 3281-82, 3286; 20:3317-18; BrownX965A, 975A, 980A, 980B).

Prior to trial, the government refused even to tell Brown what transcript sections it would designate (21:3848). At trial, the jury convicted him of perjury and obstruction based on isolated excerpts of testimony responding to vague and ambiguous questions about his own understandings and beliefs, and his understandings and beliefs of what others understood.[51] To contradict Brown's

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[50] Brown proffered the entirety of these transcripts, as well as much smaller excerpts under the Rule of Completeness, and sought repeatedly to have them admitted. Even if portions of the transcripts were inadmissible, the government did not fine tune their objections. In denying defense attorneys' proffers, the judge often "vouched" for the excerpts. He told the jury that the government excerpts "are *not* misleading without the additional testimony." (19:3116, 3151, 3157, 3158, 3162, 3170, 3228, 3231, 3236, 3238, 3274-75, 3281-82, 3285-86; 20:3317-20, 3322-23, 3228, 3330-32, 3237, 3660-61, 3663, 3974-77; 965D, 965J; 965A, 980B).

[51] The government based Count IV, perjury, on the following Grand Jury questions and answers only; it based Count V, obstruction, on the three underlined portions of those answers only:

"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. (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.

thorough and forthcoming testimony, the prosecution presented a casual email, erroneous in material respects, that Brown hastily wrote fourteen months later, regarding an unrelated transaction (GX240). The selected excerpts, approximately 31 out of more than 450 pages of testimony, truncated Brown's testimony and took it out of context.[52] Fastow personally contradicted the email, as did the government's own witnesses (19:3274-75).

Brown's convictions on these two counts must be reversed. As a matter of law, *inter alia*: (i) Brown's testimony was true: it was confirmed by Fastow's *Brady* material and the government's own witnesses at trial; (ii) the expression of one's "understanding" and that of others while under oath, responsive to ambiguous questions, is not perjury; (iii) the government's sole bit of evidence against Brown was an unreliable email written fourteen months later that the prosecutors knew to be false and hearsay-based; (iv) there was no material difference between Brown's

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Q: So you don't have any understanding as to why there would be a reference [in the Merrill Lynch document] [sic (it was not an ML document)] to a promise that Merrill would be taken out by a sale to another investor by June of 2000?

A: No. (Tr. at 88, lines 13-23)" (Dkt. 311; RE2).

[52] Both in volume and in content, Brown's testimony would have shown this jury the lengths that Brown went to in testifying voluntarily before multiple tribunals, answering endless questions, and fully explaining his hearsay understanding of this transaction to the best of his ability (19:3228-38, 3274-75, 3281-82, 3285-86;20:3317-20, 3322-23, 3330-32, 3341-42, 3974-77; Dkt:438, 488/89: BrownX965A, 975A, 980, 980B).

explanation of his understanding of the representations as an "assurance" juxtaposed with the email's use of "promise," and, (v) the court wrongly excluded Brown's proffers, which were critical to completing Brown's answers, and placing his "intent" and the materiality of his testimony in context.

A. The Standard Of Review Is *De Novo*.

This Court's standard of review for issues of legal sufficiency is *de novo*. *United States v. Lighte*, 782 F.2d 367, 375 (2nd Cir. 1986); *United States v. Cosby*, 601 F.2d 754, 757 (5th Cir. 1979).

B. The Perjury Conviction Is Invalid As A Matter Of Law.

Perjury requires the government to prove that Brown lied about a material fact and that he knew that he was doing so. *United States v. Abroms*, 947 F.2d 1241, 1245 (5th Cir. 1991). The government must prove that the defendant made a declaration under oath, that was (1) false, (2) material to the crime being investigated,[53] and (3) not believed by the defendant to be true. 18 U.S.C. § 1623; *Abroms*, 947 F.2d at 1245. The perjury statute may not be loosely construed, and if a witness is telling the literal truth to the question as asked, then he has not committed perjury. *United States v. Shotts*, 145 F.3d 1289, 1298 (11th Cir. 1998), *cert. denied*, 525 U.S. 1177

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[53] The judge erred in excluding Brown's proffers based on his unilateral determination that materiality was not an issue (22:3974-76).

(1999); *United States v. Dean*, 55 F.3d 640, 662 (D.C. Cir. 1995); *United States v. Crippen*, 570 F.2d 535, 537 (5th Cir. 1978), *abrogated on other grounds, United States v. Wells*, 519 U.S. 482, 117 S.Ct. 921 (1997).

1. Brown's Testimony Was Truthful, And The Government Knew That The Casual Email On Which It Relied Was Wrong.

Brown's Grand Jury testimony was truthful. He explained his understanding of the Nigerian Barge transaction, and of what others thought to the Grand Jury. His testimony was corroborated by the government's own witnesses, who used the same words as Brown. Most significantly, Fastow himself said in *Brady* material that he made assurances–not promises or guarantees (Furst Sentencing Tr. 17).

The government's only evidence of perjury and obstruction was an off-the-cuff, casual email Brown wrote fourteen months later, in an unrelated transaction, in which Brown described a promise that Fastow supposedly made in the call with Bayly and the lawyers.[54] The prosecutors said the perjury was as "black and white" as "promise" versus "no promise" (11:346, 30:6274), yet, the government knew before

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[54] The email states: "I'm not convinced yet that we can't obligate [the Company] more than Frank indicated, but I've been on the road for the last 3 days and haven't been able to determine that. If its [sic] as grim as it sounds, I would support an unsecured deal provided we had total verbal surrances [sic] from [the Company] ceo or Cfo, and schulte was strongly vouching for it. We had a similar precedent with Enron last year and we had Fastow get on the phone with Bayly and lawyers and promise to pay us back no matter what. Deal was approved and all went well" (G240; 19:3242-43).

the trial that the email was wrong on its face.[55] Fastow himself had contradicted Brown's email, and confirmed Brown's Grand Jury testimony. Perjury does not deal with "casual conversation," and "the statute does not make it a criminal act for a witness to state any material matter that implies any material matter that he does not believe to be true." *Bronston v. United States*, 409 U.S. 352, 356-58, 93 S.Ct. 595, 599, 602 (1973).

Some time prior to trial, Fastow admitted to the government that he did not make a promise or guarantee–a critical fact that the district court recognized only at the sentencing of Furst (Furst Sentencing Tr. 17). But, Brown was denied use of this

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[55] Significantly, the email discusses nothing illegal and is not incriminating on its face. Yet, the government aggravated the prejudice by pointing to it repeatedly as key evidence. It even used it in rebuttal, in violation of a motion *in limine* and the court's ruling, and argued in violation of Rule 404(b) that this showed the illegal lengths to which Brown would go to close a deal (Dkt: 379; 11:330-53; 18:2973; 31:6508-09, 6516). The government's conduct was deplorable, as it knew the email was false and did not mention anything illegal. Indeed, Brown understood lawyers to have been on the Fastow-Bayly call, and thus even his *misunderstanding* evidenced his belief that any assurance was legal.

The prejudice was exacerbated by the wrongful admission of Lyon's response that included the remark: "One let us try and tie up CAL a little bit more legally" (19:3242-43; GX240). Prior to trial, Brown moved to exclude Lyon's response, and the government did not oppose (Dkt: 247). Inexplicably and without warning, the government read the Lyon's response to the jury (19:3243). The government knew it violated the rules and later redacted the exhibit (20:3663), but the bell had been rung. Brown's severance and mistrial motions were denied (RSR19:3294, 3298; 31:6578). The court compounded this error by instructing the jury that the email, which the government knew to be wrong, was *reliable* (19:3242). Although the court also attempted a curative instruction the next day, it was insufficient to remedy the damage done in front of the jury. *Quercia v. United States*, 289 U.S. 466, 472, 53 S.Ct. 698, 700 (1933); *United States v. Canales*, 744 F.2d 413, 434 (5th Cir. 1984).

determinative fact.[56] Even though Fastow pled guilty to other charges and is cooperating fully with the government, he denied that he ever guaranteed to buy back the barges. Instead, he gave Merrill verbal *assurances* to create a high level of confidence that Enron would find a third-party buyer (14:1612). This is exactly what Brown told the Grand Jury. No reasonable jury could have convicted Brown if the jury had heard that *Fastow himself did not say he promised to pay Merrill back no matter what.*

Validating Brown's testimony and understanding, the government's witnesses described the "oral agreement" using the same exact words as Brown– both as to the terms and the vagueness of whatever representation Fastow made to Merrill. The record is replete with references to "assurances" provided[57] (18:2896; 19:3156; 20:3606; 21:3757). *Not a single witness testified that Fastow said he "promised to pay us back no matter what,"* and Fastow's lieutenant, Kopper, testified that no such

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[56] The court's refusal to allow defendants to use this critical *Brady* material alone requires reversal, as briefed by Appellant Furst (18:2771-72).

[57] Trinkle testified to her hearsay understanding of "*assurances*" (13:1047, 1072). Kopper recalled that Enron said it would do its best to find a buyer in six months (15:1696). Lawrence, who could not even say who had told him of the agreement, said that although there was an interest in helping Merrill exit the deal in six months, he did not recall any binding assurances (15:1775-76). Long said that he heard that a senior person at Enron "gave assurance to a senior person at Merrill Lynch that they would not get hurt by the deal" (16:2102). Boyle's email used the term "personal assurances by Enron senior management" (16:2122, 2321, 2386). A Merrill memo recited "assurances from Enron management" that the transaction would not go beyond June 30, 2000 (19:3156, 3262).

statement was ever made (14:1487-88). And, as Appellants Furst's and Bayly's briefs explain, there is abundant evidence that any assurance was only for a sale to a third party. Brown cannot be guilty of perjury and obstruction when the speaker himself and the government's own witnesses used identical words to explain an understanding of which none had personal knowledge.

In any event, the difference between "assurance," "promise," and the other synonyms[58] witnesses interchangeably used to describe something less than a binding legal commitment (arising from a conversation to which they were not parties) is neither legally material nor sufficient to support a perjury conviction. *See United States v. Serafini*, 167 F.3d 812, 818-24 (3rd Cir. 1999); *United States v. McAfee,* 8 F.3d 1010, 1014-15 (5th Cir. 1993) (differences must be more than vague, uncertain, or equivocal); 18 U.S.C. § 1623 (misrepresentation must be material). Brown did not testify falsely or knowingly make a *material* misrepresentation to the Grand Jury. The slight nuances in these words is neither material nor legally sufficient to constitute perjury under a criminal statute that must be strictly construed. *Crippen*, 570 F.2d at 537.

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[58] Courts routinely accept the plain meaning of words as defined in the dictionary. "Promise" is defined as an "assurance" that something will happen, and "assurance" is defined as "a declaration intended to give confidence." OXFORD UNIV. PRESS (2004). These are hardly distinctions of which perjury and obstruction are made.

2. Expressions Of Understanding, In Response To Ambiguous Questions, Are Not Perjury.

Forty-eight times in the Grand Jury alone, Brown was asked about *his understanding or belief*–and sometimes his understanding of what *others understood*–of what Enron told Merrill. Where questions are "fundamentally ambiguous," a perjury conviction may not be sustained. This conviction is precluded as a matter of law. *Serafini*, 167 F.3d at 820; *United States v. Ryan*, 808 F.2d 1010, 1015 (3rd Cir. 1987); *United States v. Farmer*, 137 F.3d 1265, 1269-70 (10th Cir. 1998).

First, Brown's opinions, beliefs and understandings are literally true and, in any event, do not express material *facts*. Second, the government's vague, ambiguous questions are legally infirm and will not support a perjury conviction. "Sometimes the witness does not understand the question, or may in an exercise of caution or apprehension, read too much or too little into it." *Bronston*, 409 U.S. at 356-58, 93 S.Ct. at 599, 602. "Precise questioning is imperative as a predicate for the offense of perjury," and even an evasive answer intending to mislead the questioner cannot be perjury if the answer is literally true. *Id.*; *United States v. Hairston*, 46 F.3d 316, 375-76 (4th Cir. 1995) (reversing perjury conviction because "prosecutor did not use the requisite specificity in questioning, despite [declarant's] apparent confusion or

evasion."); *United States v. Brumley*, 560 F.2d 1268, 1277 (5th Cir. 1977) (perjury failed for lack of specificity, lack of critical questioning, and lack of unequivocal answers).

Brown had no personal knowledge of the conversation between Fastow and Bayly, as he was not a party to that conversation. His testimony depended on hearsay emanating from speakers in time and contexts unknown. Brown admitted his *understanding* that Merrill made clear to Enron that it did not want to own the barges longer than six months.[59] He did not deny Fastow's representations; rather, he

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[59] **Q**: Okay. Now, do you see here where Ms. Toone says, '*It was our understanding* that Merrill Lynch IBK positions would be repaid as equity investment, as well as a return on equity by this date.' And the date being June 30th, 2000. **Did you have any *understanding* that this was what was going to happen by June 30th, 2000?**

A: *No, but it was our understanding that - - or my understanding* that we had told Enron *or that Enron understood* that we didn't want to own this after June 30.

Q: And the *understanding* - - or the question to you is: Do you have any *understanding* as to whether, how or why *Enron* would *believe* that it was - - *it understood that it was required*, to use the term used in the e-mail, to get Merrill Lynch out of the deal by June 30?

A: I did not understand - - you know, ***my understanding* of the transaction was that they were not required to get us out of the transaction, but we made it clear to them that we wanted to be out of it by June 30th.**

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.**

clarified his own understanding: *"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 used best efforts, that is my understanding."* (19:3238-41; JBX980, 980B). Thus, he fully and honestly disclosed *his understanding* to the Grand Jury. This is not perjury as a matter of law. *United States v. Derricks*, 163 F.3d 799 (4th Cir. 1998) (finding no perjury where declarant testified as to "subjective belief"). In *Derricks*, the court stated that such "testimony [is] perjurious only if [declarant] was *misrepresenting his subjective belief*." *Id.* at 828. Indeed, it is virtually impossible "to prove that someone is lying about their subjective beliefs and perceptions." *Id.*,

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Q: Now, do you see where it says in the second-to-last line, 'IBK was supportive, based on Enron relationship, approximately $40 million in annual revenues and *assurances* from Enron management that we will be taken out of our 7-million-dollar investment within the next three to six months'? Does that accord with *your understanding* of the transaction?

A: No. ***I thought*** **we had received comfort from Enron that we would be taken out of the transaction within 6 months or we would get that *comfort.* If *assurance* is synonymous with guarantee, then that is not *my understanding.* If *assurance* is interpreted to be more along the lines of strong comfort or use best efforts, that is *my understanding*.** (BrownX980, 980B: 76, 77, 81, 82, 88, 91, 92; 19:3238-41) (emphasis added).

United States v. Ellis, 121 F.3d 908, 927-28 (4th Cir. 1997), *cert. denied*, 522 U.S. 1068 (1998) (perjury as to "matter of perception" fails "absent conclusive proof" witness lied).

"Precise examination, which the prosecutor failed to pursue in this case, rather than perjury prosecution, is the primary safeguard against errant testimony." *Farmer*, 137 F.3d at 1270; *Bronston*, 409 U.S. at 360. Courts routinely overturn perjury convictions that rest on ambiguous and inherently entrapping questions such as those posed to Brown.[60] *Serafini*, 167 F.3d at 818-24 (question whether defendant was aware of checks "related to this investigation, to this Dole contribution" was ambiguous in scope); *Shotts*, 145 F.3d at 1298 (reversing perjury conviction where defendant denied owning a bail bonds business; defendant's answer was technically correct because he did not hold stock in the corporation as required for ownership under state law, and to the extent that defendant "owned" business in any other sense, government's question was ambiguous); *United States v. Manapat*, 928 F.2d 1097,

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[60] *Lighte*, 782 F.2d at 375 (reversing a perjury conviction because the question was ambiguous: "you" could refer either to the defendant personally or in his capacity as trustee), *abrogated on other grounds*, *Wells,* 519 U.S. at 482, 117 S.Ct. at 921; *United States v. Landau*, 737 F.Supp. 778, 781-84 (S.D. NY 1990) (dismissing indictment because all questions were ambiguous; the time frame was not specified, and if defendant had understood there to be an implied temporal limitation based on previous questions, his testimony would have been truthful); *United States v. Ball*, 738 F.Supp. 1073, 1076-77 (E.D. Mich. 1990) (acquittal granted at close of government's case; defendant denied a "sale" occurred, and the court found the question ambiguous because "sale" arguably did not cover a "barter" transaction).

1101-02 (11th Cir. 1991) (affirming dismissal of indictment, where form of questions were so fundamentally ambiguous as to "preclude conviction as a matter of law"); *United States v. Eddy*, 737 F.2d 564, 567-70 (6th Cir. 1984) (reversing conviction because of question whether defendant had submitted "official" transcript was ambiguous where defendant submitted falsified transcripts); *United States v. Bell*, 623 F.2d 1132, 1137 (5th Cir. 1980) (entering acquittal of perjury; crucial question was unclear, and defendant may not be "assumed" into prison). Brown's answers fully disclosed his personal understanding, and the government's ambiguous questions alone require reversal.

3. The Court Erroneously Excluded All Of Brown's Testimony, And His Convictions For Perjury And Obstruction Must Be Reversed On This Basis Alone.

The district court refused Brown's proffers, and his conviction was obtained by allowing the admission of only 31 out of more than 450 pages of testimony. Admission of additional testimony would have made it plain that Brown did not attempt to deceive the grand jury or obstruct justice, that his statements as selected by the government were not material and did nothing to impede the Grand Jury, and that he did not have the requisite criminal knowledge or intent (19:3228-38, 3274-75, 3281-82, 3285-86; 20:3317-20, 3322-23, 3330-32, 3341-42, 3974-77; Dkt:438, 488/89; G965A, 965K, 975A: BrownX 980, 980B).

The court erred in allowing the government to isolate and manipulate minuscule portions of Brown's testimony. The court excluded additional testimony upon determining, unilaterally, that "[t]he materiality of those questions, therefore, and answers are not genuinely in question" (22:3974). Yet, the materiality of Brown's answers was a critical issue in the trial. Brown never denied that he had understood that Fastow made representations. Rather, he said he understood it as an "assurance," not a "promise."

Brown's full testimony explained his understanding and evidenced his effort to provide honest and complete information to the Grand Jury. The distinction without a difference between "assurance" and "promise," could not have derailed the Grand Jury. The full transcript also showed his lack of intent to mislead or impede. Thus, the court effectively directed a verdict against Brown on the critical issue of the materiality of his statements. Materiality was an issue that only the jury could decide, and Brown had a constitutional right for the jury to do so. *Gaudin*, 515 U.S. at 522.

It is axiomatic that the government may not sustain a perjury conviction by lifting statements out of context and distorting their meaning. *Serafini*, 167 F.3d at 818-24; *Farmer*, 137 F.3d at 1269-70; *United States v. Marqiewicz*, 978 F.2d 786, 808, 820 (2nd Cir. 1992). The sovereign, whose job it is to seek the truth, *Berger v.*

United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935), should have introduced more complete transcripts.

At the least, the court should have admitted Brown's selected proffers. *Cosby*, 601 F.2d at 758. Even the limited sections offered under Rule 106, FED. R. EVID., would have shown, *inter alia*, that (i) someone in the DMCC meeting told Brown that Enron was not guaranteeing Merrill's barge interest, and that Merrill was exposed (GJ Tr.179; 19:3228; 965A); (ii) he understood that Enron had a ready buyer, Marubeni, right around the corner, and it would pay more than Merrill Lynch was paying, so Enron wanted to cap Merrill's upside (GJ Tr. 61-62; 19:3228; 965A); and (iii) the conversation between Bayly and others at Merrill with Fastow and others at Enron was to confirm that Enron "really did have Maherbani [sic] expected to take us out in the near future and that they would use their best efforts to get us out of the deal within 6 months" (GJ Tr.183; 19:3237-38; 19:3228; 965A).[61]

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[61] The excluded testimony also included Brown's sworn explanation that he was exaggerating the strength of the promise in the email. Brown stated, "[s]o what I effectively did was exaggerate what we got before [with Enron] *up to the standard that I wanted* out of Continental Airlines." (19:3286; 20:3317; X980A) (emphasis added). Brown was entitled to introduce both his explanation and the full transcript. *United States v. Ballis*, 28 F.3d 1399 (5th Cir. 1994) (reversing obstruction convictions for exclusion of the defendant's evidence of what was said); *Cosby*, 601 F.2d at 757 (acquitting for failure to prove materiality upon exclusion of transcript). It was error to exclude Brown's full testimony here, especially his explanation of the email: (1) when he was not even confronted with the email in the Grand Jury; (2) when he was under oath and confronted in another proceeding, he did explain it; and, (3) when the incorrect email was introduced against him in the trial, the judge told the jury it showed "ample indicia of reliability as required by the authorities." (19:3242).

This Court has disapproved of this tactic of isolating testimony and failing to use the complete transcript. The result "merely attests to [the government's] own purposes and actions, not the nature, scope or extent of the grand jury inquiry." *Bell*, 623 F.2d at 1135; *Cosby*, 601 F.2d at 758. In *Cosby*, this Court reversed the conviction and rendered acquittal because the government did not introduce the transcript, the court erroneously rejected *Cosby's* proffers of his entire testimony, and the government failed to prove materiality. 601 F.2d at 757. The same result is required here.

Sound policy underlies this requirement. In a perjury prosecution "we are not dealing with casual conversation." The statute, which is not to be "loosely construed," "does not make it a criminal act for a witness to willfully state any material matter that implies any material matter that he does not believe to be true." *Bronston,* 409 U.S. at 357-58, 361. The law seeks to induce witnesses to tell the truth, not to penalize them for it, and the "measures taken against the offense must not be so severe as to discourage witnesses from appearing or testifying." *Id.* at 359. Here, Brown's open and expansive explanations to the government's convoluted questions about his understanding demonstrate Brown's intent to tell the full truth. Even misstatements made without intent to deceive are not perjury–and the government may not carve up testimony to make it look that way. 18 U.S.C. §

1623(d); *United States v. Flowers*, 813 F.2d 1320, 1325-27 (4th Cir. 1987) (later clarification of testimony bears on both materiality and sufficiency for perjury conviction"); *McAfee,* 8 F.3d at 1014 (recantation, or in Brown's case, explanation, bears on whether the accused *intended* to lie).

Had the full transcripts been admitted, it would have been apparent that the testimony for which he was convicted could not even be "material" because it could not have had the effect or tendency of influencing the Grand Jury incorrectly. Brown's testimony aimed to clarify his understanding. *Id.* at 1017; *Abroms,* 947 F.2d at 1245. The district court's failure to admit all of Brown's testimony (i) to provide context, (ii) show his full answers, (iii) demonstrate his forthright and expansive testimony, and (iv) allow his explanation of the email, requires reversal. "Clearly, where the content of discussions which actually occurred is a primary issue, a party is entitled to adduce evidence of those discussions at trial." *Ballis*, 28 F.3d at 1405. The government's failure to prove materiality, and the wrongful exclusion of this evidence upon the district court's unilateral decision on "the materiality of those questions," require acquittal for perjury and obstruction.

C. Brown Did Not Obstruct Justice As A Matter Of Law.

On even less evidence than it alleged as perjury, or perhaps riding on the coattails of it, the government also charged Brown with obstruction of justice. 18

U.S.C. § 1503. To prove obstruction, the government was required 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.[62] 18 U.S.C. § 1503; *United States v. Aguilar*, 515 U.S. 593, 115 S.Ct. 2357 (1995) (conduct must have the natural and probable effect of interfering with the due administration of justice); *see also United States v. Neal,* 951 F.2d 630, 632 (5th Cir. 1992); *United States v. Varkonyi*, 611 F.2d 84, 85 (5th Cir.), *cert. denied*, 446 U.S. 945 (1980).

1. The Obstruction Conviction Must Be Reversed As A Matter Of Law Because It Rests On Less Than The Alleged Perjury.

The government made no effort to prove the *additional* elements required for obstruction. Not all false or evasive testimony constitutes obstruction of justice, and proof of perjury is insufficient alone to prove obstruction. *See In Re Michael*, 326 U.S. 224, 227-28, 66 S.Ct. 78, 79-80 (1945) ("[P]erjury alone does not constitute an

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[62] The jury was not correctly instructed on this offense. Under *Andersen*, "corrupt" or "corruptly" must "limit[ ] criminality" to persons "conscious of their wrongdoing." *Andersen,* 125 S.Ct. at 2136. "Corruptly," at the least, requires acting with "an improper motive or 'an evil or wicked purpose.'" *Id., United States v. Haas*, 583 F.2d 216, 220 (5th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979); *United States v. Partin*, 552 F.2d 621, 641-42 (5th Cir.), *cert. denied*, 434 U.S. 903 (1977); *see United States v. Thomas*, 916 F.2d 647, 652-54 (11th Cir. 1990) (reversing conviction because in the "context of false testimony, . . . the trial court must instruct the jury that false testimony alone will not provide the basis for a § 1503 conviction unless the testimony at issue had the natural and probable effect of impeding the due administration of justice."). The court also erred in omitting "willfully" from this instruction. *See* Arg. II, *supra*.

'obstruction'. . . there 'must be added to the essential elements of perjury under the general law the further element of obstruction to the Court in the performance of its duty.'") (citation omitted); *United States v. Griffin*, 589 F.2d 200, 204 (5th Cir.), *cert. denied*, 444 U.S. 825 (1979) ("[P]erjury alone does not have a necessarily inherent obstructive effect on the administration of justice");[63] *accord Thomas*, 916 F.2d at 652-54; *United States v. Perkins*, 748 F.2d 1519, 1528 (11th Cir. 1984) ("When false statements form the basis of the alleged obstruction, however, the government must prove that the statements had the effect of impeding justice.").[64]

The government introduced no evidence beyond Brown's isolated Grand Jury excerpts and the fourteen-month-later email to prove perjury or obstruction. It did not establish that Brown's testimony had any effect (actual, natural, or probable) on the

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[63] This Court noted that judicial opinions differ on whether false testimony alone is the type of conduct that constitutes an interference with the due administration of justice. *Griffin*, 589 F.2d at 203, 207.

[64] Numerous courts have reversed convictions under similar circumstances because even false statements do not prove the defendant's knowledge and intent to obstruct. *United States v. Vaghela*, 169 F.3d 729, 735 (11th Cir. 1999) ("[I]n a broad and colloquial sense, every criminal act is an obstruction of justice, as is every effort to conceal that criminal act. However, . . . such a broad and literal reading of the definition of this criminal offense is inconsistent with *Aguilar*."); *United States v. Grubb*, 11 F.3d 426, 437 (4th Cir. 1993) (following *Essex,* an obstruction cannot rest solely on proof of perjury, but requires additional proof of actual or intended obstruction); *see United States v. Wood*, 6 F.3d 692, 695 (10th Cir. 1993) (same, emphasizing nexus); *Essex v. United States*, 407 F.2d 214, 271 (6th Cir. 1969) (mere filing of false affidavit did not prove obstruction); *Pyramid Securities v. IB Resolution, Inc.*, 924 F.2d 1114, 1119 (D.C. Cir. 1991) (same).

Grand Jury proceeding. If allegedly false testimony alone is the basis for the offense, it still must be shown to be material and to have the effect of impeding justice. Obstruction of justice is not inherent in all false testimony. *Aguilar*, 515 U.S. at 599; *United States v. Williams*, 874 F.2d 968, 981 (5th Cir. 1989) (false denials of knowledge of events "had the effect of closing off avenues of inquiry being pursued"); *Grubb*, 11 F.3d at 437; *Vaghela*, 169 F.3d at 735.

While testifying fully in response to the government's ambiguous questions, Brown answered carefully and thoughtfully, trying to be more accurate and precise under oath than he was (or anyone is) in the off-the-cuff email which the government knew to be fraught with inaccuracies. Brown's Grand Jury statements–had they been taken in context with his entire testimony–prove that Brown did not testify falsely or obstruct justice.[65] Moreover, as the trial judge noted when he modified Appellant Furst's pre-sentence report alleging obstructive conduct: "The government's *Brady* disclosures before trial included a letter from the government counsel describing Andrew Fastow's debriefing, . . . and according to him, . . . he did not use the term

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[65] As in *Ballis*, this Court must reverse because the district court wrongly excluded portions of his testimony relevant to the crimes charged, that would have shown the true context of his answers, and that they were not criminal. 28 F.3d at 1403-06, 1407 (reversing obstruction conviction because court excluded portions of discussion relevant to whether defendant had obstructed justice).

'guarantee' in the telephone conference that was important to this case and was conducted between him and Bayly." (Furst sentencing Tr. 17).

2. There Was No Evidence That Brown Impeded Any Investigation.

Brown voluntarily testified at length before multiple tribunals without threat or subpoena (19:3278). He answered all questions, was forthcoming, and related his understanding, albeit hearsay-based, of the transaction. Unlike Fastow's protegé, Kopper, who destroyed his computers at Fastow's request as soon as they heard of an investigation,[66] Brown produced his documents, destroyed nothing, and voluntarily testified (14:1392, 1400, 1500-01; 19:3285; 20:3344). Brown neither concealed information nor impeded the work of the Grand Jury. *Thomas*, 916 F.2d at 652-54. He did not deny hearing about the Fastow conversation, but rather, as requested, explained his understanding of the assurances. He was not a correspondent in, or recipient of, the emails about which he was questioned in the Grand Jury (20:3339-41). At no time did he "stonewall" or cut off avenues of inquiry. This is not

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[66] Kopper, like many of the Enron executives who pocketed millions from blatant frauds contrived for their personal gain, received a generous plea agreement. Kopper admitted defrauding Enron of more than $50 million dollars and that he and Fastow lied to everyone. He only forfeited $12 million. Pursuant to his plea agreement, his domestic partner, who also profited millions, was not prosecuted at all, and was allowed to keep his $2 million dollar house and millions in ill-gotten gains. Meanwhile, Kopper is optimistic that he will receive no jail time because of his "extensive cooperation" (14:1312-15, 1320-22, 1324-29, 1382-85, 1394-95, 1397-98, 1424; GX905).

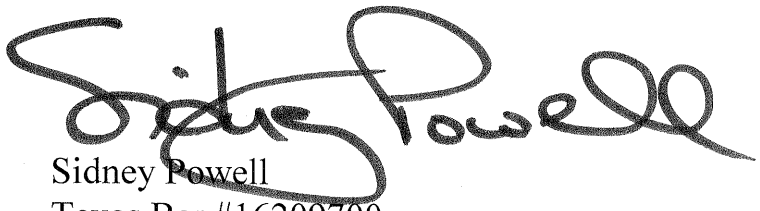
obstructive conduct as a matter of law. *Contrast Griffin*, 589 F.2d at 204, 205 (where denials and inability to recall were false and hindered grand jury's attempt to gather information).

No showing of materiality or "impeding" was made, nor could it have been in light of Brown's expansive and explanatory testimony. As the trial jury found, there was "no substantial interference with the administration of justice" (35:6967). Brown did not block or delay the judicial process. *In re Michael*, 326 U.S. at 227, 66 S.Ct. at 79-80 (reversing obstruction conviction based on perjury alone); *Thomas*, 916 F.2d at 654 (reversing conviction). There is neither a factual nor a legal basis to sustain Brown's perjury or obstruction convictions, and he should be acquitted.

CONCLUSION

For these reasons, Brown's convictions must be reversed, and a judgment of acquittal rendered on all counts; or, in the alternative, a new trial granted on all counts.

Respectfully submitted,



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I hereby certify that true and complete copies, and an electronic copy in Word Perfect version 12.0, of the Brief of Appellant James A. Brown was served via United States first class mail, postage prepaid, as listed below, on this 26th day of July, 2005:

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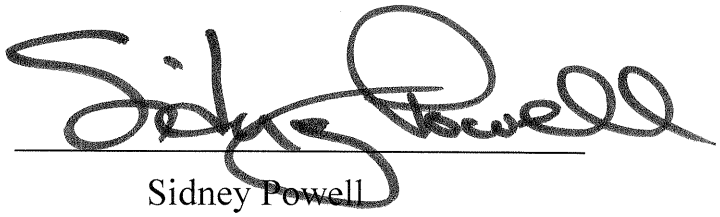

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CERTIFICATE OF COMPLIANCE

Pursuant to FIFTH CIR. R. 32.3, undersigned counsel certifies this appellate brief complies with the type-volume limitations of FIFTH CIR. R. 32.3.

1. EXCLUSIVE OF THE EXEMPTED PORTIONS OF FED.R.APP.P. 32(a)(7)(B)(iii), THE BRIEF CONTAINS 20,905 WORDS.

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4. UNDERSIGNED COUNSEL UNDERSTANDS THAT A MATERIAL MISREPRESENTATION IN COMPLETING THIS CERTIFICATE, OR CIRCUMVENTION OF THE TYPE-VOLUME LIMITS IN FED.R.APP.P. 32(a)(7)(B)(iii), MAY RESULT IN THE COURT'S STRIKING THE BRIEF AND IMPOSING SANCTIONS AGAINST THE PERSON SIGNING THE BRIEF.

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