UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,	§	
Plaintiff,	§	
	§	
v.	§	**CR. NO. H-03-363 (Werlein, J.)**
	§	
DANIEL BAYLY,	§	
JAMES A. BROWN, and	§	
ROBERT S. FURST,	§	
Defendants	§	

BROWN'S REPLY IN SUPPORT OF HIS MOTION FOR LEAVE TO ISSUE RULE 17(c) SUBPOENA

Defendant James Arthur Brown requests leave to issue a Subpoena, under authority of FEDERAL RULES OF CRIMINAL PROCEDURE Rule 17(c) and the Fifth and Sixth Amendments, ordering the government to turn over to this Court (and Defendant Brown) any materials tending to clarify, refute or impeach its current position that Brown's bond must be revoked.[1] The government's response in opposition to this request is inapposite and baseless. AUSA Spencer has waived any privilege regarding this material and has squarely placed it in issue before this Court. He has made this evidence material to the defense by his assertions of the "embarrassing" incompetence of the Assistant Attorney General in charge of the Criminal Division of the Department of Justice and of Stephan Oestricher, the Assistant United States Attorney who briefed and argued the case for the government in the United States Court of Appeals for the Fifth Circuit, and by his factual assertion that the government simply "did not do the research" and made "a misstatement of law" that,

[1] This Court's Order today (Dkt. #1027), denying the government's Motion to Revoke, does not moot this request. First, the Order invites further litigation to determine this Court's authority to resentence Brown despite the government's judicial admission to the Fifth Circuit that "Brown is entitled to be resentenced," and second, the information requested is material and necessary to a fair and just resolution of the government misconduct issues. Brown is entitled to be resentenced to time served, and the requested materials are material to the resolution of that ultimate issue.

somehow, is no longer binding on the government–despite controlling precedent and the Fifth Circuit's and Brown's reliance on it.

I. The Government's Continued Urging To Remand Brown Is Utterly Baseless And Warrants Immediate Imposition Of Sanctions.

AUSA Spencer continues to ignore the fact that **the United States Court of Appeals for the Fifth Circuit considered and acted on the government's agreement to Brown's release and on the government's admission that "Brown is entitled to be resentenced," and, that the Fifth Circuit ordered Brown's release from custody based on that admission and formal pleading**.

In yet an even more frivolous filing and demonstration of prosecutorial misconduct, AUSA Spencer tells this Court it does not have *jurisdiction* to re-sentence Brown. Yet, *United States v. Lopez*, the very case on which he relies, expressly rejects that argument. *And*, in an absolutely amazing distortion of facts and manipulative abdication of the fundamental responsibility of the United States Department of Justice for its judicial admission (while ignoring his own assertions of his predecessors' and superiors' incompetence), AUSA Spencer asserts now that it is really just all defense counsel's fault. He now writes that it is undersigned counsel, (Sidney Powell), who "originally made the misstatement of law in the Motion for Release on Bond *Instanter*," *and*, that only post-conviction, collateral review is available to Brown to litigate "whether the government was obligated to identify *Brown's counsel's mistake*, and whether Brown was prejudiced by the government's failure to alert Brown's counsel of *her mistake*." (Government's Response, Dkt. 1024, n.1; emphasis added). Undoubtedly, however, the Fifth Circuit relied on the government's agreement with Brown's Motion and its judicial admission that Brown was entitled to be resentenced when the Circuit ordered his release from custody.

Clearly then, according to AUSA Spencer, *whenever* the government confesses error, enters into a stipulation, or reaches an agreement with defense counsel–in the Supreme Court, the Fifth Circuit, or any other federal court– it is simply the fault of and attributable solely to the defendant's counsel, and the government is not bound by its admissions, stipulations and representations to *any* court. This new "Spencer rule"–an exception to uniform existing precedent which unequivocally holds that the government *is bound* by its judicial admissions, stipulations and agreements–must be rejected by this Court.

Further, sanctions should be imposed for this outrageous government misconduct, unilateral repudiation of the judicial admission that "Brown is entitled to be resentenced" and agreement to Brown's release, and for AUSA Spencer's repeated, and increasingly disingenuous efforts to mislead this Court as to the law and the facts. Indeed, there is ample justification for this Court to issue an order requiring the personal appearance of Assistant Attorney General Alice Fisher, Stephan Oestricher, Steven Tyrell and Arnold Spencer at a formal hearing to answer for the government's misconduct. At a bare minimum, Brown is entitled to the subpoena he has requested and to the production of the documents he has requested in his defense on these issues–all of which have been placed in issue by AUSA's Spencer's increasingly astonishing assertions and waiver of any privilege.

A. Title 18 U.S.C. §3582 Does Not Apply.

The government's opposition to the issuance of the requested subpoena rests entirely on a flagrant misstatement of fundamental, hornbook law: the assertion that this Court does not have

jurisdiction to resentence Jim Brown.[2] AUSA Spencer cites only 18 U.S.C. §3582 and *United States v. Lopez*, 26 F.3d 512 (5th Cir. 1994). Neither supports his position.

18 U.S.C. §3582 is legally irrelevant to this issue. It does not apply when convictions have been reversed on appeal. The statute, by its express terms, governs the original imposition of a sentence of imprisonment, requiring the court to consider the factors in section 3553(a), and, providing for modification or reduction of an imposed term of imprisonment under specific conditions, such as upon motion of the Director of the Bureau of Prisons, as permitted by FEDERAL RULES OF CRIMINAL PROCEDURE Rule 35, or as required when the Sentencing Commission lowers its guidelines. AUSA Spencer has *never cited* to this Court *a single case* that applies to the facts before this Court–where multiple counts of conviction on which a sentence was based are reversed and vacated on appeal. Indeed, he cannot do so. *All* of the *relevant* cases require that Brown be resentenced–as the government previously admitted. *See* Brown's Opposition to Motion to Government's Motion to Revoke Bond (citing cases).

Brown does not seek *modification* of his sentence within the contemplation of 18 U.S.C. § 3582.[3] Rather, the sentence originally imposed on Brown became legally and constitutionally invalid

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[2] Jurisdiction returned to this Court when mandate issued. *United States v. Matthews*, 312 F.3d 652, 657 (5th Cir. 2002). As the government agreed in its judicial admission filed with the United States Court of Appeals for the Fifth Circuit, "Brown is entitled to be resentenced." The Fifth Circuit implicitly and explicitly agreed with this admission and Brown's right to be resentenced, and therefore released Brown. *United States v. Lee*, 358 F.3d 315, 320 (5th Cir. 2004) (Issues expressly or impliedly decided by the Court of Appeals may not be re-litigated in the District Court). This result was required by *United States v. Bass*, 104 Fed.Appx. 997, 2004 WL 1719484 (5th Cir. 2004) (*per curiam*). Brown effectively litigated this issue before the Fifth Circuit through his Motion to Release *Instanter*. The Fifth Circuit's ruling on that Motion, and the government's explicit agreement, has foreclosed re-litigation– Brown is entitled to be resentenced.

[3] *Lopez*, which the government misconstrues, limits the applicability of §3582 to its express terms. For example, in *Lopez*, the Court noted that "Rule 36 does not encompass sentence modifications in the sense contemplated by §3582(c)." *Lopez*, 26 F.3d at 515 n.5. *Lopez* also acknowledges that this Court has authority to alter a sentence on remand from the Court of Appeals. *Id*. at 516-17.

when the Fifth Circuit reversed and vacated the three counts of conviction on which it was predicated and the Guidelines calculated. *Id*. at 7 (quoting *United States v. Bass*, 104 Fed.Appx. 997, 2004 WL 1719484 (5th Cir. 2004) (*per curiam*)). Upon receipt of the government's judicial admission that Brown is entitled to be resentenced, the Fifth Circuit agreed and issued its order requiring Brown's release because Brown was entitled to be released and "is entitled to be resentenced."[4] Three of the five counts of conviction–indeed the primary counts on which Brown's sentence were based–were reversed on appeal. The Fifth Circuit's decision in *Bass*, and relevant precedent across the circuits, requires that he be resentenced (to time served) on the only counts for which he stands convicted.

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[4] Contrary to AUSA Spencer's representations, Brown did raise an issue on appeal that would result in the reduction of his sentence, which, along with many other issues, the Fifth Circuit simply did not reach (*see* Furst Br. 62, adopted by Brown). However, the necessity for Brown to be resentenced did not arise until August 1, 2006, when the Fifth Circuit reversed Counts I-III. At that point, all existing applicable precedent from any circuit required that Brown's sentence be unbundled and that he be resentenced according to the guidelines applicable to the only offenses for which he stands convicted. *United States v. Bass*, 104 Fed.Appx. 997, 2004 WL 1719484 (5th Cir. 2004) (*per curiam*); *United States v. Hadden*, 475 F.3d 652, 669 (4th Cir. 2007);*United States v. White*, 406 F.3d 827, 831-32 (7th Cir. 2005); *United States v. Shue,* 825 F.2d 1111, 1114 (7th Cir.1987); *United States v. Smith,* 115 F.3d 241, 245 n. 4 (4th Cir.1997); *United States v. Evans,* 314 F.3d 329, 332 (8th Cir.2002); *United States v. Ruiz-Alvarez,* 211 F.3d 1181, 1184 (9th Cir.2000); *United States v. Hicks,* 146 F.3d 1198, 1202 (10th Cir.1998); *United States v. Watkins,* 147 F.3d 1294, 1297 (11th Cir.1998).

Indeed, had the government not immediately *agreed–upon receipt of the Fifth Circuit's opinion* and Brown's Motion for Release–and the Fifth Circuit concurred, that Brown was entitled to be resentenced, Brown would have immediately (and further) litigated this issue in the Fifth Circuit. The Fifth Circuit was bound by its opinion in *Bass* to vacate Brown's sentence, and it undoubtedly would have remanded this case for resentencing. However, in one of the few instances of the correct exercise of the ethical duties of the United States under *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935), that we have seen in this case, the Department of Justice agreed that Brown was entitled to be resentenced and released–thereby mooting the need for any further litigation on this issue in the Fifth Circuit. It was not until AUSA Spencer began to pressure Brown to plead guilty and testify against his co-defendants that the government's judicial admission became, first, *its misstatement of law*, and now, *defense counsel's misstatement of law*. AUSA Spencer's continued assertions that the prior decision of the Department of Justice were wrong, non-binding, and now, that it is *defense counsel's fault* that the government agreed to his release and resentencing, make absolute the necessity for the Rule 17(c) subpoena Brown requests. The requested material will most likely be dispositive of the real reasons for the government's judicial admission, and the requested materials will also prove or disprove egregious government misconduct by AUSA Spencer and the truth or falsity of the remarkable representations he has made to this Court.

See supra note 3 and accompanying text. This is a *Constitutional* issue and a *Constitutional* right to which §3582 does not apply any more than does, for example, 7 U.S.C. § 4801 et seq. (Act establishing a "National Pork Board" for promotion of porcine products.). *Jurisdiction* is not the issue before this Court.

B. *United States v. Lopez*, A Guilty Plea Case, Is Factually And Legally Inapposite.

Lopez is similarly inapplicable. In *Lopez*, the defendant's conviction was *not* reversed on appeal. Rather, the defendant had pleaded guilty, was sentenced, then reneged on his plea agreement. The *government* sought to *modify* his sentence–to *increase it* after he failed to cooperate and testify against his co-defendants as required by his plea agreement. The Fifth Circuit held that the district court lacked authority to increase the defendant's sentence imposed pursuant to his guilty plea. Even then, the court specifically *rejected* the government's assertion that the district court had no *jurisdiction* to modify the sentence. *Lopez*, 26 F.3d at 515 n. 3 ("§ 3582(c) does not expressly address the jurisdiction of a court to modify an imposed term of imprisonment"). *Lopez* is legally and factually irrelevant to the issues before this Court–except to the extent it notes that § 3582 is not jurisdictional and does not apply here. As the government previously agreed, "Brown is entitled to be resentenced" because the three counts of conviction on which his sentence were based were reversed on appeal, and he has served the maximum term of incarceration that could have been imposed under the guidelines for the only offenses for which he stands convicted. AUSA Spencer's repeated and disingenuous assertions to the contrary warrant sanctions.

II. AUSA Spencer Has Waived Any Privilege Applicable to the Documents Brown Requests.

On November 16, in open court, AUSA Spencer told this Court: "**the government said he should be resentenced here because the government responded in one day and didn't do the research and didn't identify this issue.**" (Transcript of Hearing, November 16, 2007, at p. 59). He said "**the misstatement of law is not a binding judicial admission**." He said, "**it's embarrassing and we wish we hadn't done it.**" (*Id*. at p. 64). These statements squarely place the materials Brown has requested in issue and make them material to Brown's defense of AUSA Spencer's continued and repeated insistence that Brown's bond be revoked because §3582 deprives this Court of jurisdiction.

In his response, AUSA Spencer has gone even further to disavow the government's judicial admission. Now, he even contradicts *his own* prior filings and statements in open court in which he said it was the *government's* misstatement of law that led to Brown's release. In his latest filing, seeking to deny Brown the requested exculpatory material, AUSA Spencer now blames opposing counsel: "*Brown's counsel* originally made the misstatement of law in the Motion for Release on Bond Instanter." (Opposition to Brown's Motion for Leave to Issue Rule 17 Subpoena, at p.2 n.1) (emphasis added). AUSA Spencer's new and increasingly disingenuous assertions simply provide further–indeed compelling–support for Brown's requested subpoena and constitute further waiver of any privilege.

AUSA Spencer does not deny that the requested documents exist; nor does he deny that they would support Brown's release and resentencing to "time served." No doubt, they do, and, Brown is entitled to them. *Bowman Dairy Co. v. United States*, 341 U.S. 214, 219, 71 S.Ct. 675, 678 (1951). *Cf. United States v. Nobles*, 422 U.S. 225, 239 n.14, 95 S.Ct. 2160, 2171 n.14 (1975) ("[W]here, as here, counsel attempts to make a testimonial use of [work-product] materials the

normal rules of evidence come into play with respect to cross-examination and *production of documents*.") (emphasis added). By his representations to this Court that the government has changed positions (now to a third one), that the change is attributable solely to a "misstatement of law," that his predecessors were incompetent and entered this agreement and made this judicial admission without any research or consideration, he has placed his predecessors' (and the government's) work product, effort, analysis, research, thought and work processes, correspondence, approval memos, and all related documentation on these issues directly in issue before this Court and waived any claim of privilege. *United States v. Kattar*, 840 F.2d 118, 131 (1st Cir. 1988) ("Government cannot indicate to one federal court that certain statements are trustworthy and accurate and then argue [] in another federal court that those same assertions" are immaterial, erroneous, or inadmissable).[5] S*ee* FED.R.CRIM.P. Rule 16(a)(2), *Nobles*, 422 U.S. at 239-40, 95 S.Ct. at 2170-71. *See also Shields v. Sturm, Ruger & Co.*, 864 F.2d 379, 382 (5th Cir.1989) (Any claim of work product is waived where "attorney discloses the information to the Court voluntarily.").

Internal government documents are not immune from production under authority of both Rule 17(c) and the United States Constitution. *Bowman Dairy Co.*, 341 U.S. at 219, 71 S.Ct. at 678.

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[5] The Court in *Kattar* went further and, following Judge Bazelon's opinion in *United States v. Morgan*, 581 F.2d 933 (C.D.C. 1978), and then-Judge Stevens' opinion in *United States v. Powers*, 467 F.2d 1089 (7th Cir. 1972) (Stevens, J., dissenting), held that:

> "The Justice Department here has, as clearly as possible, manifested its belief in the substance of the contested [evidentiary items]; it has submitted them to other federal courts to show the truth of the matter contained therein. We agree [these admissions] establish the position of the United States and not merely the views of its agents who participate therein. The inconsistency of the government's positions [] should have been made known to the [factfinder]."

Kattar, 840 F.2d at 131 (citations omitted). *See also United States v. Branham*, 97 F.3d 835 (6th Cir. 1996) (government conceded that prosecution is a party-opponent of the defendant in a criminal case).

See United States v. Wilson, 289 F.Supp.2d 801 (S.D.Tex. 2003); *accord United States v. Leung*, 351 F.Supp.2d 992, 994 n.1 (C.D.Cal 2005) (Prior to trial, district court issued subpoena, on defendant's request, and over government's motion to quash, of all internal government correspondence regarding co-defendant's plea conditions.). This material is necessary to a fair, just and complete resolution of all issues surrounding Brown's entitlement to be resentenced to "time served" for the only two counts of conviction that were affirmed by the Fifth Circuit. *United States v. Brown*, 459 F.3d 509 (5th Cir. 2006). These documents likely include exculpatory material. They may very well demonstrate the government's full recognition that Brown has served a maximum sentence for the only two counts of conviction affirmed on appeal, that the government did in fact research and consider its decision to agree to Brown's release, that the decision was approved by persons superior to Arnold Spencer, and that AUSA Spencer's remarkable new position is legally and factually unsupportable and in complete derogation of his duties as an Assistant United States Attorney.[6]

These materials bear directly on every assertion that AUSA Spencer has made to this Court on the issues raised by his Motion to Revoke Brown's bond. Indeed here, just as in *Leung*, it is likely that these documents will reveal "[i]n a stunning example of understatement," that AUSA Spencer's representations to this Court are more than "inconsistent" with the government's actual conduct and admission in this case. *Leung*, 351 F.Supp.2d at 995. Just as in *Leung*, AUSA Spencer himself has already made such a "stunning" understatement, acknowledging in writing: "**I realize this position is not consistent with the government's concession in response to your client's Motion for Release on Conditions *Instanter*.**" Letter of AUSA Spencer to Brown's Counsel,

[6] *See*, *e.g. United States v. Wilson*, 289 F.Supp.2d 801, 816 (S.D.Tex. 2003) ("Although [Defendant] *knew* [the truth], impeaching the government's witnesses by its own records would *prove* much more forceful and credible at trial.") (emphasis in original).

July 3, 2007, attached hereto as Exhibit A. "Stunning" is indeed an understated characterization of his assertions to this Court. The requested materials will make that clear.

The government, by its varying and conflicting representations to the Courts of this Circuit, all of which have prejudiced Defendant Brown and placed him in jeopardy, has waived any claim of immunity or privilege for this internal correspondence and memoranda. *See United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15, 47 S.Ct. 1, 6 (1926) (Presumption of regularity in prosecutorial decisions will be discarded where clear evidence to the contrary); *Hickman v. Taylor*, 329 U.S. 495, 510, 67 S.Ct. 385, 393 (1947) (Work product discoverable upon substantial showing of necessity or justification.); *see also Nobles*, 422 U.S. at 239-40, 95 S.Ct. at 2170-71 (Privilege waived where counsel placed issue squarely before the Court). Further, these materials were not prepared in "anticipation of litigation," and they should receive no special protection whatsoever. *Id*. at 238, 95 S.Ct. at 2170; *United States v. El Paso Co.*, 692 F.2d 530, 542 (5th Cir. 1982).

Further, the materials requested are admissible in evidence on these issues as admissions of a party-opponent. *See Kattar,* 840 F.2d at 130 ("Whether or not the entire federal government in all its capacities should be deemed a party-opponent in criminal cases, the Justice Department certainly should be considered such.") (citations omitted); *Morgan,* 581 F.2d at 938 (government cannot object to a statement as hearsay when its attorneys have already sworn that the statements are trustworthy). *Accord Branham*, 97 F.3d at 851; *United States v. Deloach*, 34 F.3d 1001, 1005 (11th Cir. 1994); *United States v. Bakshinian*, 65 F.Supp.2d 1104, 1106 (C.D.Cal. 1999). *See also United States v. Garza*, 448 F.3d 294, 298-99 (5th Cir. 2006) (Citing *DeLoach* and noting the distinct role of the prosecutor vis-a-vis admissions of party-opponents).

This Court and Defendant Brown are entitled to the truth, and the use of this and all other discovery devices is intended to enhance "the search for truth." *Nobles*, 422 U.S. at 230, 232, 95 S.Ct. at 2166-67 (citations omitted). *Cf. Washington v. Texas*, 388 U.S. 14, 18, 87 S.Ct. 1920 (1967). At all times, this Court's "compulsory processes stand available to require the presentation of evidence in court." *Nobles*, 422 U.S. at 230, 95 S.Ct. at 2166 (1975). *And see* FED. R. CRIM. P. Rule 17(c). Brown's request for the Rule 17(c) subpoena should be granted. Brown is entitled to all evidence in the possession of the Department of Justice that would explain or illuminate its ephemeral and mercurial positions on his entitlement to release and resentencing.

CONCLUSION

For these reasons and those in Brown's Motion For Leave To Issue FED.R.CRIM.P. Rule 17(c) Subpoena *Duces Tecum* For Internal Government Documents, the subpoena should be issued as requested.

Dated: January 7, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served upon Arnold Spencer, counsel for the United States, via the ECF system on January 7, 2008. It has also been served electronically on all counsel of record. It has also been served, certified mail, return receipt requested, on Alice Fisher and Steven Tyrell, United States Department of Justice.

/s/ Sidney Powell
Sidney Powell