05-20319

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES A. BROWN,
Defendant-Appellant.

BROWN'S REPLY TO THE GOVERNMENT'S *REVISED* OPPOSITION TO BROWN'S EXPEDITED APPLICATION FOR RELEASE PENDING APPEAL

On Appeal From The United States District Court
For The Southern District Of Texas, Houston Division
No. CR H-03-363

Sidney Powell
Texas Bar #16209700
Deborah Pearce
Louisiana Bar #22577
POWELL & PEARCE
1854 A Hendersonville Rd., No. 228
Asheville, NC 28803
828-651-9543
Fax: 828-684-5343

ATTORNEYS FOR DEFENDANT-APPELLANT
JAMES ARTHUR BROWN

The government's case rests on unproved assumptions and misapplications of law which will require reversal of these convictions when this Court reaches the merits. For now, however, it is sufficient that this application raises "*close*" issues, which *if decided in Brown's favor*, would result in a reversal of his convictions. *U.S. v. Valera-Elizondo*, 761 F.2d 1020, 1023-24 (5th Cir. 1985). The government's opposition approaches frivolous in light of the literally unprecedented nature of this prosecution and the magnitude and multiplicity of errors that infected this trial.

Jim Brown was going about his daily job at Merrill Lynch, did not violate any Merrill policy or rule, and neither received nor *contemplated* any personal gain from this business transaction, which he consistently opposed because of business risks. His list of risks included his understanding that Enron had "no repurchase obligation." The frauds *at Enron*, undeniably committed by Fastow, Glisan, Kopper, and others who *did* "loot the corporate treasury" for their own gain, were unrelated to this transaction and unknown to Brown. Brown also believed that LJM2, which ultimately purchased the barges from Merrill, was a third-party entity.[1] This was not a sham deal. As the district court said at sentencing: "the Nigerian Barge assets were

[1] The government contended, but never proved, that *Enron* controlled LJM2 (Tr. 392). Contrary to the government's assertion, Brown did not invest in LJM2, but did make a small investment in a Merrill partnership that invested in LJM2 after doing due diligence (Tr. 3254).

real, the negotiations for the sale of power . . . were real," and a *bona fide* sale ultimately resulted in a profit of more than $50 million for Enron (A-1:19).

The government cannot rectify the legal deficiencies in its case. Brown's Application *assumes* that the government proved its best case, yet identifies the legal deficiencies that invalidate the convictions, as preserved in the district court through various motions, including to dismiss the indictment, requested instructions, timely objections, and post-verdict motions[2] (A-3-5). No honest services case has ever criminalized the conduct of anyone outside the direct employer-employee relationship in a commercial setting without graft and/or non-disclosure of material facts.

Procrustes at his best could not force Brown's role in this business transaction for Merrill into the government's tortured version of the honest services provision. Regardless of the jury instructions (which Brown will challenge on appeal), this statute cannot be expanded to criminalize Brown's conduct. If honest services were

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[2] Brown may raise sufficiency issues on appeal but cannot do so here or correct the government's many misstatements in the page limits. For example, contrary to the government's rendition, the only Merrill witness, Tina Trinkle, who got the critical date of the internal Merrill call wrong in her "script," could not say for sure that Brown said anything if he was on the call, but if he did, it was that Enron could not give a guarantee. While acknowledging that Brown hated this deal, the government actually argued that he joined the conspiracy by failing to "speak up" in the Trinkle phone call that he may not have even been on. Trinkle, and every other witness who dealt with Brown, testified that he vehemently opposed this transaction because of the risks to Merrill–including that Enron "had no repurchase obligation" (Tr. 1036-37, 1045-50, 1066-67, 1072, 1094, 1147-50, 4438, 4443-45, 4554, 4569, 4630, 6199, 6201-02).

Brown also adopts Bayly's reply.

applied as the government suggests, then virtually *any* misconduct by *any* employee–even performed on the instructions of and for the benefit of his own employer–could constitute a *federal* crime, thereby expanding federal criminal jurisdiction to conduct that this Court, and others, have expressly rejected. *U.S. v. Ballard*, 663 F.2d 534, 540 (5th Cir. 1981), *modified*, 680 F.2d 352 (5th Cir. 1982); *U.S. v. Czubinski*, 106 F.3d 1069, 1077 (1st Cir. 1997); *U.S. v. Cochran*, 109 F.3d 660, 667 (10th Cir. 1997); *U.S. v. Bloom*, 149 F.3d 649, 656-7 (7th Cir. 1998).

The government's opposition reinforces the substantial issues undermining Brown's perjury *and* obstruction convictions. *The government does not deny that it obtained both convictions by using an email it knew was false.* Brown was wrongly convicted on both counts because he told the grand jury that he *understood*, through unidentified hearsay of a conversation to which he was not a party, that Fastow's representations were an *assurance*– not a *promise*. The jury was never allowed to hear that *Fastow himself said*–and *the government knew*–that Brown's testimony was right: *Fastow gave "assurances," deliberately avoiding words* like "*guarantee" or* "*promise*." Nor does the government dispute that its witnesses used the same words as Brown and thereby confirmed his testimony. This is not perjury or obstruction.

1. This honest services prosecution is unprecedented, and the prosecutors cite no case like this one. Since he moved to dismiss the indictment on these grounds,

Brown has challenged the legal sufficiency of the case and the application of the statutes themselves, which the government has creatively and expansively applied to criminalize conduct previously outside federal jurisdiction. As this Court recognized in *Ballard*, federal courts *must* distinguish magnitude and scope of even criminal conduct ("the quantity and quality of fraud"), and not every employee wrong or breach of fiduciary duty will rise to the level of a federal honest services violation. *Ballard*, 663 F.2d at 540-41; *U.S. v. Brumley*, 116 F.3d 728, 734 (5th Cir.) (*en banc*), *cert. denied*, 522 U.S. 1028 (1997). Notably, the government does not dispute that the legal invalidity of these charges would require reversal of Counts I, II and III, under *Yates v. U.S.*, 354 U.S. 298, 77 S.Ct. 1064 (1957), thus recognizing that this is, by definition, a substantial issue for appeal.

U.S. v. Gray, 96 F.3d 769 (5th Cir. 1996,) decided before *Brumley*, does not support the charges against Brown. The defendants in *Gray* worked directly for the employer that was deprived of their honest services by their admitted fraud and deceit in cheating and falsifying test results for students. Unlike Brown, who faithfully followed Merrill policy, rules and protocol, the *Gray* defendants stole test information, *concealing their fraud from their employer* whose codes prohibited this very conduct. Further, Brown owed fiduciary duties only to Merrill, whose interests he sought to protect, and he engaged in no material non-disclosure to Merrill (or even

to Enron, whose officers, and inside and outside counsel, had the Merrill engagement letter that specified Merrill's understanding of the transaction, including that its interest would be bought out later)[3] (Tr. 4316-24, Bayly Ex. 355,356). Brown did not conceal any material fact, as required by *Ballard*, 680 F.2d at 354-55.[4] Further, the government ignores the decisions of various courts reversing honest services convictions with facts substantially more egregious than those presented here.[5] Here, as in *Ballard*, the government's theory "sweeps too broadly" to criminalize conduct Congress did not intend to regulate with this statute.[6]

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[3] Brown requested an instruction that he owed duties to Merrill. The court initially granted this request, and at the last minute, refused to include it in the charge–itself a close question (Tr. 6037-42, 6091). Although the government never proved a violation of state law, the court wrongly instructed the jury, expanded the scope to conduct that is not criminal, and effectively directed a verdict on this essential element (Tr. 6127-28). As this Court has held, not every breach of a fiduciary duty or violation of a criminal statute is a federal honest services fraud. *Ballard*, 663 F.2d at 540, 544; *Brumley*, 116 F.3d at 734; *see U.S. v. Caldwell*, 302 F.3d 399 (5th Cir. 2002).

[4] The cases cited by the government support reversal of Brown's convictions. *U.S. v. Wallach*, 935 F.2d 445, 464 (2nd Cir. 1991), a case decided long before that court's relevant *en banc* decision in *U.S. v. Rybicki*, 354 F.3d 124, 127 (2nd Cir. 2003), and *U.S. v. Sun Diamond Growers*, 138 F.3d 961, 972 (D.C. Cir.), *aff'd*, 526 U.S. 398 (1999), both involved bribery, kickbacks and self-dealing, or payment of unlawful "gratuities" to public officials, consistent with the paradigm for valid honest services violations.

[5] *Cochran*, 109 F.3d at 667 (reversing despite undisclosed fees); *Murphy*, 323 F.3d at 104, 109-18 (reversing despite bribes and kickbacks); *Czubinski*, 106 F.3d at 1077 (reversing because no bribes, no personal gain); *U.S. v. Jain*, 93 F.3d 436 ((8th Cir. 1996), *cert. denied*, 520 U.S. 1273 (1997) (reversing conviction despite doctor's receipt of kickbacks from hospital).

[6] Congress has not extended the honest services statute to the private sector. At the least, the rule of lenity would require that the statute be construed similarly in the public and private sectors, and that everyone have fair notice of the conduct that would come within its ambit. *U.S. v. Bass*, 404 U.S. 336, 347-48, 92 S.Ct. 515, 522-23 (1971); *Ballard*, 663 F.2d at 540-41; *Rybicki*, 354

2. Title 15 U.S.C. § 78m(b) provides that "criminal liability" for a books and records violation can be imposed *only* "as provided in paragraph (5) of this subsection." Paragraph (5), in turn, limits liability (in pertinent part) to those who "knowingly falsify any book, record, or account." Even without the rule of lenity–but especially with the benefit of that well-settled principle–§ 78m(b) forecloses criminal liability beyond those who could actually falsify. Paragraph (5) goes well beyond merely establishing the "level of intent," and states instead that only a knowing *falsification* will violate the statute. As the legislative history, quoted by the government, confirms: "[t]his provision is meant to ensure that criminal penalties would be imposed where acts of commission or omission *in keeping books or records or administering accounting controls* have the purpose of falsifying books, records or accounts . . ." Congress's intent–captured in the statutory text–was to impose criminal liability *only* on those who have the duty to keep books and records.[7]

It makes perfect sense to place the most serious incentives–potential criminal

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F.3d at 127; *Cochran*, 109 F.3d at 667 (assuming without deciding that it even applies in the private sector); *Czubinski*, 106 F.3d at 1077. The issues of statutory construction and fair notice were just argued in the Supreme Court in *Arthur Andersen*, underscoring that they are substantial issues.

[7] The government contends (n.12) that "[t]here are numerous examples" of prosecutions under § 78m(b), but of the four it cites, two are unpublished, one was a guilty plea, and the remaining decision did not raise this issue, but applied the statute through a conspiracy charge to the Senior VP of Finance, CFO and CAO of the corporation, who had worked with his subordinates to report false earnings. He was directly responsible for the company's books and records, as well as the false reporting. *U.S. v. Polishan*, 336 F.3d 234, 237-38 (3rd Cir. 2003).

exposure–on those with the actual duty to keep the records. This Court adopted a similar limitation in *United States v. Castle*, 925 F.2d 831 (5th Cir. 1991), when it held that, although the FCPA *could* have penalized not only "offering" a bribe, but also "receiving" one, it chose not to do so. This Court refused to circumvent that limitation by permitting a *conspiracy* charge when the government could not charge the substantive offense. So too here: § 78m(b) *could* have extended criminal liability beyond those who "falsify" or actually keep the books.[8] It did not, and the government cannot expand it by a conspiracy charge. As for the suggestion that Congress would not make this distinction without specificity, the government overlooks that "[i]t is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history." *Pittston Coal Group v. Sebben*, 488 U.S. 105, 115 (1988).[9]

3. The government's proclaimed "best evidence" (Tr. 333) of Brown's perjury and obstruction was a later email embedded with double hearsay that *it knew to be*

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[8] Even the government's reading of *Castle* would require limiting a conspiracy charge to those who actually keep the books or have control over them–not to someone in Brown's position. As in *Castle*, the government did not–and could not–charge Brown with the substantive offense.

[9] Indeed, "[i]t would be extraordinary to require legislative history to *confirm* the plain meaning" of the statute. *Bourjaily v. United States*, 483 U.S. 171, 178 (1987) (emphasis original). Further, this legal infirmity infects not only the conspiracy count, but also the substantive counts. Because the government obtained a *Pinkerton* instruction, the jury could have convicted each defendant of *wire fraud* if it concluded that he merely *conspired* with another defendant who committed wire fraud. Under *Yates*, if the conspiracy count fails, then the wire fraud counts fail.

false–the precise language for which Brown was convicted having been disavowed by the original speaker, Fastow; Brown's open explanations of his understanding of Fastow's representations as an *assurance*–not a *promise*, responsive to questioning legally insufficient to support *perjury or obstruction* charges*;* and, the exclusion of the entirety of Brown's transcripts which would have shown Brown's efforts to inform the grand jury in full context–all raise substantial legal issues that, if decided in Brown's favor, will require reversal of the perjury *and* obstruction convictions.

Ironically, the government claims that *Brown* ignores the context of his testimony, yet it was the prosecutors who carved out small excerpts for the jury. The court then sustained their objections to Brown's efforts to have *all* of his transcript admitted so the jury could see the full context. The sovereign, whose job it is to seek the truth, *Berger v. U.S.*, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935), should have admitted *all* of the transcript–as this Court has said is proper. *U.S. v. Bell*, 623 F.2d 1132, 1135-1137 (5th Cir. 1980); *U.S. v. Cosby*, 601 F.2d 754, 757-58 (5th Cir. 1979).

Even the trial jury that convicted Brown found that he did not substantially interfere with the administration of justice (Tr. 6967). Brown neither concealed information, nor impeded the work of the grand jury. *In re Michael*, 326 U.S. 224, 227-28, 66 S.Ct. 78, 79-80 (1945); *U.S. v. Griffin*, 589 F.2d 200, 204 (5th Cir. 1979). He did not deny the Fastow conversation–to which he was not a party; rather, he

explained, as asked, his personal understanding that Fastow's representations were less than a promise. This was consistent with the testimony of the government's witnesses and responsive to its questions calling for his understanding. The government's only and "best evidence"–the unsworn email–was false–undermined even by Fastow,[10] and an unsworn email is legally insufficient *per se* to prove perjury or obstruction.[11] *U.S. v. Bell*, 367 F.3d 452, 466 (5th Cir. 2004) (lack of corroborating evidence to indicate trustworthiness). Moreover, the difference between *promise* and *assurance* is legally insufficient to support a perjury or obstruction charge. *U.S. v. McAfee*, 8 F.3d1010, 1014-15 (5th Cir. 1993).[12] Brown's numerous substantial issues warrant his release pending appeal and stay of any payment of fines and restitution.

Respectfully submitted,

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[10] Fastow was not equally available to the defense, and his plea agreement specifically prohibited him from revealing "any information derived from his cooperation to any third party without prior consent of the Department." Plea Agreement at ¶ 7(c).

[11] Contrary to the government's brief, it misused this email in rebuttal in violation of Rule 404(b). The judge did not admit it under 404(b) (Tr. 330-31, 3242). In violation of prior instructions, the government saved it for rebuttal *argument* as evidence that Brown had committed other crimes. Brown moved for mistrial as soon as reasonably possible with a judge who would not allow bench conferences (or speaking objections) (Tr. 330-53, 2973, 6508-09, 6516, 6578-79).

[12] While this Court independently assesses bail, the district court's findings of no danger to the community, no risk of flight, and no purpose of delay were factually and legally supported, uncontradicted by the government, and it has shown no abuse of discretion–much less clear error. *Beverly v. U.S.*, 468 F.2d 732, 741 (5th Cir. 1972). Regarding substantial issues, the district court acknowledged that this Court "might see it differently" (A-1:54-55, 77-78). Brown's issues do not rest on the admission of any "one piece of evidence," but on law. The government never even filed an opposition in the district court, nor has it correctly filed one in this Court.

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of Brown's Reply to The Government's Revised Opposition to Brown's Expedited Application For Release Pending Appeal was served via fax, electronic copy in Adobe PDF, and First Class United States Mail, this ___ day of May, 2005, upon the following counsel of record:

Matthew W. Friedrich
David H. Hennessy
Kathryn Ruemmler
Department of Justice
Enron Task Force
1400 New York Avenue, 10th Floor
Washington, D.C. 20530
Fax: (202) 353-3165

Joseph Palmer
Sangita K. Rao
Department of Justice
P.O. Box 899
Ben Franklin Station
Washington, DC 20044-0899
Trial Attorneys
Fax: 202-514-3521

William G. Rosch, III
Rosch & Ross
707 Travis Street
2100 Chase Bank Bldg.
Houston, Texas 77002
Fax: 713-222-0906
Attorney-in-Charge for Defendant
Daniel O. Boyle

David Spears
Richards Spears Kibbe & Orbe L.L.P.
One World Financial Center,
29th Floor
New York, New York 10281
Fax: 212-530-1801
Attorney-in-Charge for Defendant
William R. Fuhs

Seth P. Waxman
Paul A. Engelmayer
Wilmer Cutler Pickering Hale
& Dorr LLP
2445 M Street, N.W.
Washington, D.C. 20037
Fax: 202-663-6363
Attorney-in-Charge for Defendant
William R. Fuhs

Ira Lee Sorkin
Carter Ledyard & Millburn LLP
2 Wall Street
New York, New York 10005
Fax: 212-732-32332
Attorney-in-Charge for Defendant
Robert S. Furst

John W. Nields, Jr.
Howrey Simon Arnold & White LLP
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Fax: 202-383-6610
Attorney-in-Charge for Defendant
Robert S. Furst

Lawrence S. Robbins
Gregory L. Poe & Alice W. Yao
Robbins Russell Englert
Orseck & Untereiner LLP
1801 K. Street, N.W., Suite 411
Washington, D.C. 20006
Fax: 202-775-4510
Attorney-in-Charge for Defendant
Daniel Bayly

R. Thomas Seymour
Seymour Law Firm
100 West Fifth Street, Suite 550
Tulsa, OK 74103
Fax: 918-583-9251
Attorney-in–Charge for Defendant
Daniel O. Boyle

Sidney Powell

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.3, undersigned counsel certifies Brown's Reply To The Government's Revised Opposition to Brown's Expedited Application For Release Pending Appeal complies with the type-volume limitations of 5th Cir. R. 32 and 27, I.O.P.

The text of the motion has been prepared in proportionally spaced typeface in Times New Roman 14 Point font size using WordPerfect 12.0 for Windows. Footnotes are in 12 Point Times New Roman. Undersigned counsel understands that a material misrepresentation in completing this certificate or circumvention of the type-volume limits in Fed. R. App. P. 32 may result in the Court's striking the brief and imposing sanctions against the person signing the motion.

Sidney Powell
Counsel for Appellant James Brown