IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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

DEFENDANT JAMES ARTHUR BROWN'S
MOTION FOR RELEASE ON BOND PENDING APPEAL

Defendant JAMES ARTHUR BROWN, moves, pursuant to 18 U.S.C. § 3143(b), for release on conditions pending appeal. The Fifth Circuit's decisions in *U.S. v. Brumley* and *U.S. v. Ballard* require reversal of his convictions on Counts I, II and III, and call into question the validity of his convictions on Counts IV and V, which also have independent grounds for reversal. At the least, Brown's appeal will raise close questions of law that courts have recognized specifically as warranting release pending appeal. Brown has made all appearances and was released pending sentencing, which acknowledges that he is not a danger or a flight risk, and every factor favors continuing his release pending his appeal.

I. Brown Meets All Requirements For Release On Bond Pending Appeal.

Under 18 U.S.C. § 3143(b), release is warranted where it is shown (1) that Brown is not likely to flee or pose a danger to the safety of others or the community; (2) that the appeal is not for the purpose of delay; and (3) the appeal will raise a substantial question of law or fact that, if determined favorably to Brown, is likely to result in a reversal, an order for new trial, a sentence

without imprisonment, or a reduced sentence. A substantial question is "one that is 'close' or 'that could very well be decided the other way' by the appellate court." *U.S. v. Clark*, 917 F.2d 177, 180 (5th Cir. 1990). It does not require this court to certify its own error. *U.S. v. Valera-Elizondo*, 761 F.2d 1020, 1023 (5th Cir. 1985). Brown meets these standards, and release pending appeal should be granted. This appeal is not for delay, but rather, to seek review of substantial legal issues in a significant, unprecedented case in which the jury was misled from the indictment through its verdict.

A. Brown Poses No Risk Of Flight Or Danger To Any Other Person Or The Community.

By releasing Brown pending sentencing, this Court has already rejected the government's contentions and found that Brown is not a flight risk or danger to the community (Tr. 6975-76; A-1). Brown remains on significant bond, co-signed by his wife. His compliance is unquestioned, and no changes were recommended upon re-evaluation pending sentencing (A-2). Circumstances are no different now. Brown has extensive and long ties to the Connecticut area, including his family, friends, and church. He owns his home in which he lives with his wife of almost 30 years. His son and his daughter attend college, and when not in school, reside at the family home with their parents. Brown also receives medical care and treatment for several significant conditions.

B. Brown's Appeal Is Not Interposed For Delay And Raises Substantial Questions Likely To Result In Reversal. [1]

Brown need only show that *if* any legal issue is decided in his favor, it would likely result in a reversal, grant of new trial, or reduced sentence. *Valera-Elizondo*, 761 F.2d at 1025. Each issue raised herein meets that test, and Brown will expeditiously pursue his appeal. In fact, his release on

[1] Brown also adopts and incorporates the arguments briefed in Bayly's Motion for Release on Conditions Pending Appeal.

bond pending appeal is important to his pursuit of this appeal and for counsel to have his assistance in preparing it.

1. Counts I, II, And III, Alleging Honest Services Violations, Are Legally Insufficient, Do Not Apply To This Conduct, And 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." §§1343, 1346. This statute, even in light of existing precedent: (i) is unconstitutional, if it applies, because the Merrill employees had no fair notice of its boundaries; *and*, in any event, (ii) cannot be expanded to criminalize the conduct of the Merrill employees in this private commercial transaction where they had no independent duty to Enron, there was no material nondisclosure, and there were no bribes, kickbacks or self-dealing. Indeed, *the Merrill employees engaged in no conduct that was itself unlawful, and this business transaction served only corporate purposes with no personal gain*. As explained also in Bayly's motion, there was no honest services violation as a matter of law.

The Fifth Circuit's decisions in *U.S. v. Ballard*, 663 F.2d 534, 540 (5th Cir. 1981) (reversing honest services convictions), *modified*, 680 F.2d 352 (5th Cir. 1982); *U.S. v. Brumley*, 116 F.3d 728, 734 (5th Cir.) (*en banc*), *cert. denied*. 522 U.S. 1028 (1997) (requiring something like bribery); and, *U.S. v. Caldwell*, 302 F.3d 399 (5th Cir. 2002) (blatant self-dealing, taking more than $1 million), mandate reversal of Brown's honest services wire fraud conviction –*even assuming* the government proved its best case by competent legal evidence. *Accord U.S. v. Cochran,* 109 F.3d 660, 667 (10th Cir. 1997) (reversing honest services conviction despite undisclosed fees); *U.S. v. Rybicki*, 354 F.3d 124, 127 (2nd Cir. 2003) (*en banc*) (affirming because of bribery); *U.S. v. Murphy*, 323 F.3d 102, 104, 109-18 (3rd Cir. 2003) (reversing despite bribes and kickbacks); *U.S. v. Czubinski*, 106 F.3d 1069,

1077 (1st Cir. 1997) (reversing because no bribes, no personal gain to defendant); *U.S. v. Bloom*, 149 F.3d 649, 656-7 (7th Cir. 1998) (affirming dismissal of indictment; no personal gain).

Even if there were an "oral promise" by *Enron* to Merrill that invalidated *Enron's* accounting treatment for the barges in 1999, and *Enron* actually received a loan from Merrill rather than the proceeds of a sale[2] (1003, 1105, 6141, 6144, 6232), nothing about this transaction proves an honest services offense. No honest services conviction in the private sector has been affirmed outside of the immediate employer-employee relationship without bribes, kickbacks, or other misuse of one's position by self-dealing for *personal gain* to the defendant. *See Bloom*, 149 F.3d at 656 (no personal gain). None of the defendants here acted in his own interest within the meaning of the honest services jurisprudence, and it is undisputed that there were no bribes, kickbacks, undisclosed fees, or self-dealing in the Barge transaction. *Only corporate purposes were served with no personal gain to any Merrill employee.* No court has ever expanded the honest services provision of the wire fraud statute to a corporate transaction like this. In its zeal to target the wrongs of Enron, the government has distorted the outer boundaries of the wire fraud statute beyond precedent–and recognition.[3]

As the Fifth Circuit found in *Ballard*, "the government's theory sweeps too broadly and does not correctly reflect the quantity and quality of fraud necessary to invoke the criminal sanctions

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[2] Even under the government's theory, the alleged crime distills to whether *Enron* should have booked this as a sale or a loan–a complex legal and accounting question at best (Tr. 872). The government skipped proving the essential element of its case that *Enron's accounting treatment* was actually, legally wrong. *Cochran* requires reversal on this ground alone. 109 F.3d at 666-67.

[3] Brown raised these issues through his Motion For Bill Of Particulars (A-3), Motion To Dismiss The Indictment (A-4), Reply To Government's Opposition To Motion To Dismiss The Indictment (A-5), oral argument at the 4/15/04 hearing, Proposed Jury Instructions, Brown's Objections To Jury Instructions, and the charge conference (10/26/04). Defendant's motions and requests were denied (4/21/04 Orders; 10/27/04 charge; Dkt. #134, 135).

of §1341." 663 F.2d at 540; *accord, Czubinski*, 106 F.3d at 1077. This over-reaching undermines Brown's conviction on every aspect of this indictment. *Id*.; *Cochran*, 109 F.3d at 669 (reversing and rendering on all counts including interstate transportation of stolen property and money laundering because bond underwriter had no duty to disclose fee; therefore no fraud); *Murphy*, 323 F.3d at 104, 122 (reversing all counts because of spillover from wrongful honest services charge). Brown should not have been indicted or convicted under this statute. The general instructions and verdict allowed Brown to be convicted of conduct that was not criminal. Therefore, the conspiracy, wire fraud and related counts must be reversed (Tr. 6113-15, 6118, 6122-24, 6134). *Yates* v. *U.S.*, 354 U.S. 298, 77 S.Ct. 1064 (1957); *Pinkerton v. U.S.*, 328 U.S. 640, 66 S.Ct. 1180 (1946); *Ballard*, 663 F.2d at 544, *Cochran*, 109 F.3d at 669; *U.S. v. Pettigrew*, 77 F.3d 1500 (5th Cir. 1996); *U.S. v. Smithers*, 27 F.3d 142, 146-47 (5th Cir. 1994).

a. The Statute Has Never Been Applied Like This, And Brown Had No Fair Notice.[4]

The government achieved this conviction by torturing the language and precedent for the honest services provision, and by disregarding two bedrock Due Process principles: that ambiguities in criminal statutes must always 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.[5] *U.S. v. Bass*, 404 U.S. 336,

[4] In addition, the court so broadly and incorrectly instructed the jury on the honest services and wire fraud charges as to relieve the government of its burden of proof, allow conviction for conduct that was not criminal, and direct a verdict against the defendants (Tr. 6127-29). These and other erroneous instructions, including refusing to instruct on the defense theory of the case (Tr. 6050) as incorporated herein from Bayly's Motion, will also present substantial issues for appeal.

[5] "[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

92 S.Ct. 515 (1971). The Fifth Circuit, *en banc*, has made clear that the wire fraud statute must be construed in a manner that does not leave its outer boundaries ambiguous. *Brumley*, 116 F.3d at 733. Congress did not define "intangible right" and "honest services," but *Brumley* held that an honest services conviction of a *public* employee requires that the services be owed under state law and that something akin to bribery is required. *Id*. at 733. Extending this parallel to the private sector, a panel of the Fifth Circuit held that the government must *prove* that the defendant deprived the employer of a duty owed under state law.[6] *Caldwell*, 302 F.3d at 409 (undisclosed self-dealing).

No prior decision of this (or any) Court has reached so far to inculpate commercial conduct that on its face was not criminal. Because of the history of the statute, most honest services frauds involve public officials who have deprived citizens of their own honest services by accepting bribes, kickbacks, or engaging in extortion or theft in the performance of their duties. *See Brumley*, 116 F.3d at 730, 734. The provision is rarely and cautiously applied in the private sector,[7] and then in cases involving undisclosed conflicts of interest, self-dealing, bribes, or kickbacks. *Rybicki*, 354 F.3d at 127. The Fifth Circuit has specifically rejected broader application; reversed convictions

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distaste against men languishing in prison unless the lawmaker has clearly said that they should.'" *Bass*, 404 U.S. at 347-48, 92 S.Ct. at 522-23 (internal citations omitted).

[6] The government never identified or proved a legal duty required of any employee. It is undisputed that the Merrill employees had no legal or contractual duty to Enron, and the government now concedes as much. The government apparently realizes that its honest services charge fails, so it now argues that the Merrill employees deprived *Merrill* of their honest services–a point that the government did not charge or prove–nor could it (Sentencing memo, 42). Brown requested an instruction on his duty to Merrill which the court originally granted, then denied (Tr. 6037-42, 6091). Brown followed Merrill protocol to the letter, and he did not promote or even have authority to approve this transaction (Tr. 4208-10). Following corporate procedures and purposes is not an honest services violation.

[7] The Tenth Circuit expressly assumed without deciding that § 1346 applied in the private sector, and still reversed the conviction of a bond firm executive. *Cochran*, 109 F.3d at 667.

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 acknowledged, uncharted legal landscape, Brown could not have divined unwritten law and conformed his conduct to it. The government's novel and literally unprecedented use of this statute against businessmen who pursued their company's interest without bribes, kickbacks or personal gain is a substantial issue that warrants bail pending appeal.

b. Brown Did Not Violate The Honest Services Provision As A Matter Of Law.

The Fifth Circuit has held that in a private commercial 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, bribery or kickbacks, by which the defendant acts or causes someone to act for his personal gain at the expense of the employer. *Ballard*, 663 F.2d at 543-44*; Caldwell*, 302 F.3d at 409-10 (conversion); *Brumley*, 116 F.3d at 734 ("something close to bribery"); *See Rybicki*, 354 F.3d at 127 (bribes paid by attorneys to insurance adjusters); *Czubinski*, 106 F.3d at 1077 (reversing honest services conviction because no bribes or personal gain). The concept of honest services runs directly from the employee to his employer. At bottom, a defendant in the position of Mr. Brown must have engaged in secret, unlawful conduct that wrongfully schemed to

divert an employee from the best interest of his employer for the defendant's personal gain.[8] That was not charged and did not exist here.

This Circuit has expressly recognized the potential for abuse of this statute and has rejected attempts to use it to engulf the private sector where there is a real risk of every employee infraction becoming a federal crime. *Ballard* requires reversal here. The *Ballard* defendants concocted a secret scheme to sell oil through a chain of companies (a "daisy-chain"), with each maximizing its profit on the transaction, while Granlund (the mastermind) and his co-conspirators at each company, maximized their undisclosed commissions and kickbacks exceeding $2 million. Granlund literally gave his coconspirators envelopes of cash payoffs. The government argued that the mail fraud statute was violated because it was used to further a scheme in which the employees intentionally breached a fiduciary duty of honesty or loyalty by accepting kickbacks. *Id*. at 540. The Fifth Circuit reversed the convictions of all of the defendants (and rendered as to several)–even though they had accepted kickbacks and engaged in blatant self-dealing that is not present in this case. The Fifth Circuit wrote: "such conduct, though perhaps subject to criticism, would be consistent with non-fraudulent activities; the appellants could have simply been involved in a non-criminal back-scratching scheme." *Id*. at 543.

Recognizing with caution that "all fiduciary breaches, it seems, could be found to involve the loss of an intangible–an employee's faithful and honest services," the Fifth Circuit *rejected the*

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[8]In addition to the cases cited above, see *Murphy*, 323 F.3d at 104 (reversing conviction for lack of duty despite kickbacks and bribes); *U.S. v. Vineyard,* 266 F.3d 320 (4th Cir. 2001), *cert. denied*, 536 U.S. 922 (2002) ($2.8 million in kickbacks; illegal commissions, self-dealing); *U.S. v. Lanas*, 324 F.3d 894 (7th Cir.), *cert. denied,* 540 U.S. 882 (2003) (kickbacks); *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 hospitals); *U.S. v. Pennigton*, 168 F.3d 1060 (8th Cir. 1999) (kickbacks); *U.S. v. DeVegter*, 198 F.3d 1324 (11th Cir.), *cert. denied*, 530 U.S. 1264 (2000) (bribery).

government's overly-broad approach and *rejected the notion that every breach of fiduciary duty by an employee could constitute an honest services violation*. More is required. *Id*. at 540-41. Re-affirming its reversal of the convictions, despite the kickbacks, on rehearing, the *Ballard* court noted the case lacked the "type of detriment which we have held is necessary for a breach of fiduciary duty to work a criminal fraud." *U.S. v. Ballard*, 680 F.2d 352, 354 (5th Cir. 1982). Although the government's evidence set forth "what some would characterize as distasteful business manipulations and transactions which ought not to be acceptable in commerce," the court said it was not enough for a federal fraud. *Id*. at 355.

Ballard mandates reversal here. No decision in the private-sector has affirmed the convictions of persons outside the immediate employer-employee relationship without undisclosed bribes, kickbacks, conflicts of interest, or self-dealing, and personal gain, and sometimes, as *Ballard, Cochran, Bloom, Murphy,* and other cases show, even that is not enough. It is undisputed that no employee in the Barge transaction received or paid any bribe or kickback. None of the employees at either company pursued personal interests in this transaction. Only fully disclosed fees or profits were paid to each corporation,[9] and these employees acted pursuant to corporate directives for corporate purposes.[10] As a matter of law, this is not an honest services violation, and Brown's

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[9] Enron's ultimate gain on the barges totaled $53 million, and Merrill Lynch received $775,000 on its $7 million investment. Enron took $12 million of the gain in 4th quarter 1999 and the remainder on the 9-barge sale to AES in 2000**(**G401, 402, 403, 801, Brown Ex.638).

[10] Although the absence of personal gain to the defendants alone requires reversal, there was also no material non-disclosure to the employer. Enron and its counsel, including Vinson & Elkins, had all the information required for *Enron's* proper accounting of fees and profits (Tr. 4316-24; Bayly Ex.355, 356). *Not only did Enron have all the facts, but it had sole control* over the entire transaction to the extent that it *unilaterally* created any accounting issue. *Only Enron* dictated how, what, and when any gain was booked and reported; and, whether any restatement was needed (if it reacquired the barges), and would be made. Real and valuable barges underpinned the transaction.

convictions cannot stand. *Brumley*, 116 F.3d at 735-36 (something more like bribery is required); *Ballard*, 680 F.2d at 354-55 (requiring material non-disclosure[11] even when employee accepts kickbacks); *Cochran*, 109 F.3d at 668-69 (conviction reversed despite undisclosed fees; government's case rested on *supposition* of duty). Brown did nothing that constitutes an honest services violation under any precedent.

2. As A Matter Of Law, The Books And Records Statute Cannot Be Expanded By A Conspiracy Charge To Persons Who Cannot Actually Falsify The Issuer's Books And Records.

Brown's appeal will also raise the substantial legal question whether *conspiring* to falsify books and records in violation of the Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. § 78m(b)(4) and (5), is in fact a crime–or whether, as the plain language of the statute states, only actual falsification is criminalized. Because the government charged a violation of this statute as a separate object of the conspiracy, if this object was legally invalid, Brown is entitled to reversal of the conspiracy count. Moreover, because the jury was permitted to convict on the wire fraud charges based on a *Pinkerton* theory (Tr. 6124), if the books and records object was legally wrong, all three counts must be set aside.[12] *Yates*, 354 U.S. at 312.

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[11]Cases which are *truly criminal* can be prosecuted as RICO violations, on appropriate facts, or, as securities fraud where there is fraud, materiality and loss. See *U.S. v. Wallach*, 935 F.2d 445 (2nd Cir. 1991) (RICO, kickbacks). This is not a securities fraud case, although the government improperly tried it as if it were–without meeting the strictures of the securities fraud statutes. The AUSA argued: "This case is about the integrity of our publicly traded markets" (Tr. 6557).

[12]Prior to trial, Bayly moved to dismiss the conspiracy count, in part on the ground that the books and records object was unconstitutionally vague. As Bayly explained, "sections 78m(b)(2) and (5) have never been applied in a criminal case to a non-employee or agent of an issuer, owing no duty whatsoever to the issuer, in the history of American jurisprudence." *Defendant Bayly's Motion to Dismiss Count One of the Indictment for (1) Failure to State an Offense, and (2) Vagueness as Applied to Defendant Bayly* at 6. The Court denied the motion. Pressing the point, the defendants thereafter submitted a proposed jury instruction that, if given, would have told the

a. Only The Actual *Falsification* Of Books And Records–Not Mere *Conspiracy* To Falsify–Is Criminalized By Section 78m(b).

Unlike general criminal statutes,[13] the books and records provision of the FCPA is fundamentally different. First, the statute places squarely on the "issuer"–and only the issuer–the obligations to "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" (Section 78m(b)(2)). Then, in absolutely crucial language, paragraphs (4) and (5) provide:

> (4) *No criminal liability shall be imposed* for failing to comply with the requirements of paragraph (2) of this subsection *except as provided in paragraph (5) of this subsection*.
>
> (5) No person shall * * * *knowingly falsify* any book, record, or account described in paragraph (2).

15 U.S.C. §§ 78m(2), (4), (5) (emphasis added). According to the plain language of paragraph (4), the **only** "criminal liability" that can "be imposed" for a books and records violation is "as provided in paragraph (5)." Paragraph (5), in turn, covers (in pertinent part) *only* the knowing "falsif[ication]" of books and records. There is no language in paragraph (5) that purports to criminalize the act of *conspiring* to falsify records, as Brown was alleged to have done.

To our knowledge, no other criminal statute in the entire United States Code provides, as Section 78m(b) does, that "*no criminal liability shall be imposed*" except pursuant to a specific

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jury that, to violate that object, a defendant must be "an officer, employee, director or agent of an issuer of securities." See *Proposed Jury Instructions of Defendants Bayly, Boyle, Brown, Furst and Kahanek* at 43. The Court declined to give that instruction. Brown adopted these motions (Dkt. #134, 155).

[13]As a general matter, the conspiracy statute (18 U.S.C. § 371) and the aiding and abetting statute (18 U.S.C. § 2) automatically attach to substantive criminal statutes. That is because, with very few exceptions, federal criminal statutes simply state a basic prohibition, without purporting to *limit* the scope of accessorial liability.

subpart of the organic statute. This precise and quite explicit language precludes the government from charging as criminal any conduct "except as provided in paragraph (5)," which means that *conspiring* to falsify books and records (as opposed to actual *falsification*) is not chargeable under this provision. Not a *single case* has been found sustaining a conspiracy charge under Section 78m, or in which a jury has convicted a defendant on that theory.

Congress's evident purpose was to place the duty to keep a company's books and records where it belongs–with the issuer and its employees who have actual responsibility for, and control of, the books and records. Paragraph (2) of Section 78m states squarely that it is the "issuer" that bears the duty to maintain accurate books and records. Reflecting that fundamental duty, paragraphs (4) and (5) then make clear that only employees of the issuer–persons who actually "make" the entries, not those who might "assist" (or "conspire")– bear criminal liability for falsification. Those individuals, after all, are best positioned to ensure that the company's records are true and accurate. Conversely, third parties (like the Merrill Lynch defendants) have no ability to control what, if any, entries are made in a company's internal books and records, or so Congress could rationally have concluded.

At the least, the text and structure of § 78m are ambiguous as to whether co-conspirator liability is proper, and the rule of lenity counsels that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis* v. *U.S.*, 401 U.S. 808, 812, 91 S.Ct. 1056, 1059-60 (1971). The rule of lenity "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct *clearly covered*." *Ibid.* (emphasis added). Under the rule of lenity, Brown cannot be liable for conspiring to falsify books and records, for the only acts "clearly covered" by Section 78m(b) are those committed by *the actual party* that falsifies such records.

b. Under Comparable Circumstances, The Courts Have Refused To Permit Accessorial Liability.

Congress unquestionably can preclude accessorial liability when it wants to–and in several instances courts have held that Congress did so. See, *e.g.*, *Gebardi* v. *U.S.*, 287 U.S. 112, 53 S.Ct. 35 (1932) (under the Mann Act, 18 U.S.C. § 398, a woman cannot be guilty of aiding and abetting a man in transporting her across state lines for immoral purposes); *U.S. v. Ferrar*, 281 U.S. 624, 50 S.Ct. 425 (1930) (liquor purchaser cannot be guilty of aiding and abetting an illegal sale under the National Prohibition Act, which made it unlawful to "manufacture, sell, barter, transport, import, export, deliver, furnish or possess"–but not to purchase–"any intoxicating liquor"); *U.S. v. Amen*, 831 F.2d 373, 381 (2d Cir. 1987), *cert. denied*, 485 U.S. 1021 (1988) (aiding and abetting statute does not apply to the so-called "kingpin" statute, 21 U.S.C. § 848).

Significantly, this Circuit has held that 18 U.S.C. § 371 is inapplicable to certain parts of the FCPA, the very statute whose books and records provision was charged in this case. In *U.S. v. Castle*, 925 F.2d 831 (5th Cir. 1991), the Fifth Circuit observed that the express language of the FCPA criminalizes the act of *offering* a bribe but does not mention the act of *receiving* one. It therefore rejected an indictment charging Canadian officials with *conspiring* with the domestic actors who offered the bribes. More recently, in *U.S.* v. *Bodmer*, 342 F.Supp. 2d 176 (S.D.N.Y. 2004), the district court applied the same principles in rejecting a conspiracy charge brought against agents of a domestic concern under the FCPA. The defendant, a foreign national working as the agent of a domestic concern, was charged with conspiring to bribe foreign officials in violation of 15 U.S.C. §§ 78dd-2. The FCPA's criminal penalties apply in pertinent part to "[a]ny agent of a domestic concern" who "is otherwise subject to the jurisdiction of the United States," 15 U.S.C. § 78dd-2(g)(2)(B). The court found that language ambiguous, and applying the rule of lenity the court held

that the statute did not cover the defendant. *Bodmer*, 342 F. Supp. at 189. The court held that the government could not circumvent that statutory exclusion by charging the foreign agent with conspiracy under § 371. *Id.* at 181.

So too here. The text of Section 78m–even without the benefit of the rule of lenity–affirmatively precludes a conspiracy prosecution. By placing the responsibility for internal books and records squarely on the "issuer," paragraph (2) of Section 78m makes clear that only the issuer (and its employees) bear the duty of accuracy. Paragraphs (4) and (5) then reinforce that fundamental premise by limiting the scope of criminal liability to *actual falsification* – the kind of misconduct that *principals*, not conspirators, are likely to engage in. Just as the focus on the "transporter of women" under the Mann Act precluded accessorial liability in *Gebardi*; just as the focus on the "offering" of a bribe precluded a conspiracy charge against the *receivers* of the bribe in *Castle*; and just as the court in *Bodmer* was unwilling to permit a conspiracy charge to sweep foreign agents into the scope of a statute that only ambiguously covered them, so too do paragraphs (2), (4), and (5) foreclose the use of the generic conspiracy statute to impose criminal liability for anything other than actual falsification.

3. The Perjury And Obstruction Counts Must Be Reversed Because Brown's Expression of His Understanding In Response To Deliberately Ambiguous Questions Does Not Constitute Criminal Conduct As A Matter of Law.

Brown voluntarily appeared and testified freely as a witness before the Grand Jury, the SEC and a bankruptcy examiner. His perjury and obstruction convictions are based on an isolated excerpt of his Grand Jury testimony that he did not know of "the promise."[14] The government selectively

[14] Count IV charges perjury based on the following questions and answers:

Q: Do you have any understanding of why Enron would believe it was obligated to Merrill to get

ignored his full answers and all context (Tr. 3274-75). His convictions must be reversed as a matter of law because, *inter alia*: (i) the expression of one's "understanding" while under oath in response to ambiguous questions is not perjury as a matter of law; (ii) the court wrongly excluded Brown's entire Grand Jury transcript, testimony before the SEC and bankruptcy court, all of which were critical to placing Brown's testimony and "intent" in context; (iii) the government's sole bit of evidence against Brown was an unreliable email that the government knew to be false and contain multiple layers of hearsay; and, (iv) Brown's understanding as he expressed it to the grand jury was confirmed by the government's own witnesses.

a. Expressions of Understanding Are Not Perjury Or Obstruction As A Matter of Law.

Forty-eight (48) times in the grand jury alone, Brown was asked about *his understanding*–and sometimes his understanding of what *others understood*–of what Enron had told Merrill and the circumstances of the two companies' negotiated transaction. First, Brown's opinions and understandings do not express *facts*. *See Bronston v. U.S.*, 409 U.S. 352, 356, 93 S.Ct. 595, 599 (1973) (even an evasive answer intending to mislead questioner cannot be perjury if defendant gave

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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.

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.)

literally true answer). Second, the government's ambiguous questions are legally infirm and will not support a perjury conviction. *U.S. v. Lighte*, 782 F.2d 367, 373-76, (5th Cir. 1986), *abrogated on other grounds*, *U.S. v. Wells,* 519 U.S. 482 (1997).

Even a preliminary review of a larger selection of his Grand Jury testimony reveals Brown's full answers to government questions that were infected with ambiguity. This alone requires reversal of his convictions:

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: *We understood* 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: 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: I'm *aware of a discussion* between Merrill Lynch and Enron on or around the time of the transaction, and *I did not think* it was a *promise* though.

Q: 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: *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 *assurances* is synonymous with guarantee, then that is not *my understanding.* If *assurances* is

> interpreted to be more along the lines of strong comfort or used best efforts, that is *my understanding.*" (GJ Tr. 76, 77, 81, 82, 88, 91, 92; A-6) (emphasis added).

As a matter of law, these statements are not based on fact, nor do they even purport to be statements of fact. Brown was not a party to the conversation about which he was questioned and on which the government's case depended. *He had no personal knowledge of any of the testimony on this point*. His testimony necessarily rests on multiple levels of hearsay emanating from speakers in time and contexts still unknown. These subjective opinions in response to the government's ambiguous questions cannot support a perjury conviction as a matter of law for two reasons.

First, Brown *was asked for* and expressed his full *understanding,* which might or might not have reflected fact, but nonetheless was what he *thought*. It has long been held that perjury cannot be assigned to a person's expression of belief or opinion. *U.S. v. Derrick,* 163 F.3d 799, 828 (4th Cir. 1998) (rejecting perjury where witness said he did not "believe" payments were illegal); *Com. v. Bray*, 96 S.W. 522 (1906); *In re Disciplinary Proceedings Against Huddleston*, 974 P.2d 325 (Wash. 1999). Nor can it be based on a person's opinion of the state of mind of others, as this is not fact. *People v. Polk*, 174 N.E.2d 393 (1961). Allegedly false statements must be statements of fact– not conclusions, opinions, matters of construction or deduction from other facts. *Bray*, 96 S.W at 523; *Goble v. State*, 766 N.E2d 1 (Ind.Ct.App. 2002); *see U.S. v. Ellis*, 121 F.3d 908, 927-28 (4th Cir. 1997) (perjury as to "matter of perception" fails "absent conclusive proof" witness testified falsely as to belief). Indeed, *Bray* and other cases explain that a person's opinion about the binding nature of a contract is a legal question and may not form the basis for perjury. *Bray*, 96 S.W. at 523 (perjury could not be based on question about whether defendant and another party made contractual trade agreement because that depended on whether they had such negotiations that resulted in a legal contract, which is a question of law); *Goad v. State*, 61 S.W. 79 (1900) (conclusion or opinion about

construction or effect of contract cannot support perjury). Thus, both the subject matter of his testimony and his expression of *understanding* foreclose conviction for perjury.

Secondly and independently, the government crafted its questions to twist Brown's testimony by casting them in a vague, multi-level form susceptible of several plausible interpretations. Perjury cannot occur when a witness is doing his best to fully and accurately answer ambiguous questions, and vague, ambiguous questions can not form the predicate for perjury. *U.S. v. Serafini*, 167 F.3d 812, 818-24 (3rd Cir. 1999); *Lighte,* 782 F.2d at 373-76; *U.S. v. Bell*, 623 F.2d 1132, 1135-37 (5th Cir. 1980) (defendant may not be "assumed" into prison). Directly responsive to ambiguous questions, Brown's expression of his *understanding*– not actual fact of which it is undisputed he had no personal knowledge–is not perjury.

b. The Court Wrongly Excluded All Of Brown's Grand Jury And SEC Testimony.

The district court refused Brown's proffers of the entirety of his Grand Jury testimony, his SEC testimony, and his bankruptcy testimony which would have made it plain that there was neither perjury nor obstruction (3228-38, 3274-75, 3281-82, 3285-86, 3974-77, 3317-20, 3322-23, 3330-32, 3341-42; Dkt. #438, 488/89; G965A, 965K, 975A: Brown Ex. 980, 980B). Instead of allowing Brown's full testimony, the court allowed the government to isolate and manipulate selected portions. However, the government may not sustain a perjury conviction by lifting statements out of context and giving them a meaning different than they would have in context. *Serafini*, 167 F.3d at 818-24. The Fifth Circuit specifically disapproves of this tactic, because 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 1135-37; *U.S. v. Cosby*, 601 F.2d 754, 757-58 (5th Cir. 1979). The entire

transcript should have been admitted, and the Fifth Circuit looks with disfavor on prosecutions that selectively carve out testimony instead. *Id.*

Here, the government's procrustean use of only parts of Brown's testimony, blacking out and withholding from the jury Brown's full answers and the context, invalidates the result (Dkt. #488-89; Tr. 3281-82, 3974-77). The entire testimony evidenced Brown's intent to tell the grand jury everything he understood, and lack of intent to commit perjury or obstruction. *Bell*, 623 F.2d at 1135-37; *Cosby*, 601 F.2d at 757-58. In response to the government's vague and contorted questions,[15] Brown tried first to answer the question directly, and then to explain his answer fully, so that the grand jury *would* have a full account of his understanding. Incredibly, the government's manipulation of his testimony combined with the court's denial of admission of the entire transcripts and even smaller additional sections, pursuant to the rule of completeness, Fed.R.Evid. 106, distorted the truth, and the presentation to the jury, and effectively compelled his wrongful conviction.

As a matter of law, Brown's expansive explanations of his understanding should have barred the government's prosecution here. Under §1623, even a recantation of knowingly false testimony in the same proceeding bars a prosecution for perjury, as the law seeks to induce witnesses to tell the truth. 18 U.S.C. § 1623; *U.S. v. Dennison*, 508 F.Supp. 659 (M.D.La. 1981), *affirmed*, 663 F.2d 611 (5th Cir. 1981). Brown's voluntary, open, and expansive explanations to the government's convoluted and amorphous questions calling for his understanding bear on Brown's intent to tell the truth as best he could before the grand jury. This does not constitute perjury–even when the government carves up testimony to make it look otherwise. 18 U.S.C. § 1623(d); *U.S. v. McAfee,*

[15] The government repeatedly asked Brown if he had an "understanding" about why "Enron" would have a certain "understanding" about the transaction, and even based these questions on portions of emails and documents written by others that Brown had never seen (GJ Tr. 76-92; A-6).

8 F.3d 1010, 1014-15 (5th Cir. 1993) (recantation, or in Brown's case, explanation, has bearing on whether the accused intended to lie). Brown's testimony cannot be considered "material," because it did not have the effect or tendency of influencing the grand jury incorrectly. Brown's testimony aimed to clarify things, not to confuse or mislead. *Id.* at 1017; *U.S. v. Abroms,* 947 F.2d 1241, 1245 (5th Cir. 1991), *cert. denied*, 505 U.S. 1204 (1992). Had the entire transcript been admitted, this would have been apparent to this jury.[16] The Government's selective manipulation of Brown's responses to its ambiguous questions, and his full expression of his understanding of conversations of which he had no personal knowledge, preclude a perjury conviction as a matter of law.

c. Brown's Grand Jury Testimony Was Truthful, And The Email On Which The Government Relied To Prove Perjury And Obstruction Was Inaccurate And Infirm.

Morever, Brown's conviction will be overturned because his description of his understanding of the Nigerian Barge transaction was both true and corroborated by the government's own fact witnesses. In attempting to prove perjury, the government relied on an off-the-cuff, casual, email Brown wrote 14 months later, in an unrelated transaction, in which Brown referred to a promise that Fastow supposedly made–an email that even the government knows is inaccurate on its face and directly contradicted by Fastow.[17] *Fastow*, who supposedly made this guarantee, confessed in

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[16] Even with the distorted picture presented by the government, the trial jury found in the now inapplicable sentencing phase that Brown's conduct did not result in a "substantial interference with the administration of justice"–a finding tantamount to a finding that his statements were not material (Tr. 6967).

[17] 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).

limited *Brady* material finally provided by the government that *he did not make a promise or guarantee*.[18] Even though he plead guilty to other charges and is cooperating with the government, Fastow denied that he ever guaranteed to buy back the barges. He knew he could not make a binding commitment, and he only gave Merrill verbal *assurances* to create a high level of confidence that Enron would find a third-party buyer (Tr. 1612). Further validating Brown's understanding, the government's own witnesses in this trial described the "oral agreement" using the same words Brown did–both as to the frailty of the representation and its amorphous terms.[19] In fact, *not a single government witness testified that Fastow said that he "promised to pay us back no matter what."*[20] The semantic differences–if any–between Brown's grand jury testimony and the multi-level hearsay testimony of the government's own trial witnesses, describing their understandings of Fastow's representation, are legally inconsequential. The difference between "assurance," "promise," and the

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[18]June 1, 2004 letter from Enron Task Force. The government's failure to provide critical Brady material is an entirely separate issue that warrants reversal on appeal. *See* Bayly's Motion for Bail Pending Appeal, fully incorporated herein.

[19]These include: "personal *assurance* by Enron's senior management ... that the transaction would not go beyond 2000." (Tr. 2122-23, 2386-87; G532). Long, who admitted he did not know what was said, used the words "*assurance*, promise, guaranty and commitment." (Tr. 2472-73). Long said that Boyle told him that "a senior person at Enron....gave *assurance* to a senior person at Merrill that they would not get hurt by the deal." (Tr. 2102). Boyt (who was not prosecuted despite his handwork in every phase of this deal for Enron) claimed that Boyle told him that Fastow "provided them *assurances* that they would not be on the barges in 6 months, that we would help facilitate a buyer or that we would guarantee a 15% buyback in 6 months." (Tr. 2526).

[20]Trinkle, the government's only Merrill witness, testified to her hearsay understanding that only an *assurance* was provide by McMahon. Trinkle testified that either Furst or Tilney said: "He gave me his word. He gave me his strongest *assurances*. He said we won't own these past June 30th" (Tr. 1072). Kopper confirmed what Brown had said, recalling that Enron said it would do its best to find a buyer in six months (Tr. 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 himself recall any binding assurances (Tr. 1775-76). Brown did not state his understanding any differently or falsely.

other synonyms all witnesses used loosely and interchangeably,[21] in a way meant to describe something less than a binding legal commitment (arising from a conversation to which they were not parties), is not legally sufficient to prove perjury. *McAfee,* 8 F.3d 1010 at 1014-15 (differences must be more than vague, uncertain, or equivocal). Even the government admitted the various witnesses' word choices were distinctions without differences (Tr. 6525).

As the district court's difficulty in deciding whether even to admit the email demonstrates, its relevance was doubtful and its prejudice was apparent (Tr. 73-74, 330-53, 2954-81, 3242). The court compounded this prejudice by stating in front of the jury that the email was reliable, thereby stamping its imprimatur on it (Tr. 3242).[22] The email, however, discusses nothing illegal and is not incriminating on its face.[23] Only statements that "clearly and directly" implicate a defendant in

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[21]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 is made.

[22]In response to Bayly's request for a limiting instruction, the court said in the jury's presence "given the fact that–due to the reliability of the statement's admissibility against all defendants under 804(b)(3)" the motion is denied (Tr. 3242). Although the court issued a corrective instruction the next day, that was insufficient to purge the damage already done in front of the jury. *Quercia v. U.S.*, 289 U.S. 466, 472, 53 S.Ct. 698, 700 (1933)*; U.S. v. Canales*, 744 F.2d 413, 434 (5th Cir. 1984).

[23]The government aggravated its abuse and the prejudice of this inaccurate email by pointing to it repeatedly as key evidence in this case. It even used it in rebuttal, in violation of a motion in limine and the court's ruling, and argued in flagrant violation of Rule 404(b) that this showed the illegal lengths Brown would go to close a deal. (Dkt. #379; Tr.330-53, 2973, 6508-09, 6516). "Jim Brown proposing a fraud in a completely separate transaction later.....". "This is someone who proposes oral side deals if that's what it takes to get the ball across the goal line" (6516). Brown moved for a mistrial (6578). The government's conduct was particularly deplorable in light of the fact that it knew the email was false and did not discuss anything illegal. Indeed, given the fact Brown understood lawyers were on the call, even his *misunderstanding* evidenced his belief in the legality of the assurance. The prejudice was exacerbated by the clearly wrongful admission of Lyon's response that included the remark: "One let us try and tie up CAL a little bit more legally" (GX 240, Tr.3242-43).

criminal conduct can be a statement against interest, and even statements that could be interpreted as self-incriminatory do not satisfy Rule 804(b)(3) if there are other possible explanations which are inconsistent with culpability. *U.S. v. Sarmiento-Perez*, 633 F.2d 1092, 1097, 1102 (5th Cir. 1981); *U.S. v. Pena*, 527 F.2d 1356, 1361-62 (5th Cir.), *cert. denied*, 426 U.S. 949 (1976). Nor was the statement "corroborated by circumstances clearly indicating its trustworthiness." *U.S. v. Bell*, 367 F.3d 452, 466 (5th Cir. 2004). By excluding proffered testimony, the court also excluded Brown's explanation that he was exaggerating in the midst of contractual negotiations with Continental.[24] The government knew this email was incorrect, denied by Fastow, and rested on multiple layers of hearsay. The government did nothing to cure the email's inherent unreliability by corroborating evidence as a matter of law under *Idaho v. Wright*, 497 U.S. 805, 823, 110 S.Ct. 3139, 3150-51 (1990), nor could it do so as a matter of fact because its own witnesses corroborated Brown. Instead, the government wrongly exacerbated its prejudice.

Brown's perjury and obstruction of justice convictions must be reversed. Because Brown testified about his understanding as openly and honestly as he could before the grand jury, he cannot be found to have obstructed justice. *Contrast U.S. v. Griffin*, 589 F.2d 200, 204 (5th Cir.), *cert. denied*, 444 U.S. 825 (1979) (where denials and inability to recall were false and hindered grand jury's attempt to gather information). Even if Brown's *understanding* differed from actual

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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 (3243). With no pretext of admissibility, the jury heard Lyon's say the Continental deal should be done "a little bit more legally." (3243). The government knew it violated the rules and later redacted the exhibit (3663), but the bell had been rung.

[24]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." (Brk.Tr. 166-67) (emphasis added).

fact–albeit corroborated by government witnesses, Brown did not lie, and his voluntary disclosures demonstrate that he did not try to mislead. *U.S. v. Varkonyi*, 611 F.2d 84, 86 (5th Cir.), *cert. denied*, 446 U.S. 945 (1980) (under §1503, government must prove specific intent to lie); *see also In re Michael*, 326 U.S. 224, 227-28, 66 S.Ct. 78, 79-80 (1945) (in contempt setting, obstruction was not proved where witness answered willingly but judge simply disbelieved his testimony). Here, Brown's open, considered, and thorough answers were not perjurious or obstructive. Both the perjury and obstruction convictions present substantial, indeed reversible issues on appeal, and they both support granting Brown bail pending appeal.

II. Federal Courts Have Granted Release Pending Appeal Based On The Very Issues Presented Here Which Constitute Close Questions or Actual Reversible Error In Other Analogous Cases.

The Fifth Circuit has reversed similar convictions because of the issues raised by Brown. *Ballard*, 663 F.2d at 540-42. Controlling precedent will require reversal of this case on appeal. Because the honest services violation is such a substantial issue, bail pending appeal has been granted in two other circuits. In *Cochran*, which is analogous on many points, the Tenth Circuit stayed his reporting date, expedited the appeal, and reversed all convictions despite the existence of an undisclosed fee. 109 F.3d at 662, 665-66. In *Rybicki*, bail was also granted pending appeal. 354 F.3d at 128**.** As the court noted in *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." Moreover, the Supreme Court recently granted certiorari to the Fifth Circuit in *Arthur Andersen, L.L.P. v. U.S.,* on the similar issues of fair notice and the scope of the statute under which the Enron task force prosecuted that case. 125 S.Ct. 823 (2005).

Brown engaged in no conduct within the scope of the honest services provision, and his convictions are legally invalid. He did not scheme to misuse any position for his personal gain, and there were no bribes, kickbacks or self-dealing. The provision's use here is unprecedented. As in *Ballard*, "the theory upon which the appellants were successfully prosecuted was incorrect as a matter of law." 663 F.2d at 536. Further, the government's ambiguous questions, Brown's expressions of his understanding, the matters on which he testified, and the factually inaccurate email, did not rise to perjury or obstruction of justice as a matter of law. These issues are substantial and warrant bail pending appeal for this long-respected businessman with family and close ties to the community. *Ballard*, 663 F.2d at 544; *Cochran*, 109 F.3d at 662 (staying reporting date); *Rybicki*, 354 F.3d at128 (surrender stayed pending appeal).

III. Conclusion.

For these reasons and those in Bayly's motion, Brown is entitled to release pending appeal to the Fifth Circuit and any further proceedings ordered on direct review.

Respectfully,

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CERTIFICATE RESPECTING CONFERENCE

I, Sidney Powell, do hereby certify that I contacted Mr. Friedrich by facsimile with a formal request for his response for purposes of this certificate on March 24, 2005. He called and advised that "the government opposes the Brown motion."

_____
Sidney Powell

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and complete copy of James Arthur Brown's Motion For Release On Bond Pending Appeal was served via FedEx on counsel for defendants and the government's counsel of record at the following addresses this 24 day of March, 2005.

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