05-20319

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

DANIEL BAYLY,
DANIEL O. BOYLE,
JAMES A. BROWN,
WILLIAM R. FUHS, and
ROBERT S. FURST,
Defendants-Appellants.

On Appeal From The United States District Court
For The Southern District Of Texas [Houston Division]
Criminal Action Number H-03-363

EXPEDITED APPLICATION FOR RELEASE PENDING APPEAL
ON BEHALF OF JAMES ARTHUR BROWN

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Local Rule 28.2.1, Appellant James Brown certifies that the following persons and entities have an interest in the outcome of this appeal, No. 05-20319:

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Respectfully submitted,

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STATEMENT OF JURISDICTION

Defendant/Appellant, James Brown, a former employee in the New York office of Merrill Lynch, requests stay of his sentence and continuation on bond pending appeal from a conviction for conspiracy, "honest services" wire fraud, perjury, and obstruction of justice, arising from a 1999 transaction between Merrill and Enron that he opposed from its inception as too risky for the company and had no authority to approve. After a six-week trial and conviction, Brown was sentenced to: three years, 10 months in prison, fines and restitution (A-1). Finding no risk of flight or danger to the community, the district court granted voluntary surrender, but denied release pending appeal (A-1). Brown was ordered to surrender upon designation by BOP, expected in three to four weeks. Brown filed notice of appeal *instanter*. This Court has jurisdiction to consider this application under FED.R.APP.P. 9(b) and FIFTH CIR.R. 9.2 by virtue of its jurisdiction over the underlying appeal pursuant to FED.R.APP.P. 4(c) and 28 U.S.C. § 1291. The record is expected to fill more than 20 boxes.

STATEMENT OF COMPLIANCE WITH RULE 9

In accordance with FIFTH CIR.R. 9.3, Brown has included a separate appendix volume, including the District Court's ruling denying bond pending appeal (A-1), the transcript of the bond hearing (A-1), the notice of appeal (A-2), and the district court briefs and appendix of Brown and of Bayly, lodged with this Court on April 18th.

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STATEMENT OF THE CASE

A. Procedural Facts.

Brown voluntarily surrendered upon indictment on September 17, 2003, was released on a $100,000 bond co-signed by his wife of 30 years, and was continued on release after conviction on November 9, 2004. At sentencing on April 21, 2005, the district judge rejected the prosecutors' demand for immediate remand, and instead, is allowing Brown to voluntarily surrender upon designation by Bureau of Prisons within a few weeks. The court found that he is neither a flight risk nor a danger to the community and that the appeal is not for purpose of delay. Recognizing that this Court "might see it differently," it denied bail pending appeal because it opined that it could not find the appeal likely to result in a reversal (A-1: 54-55, 77-78).

B. Statement Of The Relevant Facts.

None of the Merrill Defendants personally profited from this transaction, and none engaged in any conduct that was unlawful on its face. This was a corporate transaction that served only corporate purposes, and unlike all other Enron indictments, there was no securities fraud charge. Even assuming the government's best case, the district court noted*:* "The Nigerian Barge fraud . . . would appear to have been one of the smaller and more benign frauds committed by these conspirators at Enron. In this instance at least, the Nigerian Barge assets were real, the

negotiations with Nigeria for the sale of power generated from the barges were real, and a bona fide sale ultimately was consummated in the year 2000, producing an authentic profit for Enron of more than $50 million" (A- 1, p. 19).

The transaction underlying this prosecution arose in late 1999, when Enron aggressively solicited Merrill to invest $7 million to purchase an interest in a company that would profit from the operation of three electrical power barges in Nigeria.[1] The government convicted the Merrill employees on its version of a telephone conversation, to which no government witness was a party, in which Andrew Fastow supposedly guaranteed that Enron would buy the barges back within six months at a specified rate of return. *Jim Brown was neither a party to this conversation nor did he make Merrill's "actual decision to enter this transaction."*[2]

Despite contracts drafted by Vinson & Elkins that expressly excluded any prior oral representations, the prosecutors argued that Fastow's alleged promise vitiated *Enron's accounting* of the transaction as a gain (rather than a loan), thereby rendering

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[1] Moreover, assuming the government's best case, the district court also noted at sentencing: "the organizers, leaders, managers and supervisors of this criminal activity were the executives at Enron, who conceived, planned and directed the execution of the entire fraudulent Nigerian Barge transaction . . . . Defendant Brown and other Merrill Lynch executives . . . were all acting in their ordinary roles commensurate with their positions they held at Merrill Lynch. . . . The entire fraud was organized and driven by certain executives at Enron"(A-1: 22-23).

[2] Indeed, as the district court noted, the prosecutors did not indict the person who authorized Merrill's participation in this transaction (A-1: 24). Moreover, the government's own witnesses agreed that Brown vigorously opposed Merrill's participation in this deal because of the many and significant business risks it raised (Tr. 1036-37, 1094, 1147-50, 4438, 4443-45, 4554, 4569, 4630).

Enron's financial statements false and Merrill's employees guilty. Ironically, the government never proved by any expert accounting evidence that Enron's accounting was wrong. And, contrary to the case the prosecutors selectively presented to the jury, Fastow, in *Brady* disclosoures *denied* that he made such a promise to Bayly or Merrill. Not surprisingly, the government did not call Fastow to testify, so its rendition of this promise rested on multi-level, even unidentified, hearsay. Merrill understood only that Enron would use its best efforts to find a third party buyer for Merrill's interest within six months. A remarketing agreement to a third party is not illegal, and the government's witnesses fully supported this defense.

This appeal raises substantial questions and will establish Brown's innocence. Two prongs of the conspiracy charge, and the two substantive counts, are invalid as a matter of law. Jury instructions allowed conviction for conduct that was not criminal, while denying the defense an instruction on its critical remarketing theory. Brown's explanation to the Grand Jury of his hearsay *understanding* of Fastow's representation as an *assurance*–not a *promise*–in response to ambiguous questions about a conversation to which he was not a party, is not perjury or obstruction.

I. GOVERNING STANDARD. This Court conducts an independent assessment of a district court's denial of bond pending appeal. *U.S. v. Clark*, 917 F.2d 177, 180 (5th Cir. 1990); 18 U.S.C. § 3143(b).

II. BROWN POSES NO DANGER, NO RISK OF FLIGHT, AND THE APPEAL IS NOT FOR DELAY.

As the court found, Brown in neither a danger to the community nor a risk of flight. (A-1, and motions lodged); *see U.S. v. Farran*, 611 F.Supp. 602, 605 (S.D.Tex. 1985), *aff'd*, 784 F.2d 1111 (5th Cir. 1986). The court also found that the appeal is not for purpose of delay (A-1: 47-48). This filing addresses the only remaining issue of a substantial question for appeal.

III. THE APPEAL RAISES RECOGNIZED SUBSTANTIAL QUESTIONS LIKELY TO RESULT IN REVERSAL.[3]

Brown's appeal will raise "substantial questions," which this Court defines as "'close' or 'that could very well be decided the other way' by the appellate court." Brown need only show that *if* any of these issues were decided in his favor, it would result in a reversal. *Clark*, 917 F.2d at 180; *U.S. v. Valera-Elizondo*, 761 F.2d 1020, 1023 (5th Cir. 1985). Like the district court in *Valera-Elizondo*, the judge here seemed to be vested in his prior rulings and mistakenly believed that to recognize a likelihood of reversal on appeal would be tantamount to certifying his own error A-1: 77). That, however, is not the test. Courts have granted bail pending appeal on the very issues raised here in *U.S. v. Cochran*, 109 F.3d 660, 667 (10th Cir. 1997), and in *U.S. v. Rybicki*, 354 F.3d 124, 127 (2nd Cir. 2003). This Court has *reversed*

[3] As in the district court, Brown also adopts and incorporates the arguments made by Bayly in his Application for Release Pending Appeal to this Court.

convictions for this offense, even though employees received kickbacks. *U.S. v. Ballard*, 663 F.2d 534, 540 (5th Cir. 1981), *modified*, 680 F.2d 352 (5th Cir. 1982). *No case* has affirmed a conviction under the honest services statute against anyone in the context of Brown. The Supreme Court recently granted *certiorari* in *Arthur Andersen, L.L.P. v. U.S.,* on similar issues of fair notice and the same prosecutors' expansive application of the obstruction statute. 125 S.Ct. 823 (2005). This Court also granted bail pending appeal in the high profile, "white collar" case of *U.S. v. Edwards*, Case No. 01-30036 (A-3).

A. Brown's Convictions On Counts I, II And III Must Be Reversed Because He Did Not Commit Honest Services Fraud As A Matter of Law, And Had No Notice Of Its Boundaries, Rendering It Unconstitutional If Applied.

This Court's decisions in *Ballard*, 663 F.2d at 540 (reversing honest services convictions); *U.S. v. Brumley*, 116 F.3d 728, 734 (5th Cir.) (en banc) (requiring something like bribery), cert. denied. 522 U.S. 1028 (1997); and, *U.S. v. Caldwell*, 302 F.3d 399 (5th Cir. 2002) (blatant self-dealing, taking $1 million), mandate reversal of Brown's honest services wire fraud convictions–*even assuming* the government proved its best case by competent legal evidence. In *McNally*, the Supreme Court described the intangible right to honest services as "a fiduciary duty to the public, and misuse of his office for private gain . . ." *McNally v. U.S.*, 483 U.S. 350, 355, 107 S.Ct. 2875 (1987) (reversing conviction as outside the scope of the

statute as written). Congress reinstated the "intangible right" to "honest services" in response to *McNally* by enacting 18 U.S.C. §1346, to protect the public from officials abusing their offices for personal gain. This Court, *en banc*, held that something close to bribery was required even when the defendant violated a state statute. *Brumley*, 116 F. 3d at 734.

Rarely and cautiously extended to a private transaction, an honest services fraud requires a legal duty to the employer, breach by non-disclosure of material information, *and* self-dealing, conflicts of interest, bribery or kickbacks, by which the defendant acts or causes someone to act for his personal gain to the detriment of the employer. *Ballard*, 663 F.2d at 543-44 (kickbacks)*; Caldwell*, 302 F.3d at 409-10 (conversion); *See Brumley*, 116 F.3d at 734 ("something close to bribery"). Not every breach of fiduciary duty in the private sector constitutes a federal fraud, and this Court carefully applies this principle in the private sector, where *there is a real risk of every employee wrong* becoming a federal crime. *Ballard*, 663 F.2d at 540; *accord, U.S. v. Bloom*, 149 F.3d 649 (7th Cir. 1998) (affirming dismissal of indictment, no personal gain). Indeed, in *Ballard*, this Court reversed the convictions despite the fact that the defendants had received in excess of $2 million in kickbacks in envelopes of cash.

Numerous cases have reversed convictions under this provision, which has been misused by prosecutors attempting to expand the statute to make federal crimes of business conduct. Recognizing that "all fiduciary breaches, it seems, could be found to involve the loss of an intangible–an employee's faithful and honest services," this Court *rejected* the government's theory because it "sweeps too broadly and does not correctly reflect the quantity and quality of fraud necessary to invoke the criminal sanctions" of an honest services violation. *Ballard*, 663 F.2d at 540-41.[4] The duty of honest services runs from the employee directly to his employer. *See Caldwell*, 302 F.3d 409-10 (proof of duty under state law is required). No case has extended it to shareholders or affirmed a conviction of someone outside of that direct employment relationship without bribes, kickbacks, self-dealing or personal gain by which the outsider caused the employee to act adverse to the interest of his employer. *See Rybicki*, 354 F.3d at 127 (attorneys bribed insurance adjusters to obtain favorable treatment for their clients).

[4] *Accord 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"); *U.S. v. Murphy*, 323 F.3d 102, 104, 109-18 (3rd Cir. 2003) (reversing conviction for lack of duty despite kickbacks and bribes); *U.S. v. Czubinski*, 106 F.3d 1069, 1077 (1st Cir. 1997) (reversing because no bribes, no personal gain to defendant); *Bloom*, 149 F.3d at 656-7 (reversing, no personal gain); *U.S. v. Jain*, 93 F.3d 436 (8th Cir. 1996) (reversing despite kickbacks paid to doctor), *cert. denied*, 520 U.S. 1273 (1997).

Brown and the Merrill defendants did not corrupt Enron employees to act for anyone's personal gain. *All the employees in this case served only corporate purposes for corporate gain.*[5] *There were no bribes, no kickbacks, no conflicts of interest, no self-dealing, and no personal gain by any employee in the Barge transaction*. Only fully disclosed fees and profits were paid to each corporation. *No case* has upheld a conviction for honest services fraud in the attenuated context of the Merrill employees.[6] In some cases, such as *Ballard*, even use of bribes or kickbacks was not enough. 663 F.2d at 540; *Cochran,* 109 F.3d at 667 (reversing despite undisclosed fees); *Murphy*, 323 F.3d at 109-18 (reversing despite bribes and kickbacks); *Jain*, 93 F.3d at 441-42 (reversing despite doctor's receipt of kickbacks).

Brown should not have been indicted *or* convicted under this statute. Following corporate policy and directives for corporate purposes with the full

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[5] Enron's profits exceeded $50 million. The district court also recognized this fact, also noting that Brown was "engaged in his regular job," and again, that "he was playing his ordinary role in this matter as an employee at Merrill Lynch," but the court did not recognize its significance in the context of the applicable law. Indeed, the court did not discuss or analyze the legal issues raised, but rather, summarily concluded that there was not an issue likely to result in reversal (A-1: 19, 26, 27, 55).

[6] Although the absence of personal gain alone requires reversal, there also was no material non-disclosure to the employer. Enron and its in-house and outside counsel, including Vinson & Elkins, had all the information required for *Enron's* proper accounting (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 *Enron* reacquired the barges), and would be made. Nor was this a sham: valuable barges underpinned the transaction and Merrill bore their risk. Enron's total profit was $53 million (A-1: 19).

knowledge of the employer is not an honest services fraud. Moreover, if the statute applies to Brown, it is unconstitutional as applied because Brown had no fair notice of its perimeter, and this Court *en banc* has held that the honest services statute must be construed in a manner that does not leave its outer boundaries ambiguous. *U.S. v. Bass*, 404 U.S. 336, 92 S.Ct. 515 (1971); *Brumley*, 116 F.3d at 733. Further, the erroneous instructions and general verdict, which included honest services in Counts I, II, and III, allowed Brown to be convicted of conduct that was not criminal. Therefore, the conspiracy, wire fraud and related counts must all be reversed. *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); *U.S. v. Pettigrew*, 77 F.3d 1500 (5th Cir. 1996); *U.S. v. Smithers*, 27 F.3d 142, 146-47 (5th Cir. 1994). The unprecedented use of this statute to convict businessmen who pursued their company's interest without bribes or kickbacks raises a substantial issue that warrants bail pending appeal.

B. 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.

C*onspiring* to falsify books and records in violation of the Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. § 78m(b)(4) and (5), is not a crime because the plain language of the statute criminalizes only *actual falsification*. Because the government charged a violation of this statute as a separate object of the conspiracy,

and this object was legally invalid, the conspiracy count must be reversed, as must substantive counts because the jury was permitted to convict on these charges on a *Pinkerton* theory (Tr. 6124). *See also Yates*, 354 U.S. at 312.

1. Only The Actual *Falsification* Of Books And Records–Not *Conspiracy* To Falsify–Is Criminalized By Section 78m(b). Unlike general criminal statutes,[7] the books and records provision of the FCPA 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." 15 U.S.C. § 78m(b)(2). Paragraphs (4) and (5) critically 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 "provided in paragraph (5)," and paragraph (5), in turn, prohibits

[7] Generally, 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. That is not true for the prohibition of section 78m.

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.

No other known federal statute provides that *"no criminal liability shall be imposed"* except pursuant to a specific subpart of the organic statute. No *case* has been found sustaining a conspiracy charge under section 78m, or in which a jury has convicted a defendant on a conspiracy theory. Congress's purpose was to place the duty to keep a company's books and records where it belongs–with the issuer and its employees– who alone have actual responsibility for, and control of, the books and records and can insure their accuracy. Conversely, third parties have no ability to control what, if any, entries are made in a company's internal books and records, and should not bear criminal responsibility for them–as Congress rationally concluded.[8]

2. Under Comparable Circumstances, Courts Have Refused To Permit Accessorial Liability. Courts have recognized that Congress can preclude accessorial liability whenever it wants. See, *e.g.*, *Gebardi* v. *U.S.*, 287 U.S. 112, 53 S.Ct. 35 (1932) (woman cannot be guilty of aiding and abetting a man in transporting

[8]Even if the text and structure of section 78m are *ambiguous* as to co-conspirator liability, the rule of lenity requires that any "ambiguity concerning the ambit of criminal statutes" be resolved in favor of the defendant, applying statutes only to conduct "clearly covered." *Rewis* v. *U.S.*, 401 U.S. 808, 812, 91 S.Ct. 1056, 1059-60 (1971). 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, and Brown could not have had fair warning of his criminal liability for *Enron's* books and records, let alone any control over them.

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 act, which made it unlawful only to "manufacture, sell, barter, transport, import, export, deliver, furnish or possess"–*not to purchase*–"any intoxicating liquor"); *U.S. v. Amen*, 831 F.2d 373, 381 (2d Cir. 1987) (aiding and abetting does not apply to "kingpin" statute, 21 U.S.C. § 848) *cert. denied*, 485 U.S. 1021 (1988).

Significantly, this Court has already held that 18 U.S.C. § 371 is inapplicable to certain parts of the FCPA, the very statute containing the books and records provision. *U.S. v. Castle*, 925 F.2d 831 (5th Cir. 1991) (rejecting *conspiracy* charge because the express language of the FCPA criminalizes the act of *offering* a bribe but does not mention the act of *receiving* one); *accord U.S. v. Bodmer*, 342 F.Supp. 2d 176, 181 (S.D.N.Y. 2004) (government could not circumvent statutory exclusion by charging foreign agent with conspiracy under § 371). Section 78m precludes a conspiracy prosecution and limits criminal liability to *actual falsification.* Counts I, II and III must be reversed on this basis also.

C. Brown's Expression of His Understanding In Response To Deliberately Ambiguous Questions Is Not Perjury or Obstruction As A Matter of Law.

Brown was wrongly convicted of perjury and obstruction for his statement to the Grand Jury that he did not *understand* Fastow's representation to Bayly to be "*a*

promise." Brown was invited to the grand jury as a witness, not a target, and was encouraged to speak freely of his thoughts and understandings. He voluntarily appeared and testified 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.[9] Brown explained elsewhere that he understood the conversation–to which he was not a party–to reflect an *assurance* by Fastow that another buyer would be found for Merrill's interest within six months, but that he did not think it was a *promise* or an obligation. The prosecution selectively ignored his full answers and all context (Tr. 3274-75). This raises substantial issues for appeal because, as a matter of law, *inter alia*: (i) the expression of one's "understanding" while under oath,

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[9] **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 them out of the deal on or before June 30th?

A: It's inconsistent with my understanding of what the transaction was. (Tr. at 80, lines 6-11.)

Q: ....Again, do you have any information as to a promise to Merrill that it would be taken out by sale to another investor by June 2000?

A: In - - no, I don't - - the short answer is no, I'm not aware of the promise. I'm aware of a discussion between Merrill Lynch and Enron on or around the time of the transaction, and I did not think it was a promise though.

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.)

responsive to ambiguous questions, is not perjury; (ii) the court wrongly excluded Brown's entire testimony, which was critical to placing Brown's "intent" in context; (iii) the government's sole bit of evidence against Brown was an unreliable email 14 months later that the prosecutors knew to be false and hearsay-based; and, (iv) the government's own witnesses confirmed Brown's understanding and testimony.

1. Expressions Of Understanding Are Not Perjury Or Obstruction.

Forty-eight 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. First, Brown's opinions and understandings are literally true and do not express *facts*. Second, the government's vague, ambiguous questions are legally infirm and will not support a perjury conviction. Reversal is required. *Bronston v. U.S.*, 409 U.S. 352, 356, 93 S.Ct. 595, 599, 602 (1973) ("precise questioning is imperative as a predicate for the offense of perjury," and even an evasive answer intending to mislead questioner cannot be perjury if the answer is literally true); *U.S. v. Lighte*, 782 F.2d 367 (5th Cir. 1986), *abrogated on other grounds*, *U.S. v. Wells,* 519 U.S. 482, 117 S.Ct. 921 (1997). *U.S. v. Serafini*, 167 F.3d 812, 818-24 (3rd Cir. 1999); *U.S. v. Bell*, 623 F.2d 1132 (5th Cir. 1980) (defendant may not be "assumed" into prison).

The government's vague, ambiguous questions underlying the perjury charge, *supra* n. 9, and Brown's full answers invalidate these convictions.[10] *Brown had no personal knowledge of this conversation–he was not a party to it.* His testimony depended on hearsay emanating from speakers in time and contexts still unknown.

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

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

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

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

Q: Again, do you have *any information* as to a *promise* to Merrill that it would be taken out by sale to another investor by June, 2000?

A: In - - no, I don't - - the short answer is no, I'm not aware of the promise. I'm *aware of a discussion* between Merrill Lynch and Enron on or around the time of the transaction, and *I did not think* it was a *promise* though.

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

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

Subjective opinions responsive to the government's ambiguous questions cannot support a perjury conviction as a matter of law. *U.S. v. Derrick,* 163 F.3d 799, 828 (4th Cir. 1998) (rejecting perjury where witness did not "believe" payments were illegal); *Com. v. Bray*, 123 Ky. 336, 96 S.W. 522 (Ky. 1906) (perjury could not be based on question about binding nature of contract–a legal question); *U.S. v. Ellis*, 121 F.3d 908, 927-28 (4th Cir. 1997) (perjury as to "matter of perception" fails "absent conclusive proof" witness lied). Brown's responsive explanations of his hearsay-based *understanding* of an *assurance*, not a *promise*, is not perjury.

2. The Court Wrongly Excluded All Of Brown's Testimony. The district court refused Brown's proffers of the entirety of his testimony, which would have made it plain that he did not intend to deceive or obstruct (Tr. 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, the prosecutors were allowed to isolate and manipulate selected portions. The government may not sustain a perjury conviction by lifting statements out of context and distorting their meaning. *Serafini*, 167 F.3d at 818-24. This Court has disapproved 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).

Under §1623, even a recantation of knowingly false testimony in the same proceeding bars a prosecution for perjury because the law seeks to induce witnesses to tell the truth, not to penalize them for it. 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). Recognizing that "we are not dealing with casual conversation," in *Bronston*, the Court noted that "the statute does not make it a criminal act for a witness to willfully state any material matter that implies any material matter that he does not believe to be true." 409 U.S. at 357-58. Further, "the perjury statute is not to be loosely construed. . . ." *Id.* at 361. Here, Brown's open and expansive explanations to the government's convoluted questions about his understanding demonstrate Brown's intent to tell the full truth as best he could. This is not perjury–and the government may not carve up testimony to make it look otherwise. 18 U.S.C. § 1623(d); *U.S. v. McAfee,* 8 F.3d 1010, 1014-15 (5th Cir. 1993) (recantation, or in Brown's case, explanation, bears on whether the accused intended to lie). Brown's testimony also cannot be considered "material,"[11] because it did not have the effect or tendency of influencing the Grand Jury incorrectly. Brown's testimony aimed to clarify his understanding. *Id.* at 1017; *U.S. v. Abroms,* 947 F.2d 1241, 1245 (5th Cir. 1991), *cert. denied*, 505 U.S. 1204 (1992).

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

Had his entire testimony been admitted, this would have been apparent to this jury.

3. Brown's Testimony Was Truthful, And The Casual Email On Which The Government Relied Was Wrong. Brown's Grand Jury description of his understanding of the Nigerian Barge transaction was true. In attempting to prove perjury, the government relied on an off-the-cuff, casual email Brown wrote 14 months later,[12] in an unrelated transaction, in which Brown referred to a promise that Fastow supposedly made–an email that the government did not show to Brown in the Grand Jury, and that it knew to be wrong on its face and directly contradicted by Fastow. Fastow confessed in limited *Brady* material finally provided by the government that *he did not make a promise or guarantee*.[13] Even though he pled guilty to other charges and is cooperating fully with the government, Fastow *denied* that he ever guaranteed to buy back the barges; instead, he only gave Merrill verbal *assurances* to create a high level of confidence that Enron would find a third-party buyer (Tr. 1612), which is exactly what Brown told the Grand Jury. Only the casual

[12]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).

[13] The court's failure to allow defendants to use this critical Brady material is a separate issue that warrants reversal on appeal. *See* Bayly's Motion and Application, incorporated herein.

email was wrong–not Brown's sworn testimony.

Further validating Brown's understanding, the government's own witnesses described the "oral agreement" using the same words Brown did–as to both the frailty and vagueness of the representation. *Not a single witness testified that Fastow said he "promised to pay us back no matter what."*[14] Further, the difference between "assurance," "promise," and the other synonyms[15] all witnesses used interchangeably 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 at 1014 (differences must be more than vague, uncertain, equivocal).

Significantly, the email discusses nothing illegal and is not incriminating on its face.[16] By excluding proffered testimony, the court also excluded Brown's

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[14]Trinkle, the government's only Merrill witness, testified to her hearsay understanding that either Furst or Tilney said: "He [McMahon] 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).

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

[16]The government aggravated the prejudice of this false email by pointing to it repeatedly as key evidence. It even used it in rebuttal, in violation of a motion in limine and the court's ruling, and argued in violation of Rule 404(b) that this showed the illegal lengths to which Brown would go to close a deal (Dkt. #379; Tr.330-53, 2973, 6508-09, 6516). Brown moved for a mistrial (Tr. 6578). The government's conduct was deplorable, as it knew the email was false and did not discuss

explanation that he was exaggerating to a Merrill colleague in the midst of contractual negotiations with Continental.[17] The government knew this email was false in many ways, denied even by Fastow, and rested on multiple layers of hearsay.

Brown's understanding of the representations as *assurances* as he carefully explained under oath to the Grand Jury, and his voluntary disclosures demonstrate that he did not try to mislead or obstruct. *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). Both the perjury and obstruction convictions present substantial, indeed reversible issues on appeal.

III. CONCLUSION. Accordingly, Brown requests stay of his sentence, including payment of fines and restitution, and continuation on conditions pending appeal.

Respectfully submitted,_____ Sidney Powell

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anything illegal. Indeed, Brown understood lawyers to have been on the call, and thus even his *misunderstanding* evidenced his belief that the assurance was legal. The prejudice was exacerbated by the wrongful admission of Lyon's response that included the remark: "One let us try and tie up CAL a little bit more legally" (GX 240, Tr.3242-43). 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). The government knew it violated the rules and later redacted the exhibit (3663), but the bell had been rung. There is a *Brady* issue here also.

[17]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).

CERTIFICATE RESPECTING CONFERENCE

I, Sidney Powell, do hereby certify that the government opposes bail pending appeal.

_____

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I hereby certify that a true and correct copy of this Emergency Application For Release Pending Appeal was served via hand-delivery and electronic transmission, this 25th day of April, 2005, upon the following counsel of record:

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