UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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

DEFENDANT JAMES A. BROWN'S MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS AND *BRADY* MATERIAL

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DEFENDANT JAMES A. BROWN'S MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS AND *BRADY* MATERIAL

Pursuant to Rule 16(a)(1)(E) of the FEDERAL RULES OF CRIMINAL PROCEDURE and *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963), Defendant James Brown ("Defendant") requests that the Court order the government to produce certain specific documents and *Brady* material which are critical to establishing Defendant's innocence in this case.[1] The government must be held to the highest standards here, given the reversal of the original prosecution, an additional acquittal, one appellate judge urging Brown's acquittal, and the significant developments since the first trial–now almost three years ago.[2]

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[1] Brown also adopts the *Brady* and Rule 16 requests of his co-defendants, by letter and by Motion.

[2] For example, since the first trial, hereinafter "Barge I," almost three years ago, the government has finally unleashed Fastow to testify. Fastow has twice confirmed the defense theory of this case: That Fastow gave his assurances that a third party would buy the barges. Further, Fastow's testimony impeaches that of key government witnesses in Barge I. *See*, *e.g.* Newby Deposition, relevant portions of which are attached hereto as Exhibit "A" (Vol. 6, Tr. 1520-21, 1532-34); Lay/Skilling Trial, relevant portions of which are attached hereto as Exhibit "B" (Vol. 23, Tr. 7128-29, 7189, 7204, 7209-10, 7212-14). The government has not produced any additional material in the last two years, despite the continuing interviews of Fastow, Glisan, and others, the Lay-Skilling litigation and the *Newby* litigation, both which included deposition and/or trial testimony regarding the barge transaction.

Also, Glisan, who denied a deal with the government in Barge I, received significant undisclosed benefits and consideration from the government because of his cooperation there. At some time, Glisan was even allowed to enter a substance abuse program which resulted in a substantial reduction of his sentence. Exhibit "C," pp.1-33. Indeed, Glisan, one of the masterminds of the Enron fraud, has been out of prison at home with his family for a year already. (Quotes from Glisan and Fastow in the *Newby* case are taken from unofficial portions of the transcript. As *Brady* and Rule 16 material, we request this Court order the government to provide the final official transcripts of those pages and any other testimony or statements as specified herein.)

The government also produced–after Barge I–telephone records indicating that Brown was not on the Trinkle call–the only place the government even argued that Brown joined the alleged conspiracy.

At this point, the government has either refused to provide requested discovery or has failed to follow through on its acknowledged commitments to provide the supplemental discovery in this case that it committed to this Court it would provide. For example, the government has not responded to Defendant's letter of February 6, 2007, requesting grand jury testimony from Merrill Lynch employees who testified after the first Barge trial that are believed to have *Brady* material. *See* Letter to Arnold Spencer of February 6, 2007, attached hereto as Exhibit "D." The government has also declined our request for an open file policy (Exhibit "E").

Moreover, at the status hearing on April 4, 2007, the prosecutor "commit[ed] to the Court that [he would] personally [] go back over the discovery that was made, as well as any documents the government has received in the interim from the time the discovery was produced in the first trial until today; and [that the prosecution] will make subsequent supplemental production." (04-04-07 Hearing Tr. 15; Dkt. 939). Indeed, the government agreed to turn over this production by August 1, 2007, if not earlier. (04-04-07 Hearing Tr. 10, 11, 15-20; Dkt. 939).[3] To date, defendants have received nothing. On August 7, 2007, Mr. Spencer advised that he thinks "it will be more productive to address these issues through the Court," and he has declined to tell the defense what, if any, additional materials there are, if he has reviewed the Fastow 302s for *Brady* material or Rule 16 material, or even if he has *reviewed any* of the materials he committed to this Court on April 4 that

[3] The entire docket order schedule issued by this Court was premised upon Defendants receiving the supplemental discovery promised by Mr. Spencer by August 1, 2007. Brown has therefore previously moved for an extension/modification of that schedule to account for the government's failings and refusal to provide any additional discovery in this case.

he would "personally" review. It is therefore appropriate for this Court to now issue an Order directing the government to disclose materials necessary to preparation of the defense.[4]

It is well settled that the government "has no interest in interposing any obstacle to the disclosure of facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons." *Gordon v. United States*, 344 U.S. 414, 419, 73 S.Ct. 369, 373 (1953). And, "while the government may choose to prosecute, it may not prosecute without telling the whole truth." *United States v. Wilson*, 289 F.Supp.2d 801, 817 (S.D.Tex. 2003). "If it chooses the criminal process, [the government] will have to yield its information about both the offense and the defense," *Id*. The Defendants in this case are entitled to the whole truth this time–not some manufactured or surgically constructed "truth" that suits only the government's erroneous theory of the case. *Brady,* 373 U.S. at 87-88, 83 S.Ct. at 1197. Complete and unadulterated disclosures are required to the fullest extent of the mandates of Rule 16, *Brady* and its progeny. *See*, *e.g. United States v. Agurs*, 427 U.S. 97, 106, 96 S.Ct. 2392, 2398 (1976) ("When the prosecutor receives a specific and relevant request, failure to make any response is seldom, if ever, excusable.").

I. GOVERNING LEGAL STANDARDS

A. FEDERAL RULE OF CRIMINAL PROCEDURE 16(a)(1)(E) ENTITLES BROWN TO ALL DOCUMENTS MATERIAL TO HIS DEFENSE.

Under Rule 16(a)(1)(E) of the FEDERAL RULES OF CRIMINAL PROCEDURE, the prosecution must provide a defendant with access to documents and other information within the "government's possession, custody, or control" that are "material to preparing the defense." FED. R. CRIM. P.

[4] Furthermore, if AUSA Spencer actually conducts his due diligence in this case and "personally" reviews the discovery materials requested herein, he may learn that it would be prudent and proper to dismiss the indictment, thereby obviating the need for a trial. *See United States v. Ramming*, 915 F.Supp. 854, 868 (S.D. Tex. 1996).

16(a)(1)(E); *see also United States v. Rigas*, 258 F.Supp.2d 299, 306 (S.D.N.Y. 2003) ("Rule 16(a)(1)(E)(I) entitles a defendant to documents or other items that are material to preparing argument in response to prosecution's case-in-chief.") (*citing United States v. Armstrong*, 517 U.S. 456, 462, 116 S.Ct. 1480, 1485 (1996)). Rule 16 "is intended to prescribe the minimum amount of discovery to which the parties are entitled. It is not intended to limit the judge's discretion to order broader discovery in appropriate cases." FED. R. CRIM. P. 16 advisory committee's note. *Cf. United States v. Ross*, 511 F.2d 757, 762 (5th Cir. 1975) ("[T]he granting of discovery motions is a matter of the trial court's discretion."); FED. R. CRIM. P. 16(d) (District Court charged with regulating discovery.).

For purposes of Rule 16, a document is considered to be material if "it could be used to counter the government's case or bolster a defense." *United States v. Stevens*, 985 F.2d 1175, 1180 (2d Cir. 1993). The materiality standard is "not a heavy burden." *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993). Rather, a defendant satisfies Rule 16(a)(1)(E)'s materiality standard by providing "some indication that the pretrial disclosure of the disputed evidence would ... enable[] the defendant significantly to alter the quantum of proof in his favor." *Ross*, 511 F.2d at 763; *see also* FED. R. CRIM. P. 16 advisory committee's note (1974 amend.) ("[B]road discovery contributes to the fair and efficient administration of criminal justice by providing the defendant with enough information to make an informed decision to plead; by minimizing the undesirable effect of surprise . . . ; and by otherwise contributing to an accurate determination of the issue of guilt or innocence.").

Further, evidence is material for Rule 16 purposes "as long as there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation,

corroborating testimony, or assisting impeachment or rebuttal." *Lloyd*, 992 F.2d at 351 (citations omitted). Inculpatory evidence is also material; such evidence "may alter the quantum of proof in [defendant's] favor in several ways: by preparing a strategy to confront the damaging evidence at trial; by conducting an investigation to attempt to discredit that evidence; or by not presenting a defense which is undercut by such evidence." *United States v. Marshall*, 132 F.3d 63, 68 (D.C.Cir. 1998).

Moreover, the government is not "excused from its obligation [under Rule 16] by the fact that the documents [a]re in the possession of the FBI [or other government agency] prior to trial." *United States v. Scruggs*, 583 F.2d 238, 242 (5th Cir.1978). *See also United States v. Deutsch*, 475 F.2d 55, 57 (5th Cir. 1973), *overruled on other grounds by United States v. Henry*, 749 F.2d 203 (5th Cir. 1984) (*en banc*). Therefore, as under *Brady*, the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in th[e] case." *Strickler v. Greene*, 527 U.S. 263, 281, 119 S.Ct. 1936, 1948 (1999) (*Quoting Kyles v. Whitley*, 514 U.S. 419, 437, 115 S.Ct. 1555, 1567 (1999)). A "prosecution is brought in the name of the United States of America," and the government may not "restrict the scope of responsible knowledge to the individual prosecutor in the courtroom." *Wilson*, 289 F.Supp.2d at 811.

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win the case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 86, 55 S.Ct. 629 (1935). The prosecutor's duty of disclosure is "broad," flowing as it does from the prosecutor's special status as a minister of justice. *Strickler*, 527 U.S. at 281, 119 S.Ct. at 1948. As under the *Brady* inquiry,

"production may sometimes be required though inspection may [later] show that the document could be excluded [from evidence at trial]." *Gordon*, 344 U.S. at 418, 73 S.Ct. at 372. "For production purposes, it need only appear that the evidence is relevant, competent, and outside of any exclusionary rule." *Id*. at 420, 73 S.Ct. at 373. *See United States v. Stein*, 488 F.Supp.2d 350, 356-57 (S.D.N.Y. 2007) (Evidence that government does not intend to use in its case in chief is "material" under criminal procedural rule governing discovery if it could be used to counter government's case or to bolster defense.).

B. UNDER *BRADY* AND ITS PROGENY, BROWN IS ENTITLED TO EXCULPATORY AND IMPEACHMENT EVIDENCE NOW.

Due process forbids a prosecutor from withholding "evidence favorable to an accused upon request . . . where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87, 83 S.Ct. at 1196. *Cf. Rector v. Johnson*, 120 F.3d 551, 558 (5th Cir. 1997); *Williams v. Dutton*, 400 F.2d 797, 799-800 (5th Cir. 1968). The United States Supreme Court has rejected any constitutional distinction (for purposes of the government's *Brady* obligation) between impeachment evidence and exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375 (1985); *accord Williams*, 400 F.2d at 799-800 (Impeachment evidence is included in the category of favorable evidence which must be disclosed.). Even evidence that is (presumably) inadmissible at trial may be material for *Brady* purposes– and thus must also be disclosed where it is favorable to the accused. *United States v. Sipe*, 388 F.3d 471, 485 (5th Cir. 2004).

Brady imposes an affirmative duty on the government to produce evidence which is materially favorable to the accused either as direct or impeaching evidence. *Williams*, 400 F.2d at

800. This affirmative duty to disclose is ongoing. *Pennsylvania v. Ritchie*, 480 U.S. 39, 60, 107 S.Ct. 989, 1003 (1987). Exculpatory evidence includes material that goes to the heart of the defendant's guilt or innocence as well as that which might alter the jury's judgment of the credibility of a prosecution witness. *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766 (1972). *Cf. Sipe*, 388 F.3d at 478.[5] Evidence impeaching the testimony of a government witness is exculpatory when the credibility of the witness may be determinative of a criminal defendant's guilt or innocence. *Giglio*, 405 U.S. at 154, 92 S.Ct. at 766. If the exculpatory evidence "creates a reasonable doubt" as to the defendant's culpability, it will be held to be material. *Agurs*, 427 U.S. at 112, 96 S.Ct. at 2401.

Under *Brady*, the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in th[e] case." *Strickler*, 527 U.S. at 281, 119 S.Ct. at 1948 (*Quoting Kyles*, 514 U.S. at 437, 115 S.Ct. at 1567). It is no answer that the prosecutor did not know of the exculpatory evidence because it was in the hands of another arm of the state. *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980); *Wilson*, 289 F.Supp.2d at 815 . Even evidence concealed by other arms of government is imputed to the prosecutor for *Brady* purposes. *Guerra v. Collins*, 916 F.Supp. 620, 635 (S.D.Tex. 1995). This standard is especially important in this case because the government possesses an enormous volume of material from the SEC, its intervention in the *Newby* class action, Fastow's testimony in other cases, Fastow's hundreds of statements to government agents, and likely other matters and investigations not even known to the defense. **To**

[5] Accordingly, the government violated *Brady* in Barge I when it allowed Glisan to testify as an unbiased witness when actually, he was already in negotiations with the government to procure various undisclosed benefits (furloughs, prison transfer) and the government's agreement not to interfere or oppose his entrance into a substance abuse program despite Glisan's assertion that he has no addiction. These maneuvers reduced his sentence by a full year. Exhibit "C," pp. 1-33.

date, the government has produced none of these documents, despite specific requests for *Brady* material and for Rule 16 in Fastow's 302s, and/or from the *Lay/Skilling* and *Newby* litigation, and in material generated in the last three years since Barge I. Moreover, the prosecutor has refused the Defense's request for an open file policy which would have so easily met its *Brady* and Rule 16 obligations.

Finally, the government has an "affirmative duty to resolve doubtful questions in favor of disclosure, and "if the sword of Damocles is hanging over the head of one of the two parties, it is hanging over the head of [the government]." *United States v. Blackley*, 986 F.Supp. 600, 607 (D.D.C. 1997). *See also Agurs*, 427 U.S. at 108, 96 S.Ct. at 2399 ; *United States v. Starusko*, 729 F.2d 256, 263 (3d Cir. 1984).

1. This Court Must Insure Disclosure Of Favorable Evidence.

"The right of the accused to have evidence material to his defense cannot depend upon the benevolence of the prosecutor." *Williams*, 400 F.2d at 801. In other words, the prosecution "may not arrogate to itself the trial court's *opportunity* to decide th[e] issue" of materiality and required disclosure. *Wilson*, 289 F.Supp.2d at 814 (emphasis added).[6] *Cf. United States v. Campagnuolo*,

[6] The Prosecutor has "duty under the due process clause to insure that 'criminal trials are fair' by disclosing evidence favorable to the defendant upon request." *Weatherford v. Bursey,* 429 U.S. 545, 559, 97 S.Ct. 837, 845-46 (1977); *accord Auten*, 632 F.2d at 481 (Production of material evidence is required "in the interests of inherent fairness ... to promote the fair administration of justice."). Indeed, there can be no doubt that the pre-trial disclosure of *Brady* material implicates the prosecutor's role as a minister of justice. *United States v. Sarcinelli*, 667 F.2d 5 (5th Cir. 1982). *Cf. Berger*, 295 U.S. at 88, 55 S.Ct. 629 . It is clear that "a prosecutor who intentionally fails to make disclosure to the defense, *at the earliest feasible opportunity*, of the existence of evidence which tends to negate the guilt of the accused as to the offense charged," violates certain standards of professional conduct. STANDARDS FOR CRIMINAL JUSTICE § 3-3.11 (1993) (emphasis added). *See also* MODEL RULES OF PROFESSIONAL CONDUCT RULE 3.8 (2004). The prosecutor can be subject, therefore, to disciplinary sanctions for his misconduct. STANDARDS FOR CRIMINAL JUSTICE § 3-1.1 (1993). Likewise, he can be sanctioned for "engag[ing] in conduct that is prejudicial to the

592 F.2d 852 (5th Cir. 1979). One of our sister circuits has been specific: "We flatly reject the notion, espoused by the prosecution, that 'it is the government, not the district court, that in the first instance is to decide when to turn over *Brady* material.'" *Starusko*, 729 F.2d at 261. *Accord Wilson*, 289 F.Supp.2d at 814 ("If the trial court had had the opportunity to review the undisclosed information, it could have ruled on its relevance and admissibility; however, the government peremptorily and illegally excluded the defendant and court from the process.").

A defendant seeking to have this Court *review* specifically requested evidence to make a *Brady* determination need only make a "plausible showing" that the prosecutor's file will produce material evidence. *United States v. Lowder*, 148 F.3d 548, 551 (5th Cir. 1998). Finally, this Court has "broad discretion to administer sanctions for the violation of a valid discovery order," even where that order exceeds the requirements of *Brady*. *Campagnuolo*, 592 F.2d at 858; *accord United States v. Ellender*, 947 F.2d 748, 756 (5th Cir. 1991) ("[T]rial court holds great latitude in the management of the discovery process, including fashioning the appropriate remedy for alleged discovery errors."); *see also United States v. Katz*, 178 F.3d 368 (5th Cir. 1999) (affirming exclusion of evidence when, among other things, government "sandbags" defendant.").

2. Context For Assessing Whether Evidence Is Discoverable.

In assessing *Brady* evidence and its required disclosure, the Fifth Circuit holds that courts must assess the evidence "in the context of the specific elements of the charged offense[s]." *Sipe*, 388 F.3d at 479. In other words, if an item of evidence, disclosure of which is sought, tends to negate or disprove an element of the offense charged (for example willfulness where the crime

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administration of justice." MODEL RULES OF PROFESSIONAL CONDUCT RULE 8.4 (2004).

requires "specific intent"), then the prosecutor must produce that evidence under the mandate of *Brady*. *Id*.

3. Specific Disclosure Of Evidence Demonstrating Impeachment and Bias.

"The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness ... that a defendant's life or liberty may depend." *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177 (1959). *Accord Dickson v. Quarterman*, 462 F.3d 470, 477 (5th Cir. 2006). Impeachment evidence is "material" and must be disclosed where that evidence would "undermine the testimony of a key witness on an essential issue or [where] there is no strong corroborati[ve]" evidence on the issue. *Sipe*, 388 F.3d at 478. The requirement that the prosecutor disclose impeachment evidence applies also to "any understanding or agreement as to a future prosecution" of a government witness. *Giglio*, 405 U.S. at 155, 92 S.Ct. at 763. *Cf. Sipe*, 388 F.3d at 477 (Of *Brady* significance are (1) the scope of the benefits provided to the government's witnesses, and (2) evidence of animosity or other relevant bias of testifying witnesses.).

II. SPECIFIC EVIDENCE REQUESTED: ALL OF THE ITEMS FALL WITHIN THE AMBIT OF RULE 16 AND/OR *BRADY* AND ITS PROGENY.

A. *Brady* And Its Progeny And Rule 16 Require The Government To Produce Any Recording In Any Form Of Statements By Andrew Fastow, Including But Not Limited To: Fastow's 302s, Notes Underlying Fastow's 302s, Final Corrected Copies Of Depositions In Both Civil And Criminal Trials, Grand Jury Testimony, And Criminal And Civil Trial Testimony.

Andrew Fastow, on whose words the government's entire prosecution depends, did not testify in Barge I, but he has since been unleashed by the government and has testified at least twice under oath–in the Lay-Skilling trial and in the *Newby* class action. In addition, during the last several years

since Barge I, he has given countless statements to government agents–none of which have ever been produced to the Defense in this case. *See*, *e.g.* Exhibit "A" at Vol. 6 at 1532-34 and Exhibit "B" at Vol. 23, Tr. 7128-29, 7189, 7204, 7209-10, 7212-14 (among other items of testimony, reference to multiple interviews with government agents and prosecutors). Those must now be produced in their entirety where they relate at all to LJM2, the barge transaction, his telephone conversation with Dan Bayly, or impeach or contradict the testimony of any other witness in Barge I. *Wilson*, 289 F.Supp.2d at 814 ; *Brady*, 373 U.S. at 87, 83 S.Ct. at 1196. We now know from the uncertified materials that we have been able to obtain *from others* that Fastow's testimony both directly contradicts the government's case in Barge I and impeaches the testimony of virtually every government witness (including Glisan, Lawrence, Long and Kopper) who testified against the Merrill Lynch Defendants on the substance of the critical conversation between Dan Bayly and Fastow and on other issues as well. *Giglio*, 405 U.S. at 154, 92 S.Ct. at 766. *See also Agurs*, 427 U.S. at 103-04, 96 S.Ct. at 2397-98 (*Brady* clearly implicated where previously undisclosed evidence reveals that the prosecution introduced trial testimony that it knew or should have known was perjured.").

Grand jury testimony falls within purview of material required to be disclosed under *Brady*. *Campagnuolo*, 592 F.2d at 859. *Accord United States v. Herberman*, 583 F.2d 222, 229 (5th Cir. 1978). Therefore, any testimony given by Andrew Fastow during any and all Grand Jury proceedings–related to this or other cases–in which he recounts or describes any portion of the Nigerian Barge deal or any information regarding Jim Brown, Dan Bayly, Robert Furst, or William Fuhs must now be produced forthwith.[7]

[7] Indeed, the necessity of production of all Fastow-related materials versus the incredible second and third-hand hearsay testimony the government relied on in the first Barge trial can be analogized to the use of "best evidence": Fastow, as first-hand participant, "is a more reliable,

Further, there can be no doubt that, at a minimum, portions of the Fastow 302s and the notes underlying them are material for *Brady* purposes and Rule 16.[8] From the first trial, we already know the role that Fastow and other government witnesses played in the government's case. *See Agurs,* 427 U.S. at 108, 96 S.Ct. at 2399. Fastow himself, and his conversation with Bayly were the linchpin of the prosecution. It logically follows, therefore, that the F.B.I. reports, which affect his credibility and shed light on the underlying question of substantive guilt, are material for impeachment purposes. It is "obviously of such substantial value to the defense that elementary fairness requires it to be disclosed." *Id*. at 110, 96 S.Ct. at 2401. *Accord Sipe*, 388 F.3d at 477 (*Brady* violation in failure to disclose impeachment evidence as to star witness). Indeed, as to all defendants, the testimony of Fastow "may well be determinative of guilt or innocence." *Giglio*, 405 U.S. at 154, 92 S.Ct. at 766 (citations omitted). The government must be required to immediately produce this evidence.[9]

Finally, it is no answer that the defendants are aware of Fastow's assertion that no "guarantee" to "buyback" the barges was made, or that this evidence is simply cumulative as supporting defendants' position or defense. This Court in *Wilson* put the matter succinctly:

> "The law does not exempt [from disclosure] information that the defendant knows from [other] disclosure requirements. Although [Brown] *knew* [that no guarantee had been made], impeaching the government's witnesses by its own records would *prove* much more forceful and credible at trial."

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complete and accurate source of information as to [the deal's] contents and meaning than anyone[]" else could be. *Gordon*, 344 U.S. at 421, 73 S.Ct. at 374.

[8] For example, in Barge I, there were substantial and material differences between Agent Bhatia's notes of his interview of Kopper and the 302 Agent Bhatia wrote of that interview (14:1312-15, 1320-22, 1324-29, 1382-85, 1394-95, 1397-98, 1424, 1487-88; 15:1696; GX905).

[9] Apparently, it produced many volumes of Fastow's 302s in the Lay-Skilling trial.

Wilson, 289 F.Supp.2d at 816 (emphasis in original). Of course Brown knew what he understood–no guarantee had been made–but the government *must produce* evidence that shows what he understood was, in fact, correct. Such "information [is] invaluable to [Brown's] defense and its credibility," and is therefore material under *Brady*. *Id*. at 814. Indeed, this evidence refutes the central claim of the government–that Enron promised to buy back Merrill's Barge interest–and clearly provides the evidentiary basis for the trial jury to reject the central premise of the government's case.

B. The Government Must Produce Any Recording In Any Form Of Statements Of Any Person Or Questions To Any Witness Regarding Who Signed The Nigerian Barge Engagement Letter On Behalf Of Merrill Lynch, And Who Was Present When The Closing Documents Were Signed.[10]

In Barge I, the government never even argued that Brown signed the final engagement letter memorializing the Nigerian Barge transaction between Enron and Merrill Lynch, perhaps because the government knows he did not. However, for the PSR and then on appeal, the government flatly stated that Brown finalized the deal and signed the engagement letter for Merrill along with Andrew

[10] Any *Brady* materials related to whether Brown signed the final engagement letter were specifically requested by letter of August 29, 2006, almost one year ago. *See* Letter to Stephan Oestreicher dated August 29, 2006, attached hereto as Exhibit "F." To date, Brown has received nothing by way of *Brady* production as to same, even though every other transaction document was signed by Joe Valenti, and we believe Valenti was called before the grand jury and may have given other statements as well.

Fastow for Enron. Government's Brief on Appeal 101.[11] This is simply not true. Contrary to the government's misrepresentations, the record shows the following:

- Brown did not see any of the engagement letters during the duration of the negotiations, and the trial record showed that he was not even on the email chain amongst which the various drafts were circulated (GRE 32, 33 (emails and first draft engagement letter); 14, 37 (black-lined letter); 39 (final draft); 16 (fax and final letter)).

- Not a single copy of any engagement letter was ever on Brown's computer or in his hard copy files (15:1938; 16:1959, 1983-85; 19:3126).

- Brown did not sign the engagement letter dated December 29, 1999, for the Enron-Merrill barge transaction - Brown was in Scottsdale, Arizona on vacation with his family at the time (X975A:31, 141; Dkt. 621 GX List).

- Every other deal document signed on 12/29/99 was signed by Joe Valenti. Valenti signed: the Limited Liability Co. Agreement; the Share Purchase Agreement; the Shareholders' Agreement; the Loan Agreement; the Pledge Agreement; and, attended the special meeting of ML IBK at which Ebarge was formed and the $7 million was contributed. Brown was in Arizona.

To the extent that the government attempted to prove that Brown joined a conspiracy and "finalized" the deal documents as an alleged overt act in furtherance of that conspiracy, government Indictment at ¶ 31(g), all facts surrounding the final deal documents - substance, form, creation - are material to either guilt or innocence, and must be produced forthwith. *Sipe*, 388 F.3d at 479; FED. R. CRIM. P. 16(a)(1)(E). Specifically, the government charges in the indictment that Enron and Merrill entered into a written agreement -- memorialized in the final engagement letter -- to mask

[11] This Court required the PSR to be revised to state the Probation Office's concession that they do "not know if Defendant Brown personally signed the engagement letter or authorized someone to sign for him." (Sentencing Tr. 12). Nevertheless, in the Fifth Circuit's divided affirmance of Brown's convictions for perjury and obstruction, and based on the government's misrepresentations on appeal, the Court pointed to the alleged fact (untrue) that Brown signed the engagement letter as one of only four points of evidence two judges found justifying affirmance. *United States v. Brown*, 459 F.3d 509, 528 (5th Cir. 2006) (final engagement letter was executed by Brown).

the alleged "true" terms of the deal. Indictment at ¶ 14. Therefore, if Brown was neither a party to this "written agreement," nor aware of its contents, metamorphoses, or consummation, such a fact would meet the government's allegations head-on and would be materially exculpatory insofar as Brown was not a party to any alleged "masking" in the form of a written agreement. *Rigas*, 258 F.Supp.2d at 306 (Defendant is entitled to pre-trial discovery of materials essential to "preparing argument in response to prosecution's case-in-chief."). It would be absolutely amazing if Brown did sign the engagement letter on December 29. Joe Valenti signed every other document in this heavily documented deal, *and* Brown was in Scottsdale, Arizona.

Accordingly, the government should be required under Rule 16 and/or *Brady* to produce: Every question it has asked any person in any form about who signed the engagement letter,[12] who was present when all the documents were signed, and any responses to those questions; any inquiry or statements of any handwriting expert evaluating Brown's handwriting for any purpose; any grand jury testimony or any other kind of recording of statements of Joe Valenti (who signed every other document for closing the Barge transaction); Doug Madden (the IBK counsel who facilitated the IBK meeting that day), and Gary Dolan (counsel); any correspondence of any kind with and within the government discussing that Brown did not sign the engagement letter; and, any evidence in any form tending to demonstrate that Brown had no involvement in the creation of and did not sign the final engagement letter of 12/29/99.

[12] The very fact the government continued to question other witnesses about who signed the engagement letter is evidence that it knew Brown did not.

C. The Government Must Produce Any Evidence, Statement Or Otherwise That Brown Was On Vacation And Out Of State From December 23 Or 24, 1999 Until January 3 Or 4, 2000.

The government's theory of this case posits that Enron coerced Merrill into facilitating the illegal warehousing of an asset for which Enron wrongfully posted gains in the fourth quarter of 1999. The government relies on a series of actions and purported machinations beginning with the allegation that Robert Furst presented the deal to other Merrill employees on December 22, 1999 and ending when Merrill and Enron "closed" the deal on December 29, 1999. Government indictment at ¶¶ 11-12, 14. This is the period in which the government alleges a conspiracy was hatched and consummated.

Jim Brown was on vacation for the majority of this period (from December 24, 1999 until January 3 or 4, 2000); out of the office and out of state. Under these circumstances, and given the government's admitted time frames, any evidence confirming that Brown was out of the office on vacation, "out of the loop," or otherwise unavailable and therefore not involved in the review process and finalization of the documentation or any other actions taken during the alleged conspiracy, is critically important to the defense, clearly exculpatory and must be produced forthwith. *Stevens*, 985 F.2d at 1180 (Government must produce all documentary material that "could be used to counter the government's case or bolster a defense."). *See Ross*, 511 F.2d at 763; FED. R. CRIM. P. 16(a)(1)(E).

Evidence including, but not limited to phone records, internal Merrill Lynch documents, calendars, receipts or other indica of Mr. Brown's whereabouts during this period must be produced by the government. Further, the government must also produce any statements, testimony, or reports tending to demonstrate same, including, but not limited to those produced by or regarding the following individuals: Schuyler Tilney, Troy Bloom, Geoffrey Wilson, Kathy Zrike, Gary Dolan,

Doug Madden, Gary Carlin, Joe Valenti, Gerard Haugh, Kira Toone, Frank Conley, Carlos Valle, Rob Jones, Richard Gordon, Mark McAndrews,Vince DiMassimo, Kevin Cox, Mark DeVito, Paul Wood, Dan Gordon, Alan Hoffman and Tina Trinkle.

Finally, Defendant requests this Court order the government to also produce any and all recorded evidence tending to show Brown's whereabouts during this period, including, but not limited to the following items: any telephone or fax records obtained from Merrill Lynch or any other source, to or from all Merrill people and Alan Hoffman, for the period 12/24/99-1/04/00 to Hyatt Regency at Gainey Ranch in Scottsdale, Arizona; any business records of airlines or Brown's credit card receipts (Visa, Amex, Mastercard), or Hyatt Regency Corporation records or receipts, that would show Brown was in Scottsdale during this period; and any telephone, cell phone, or e-mail records from Merrill Lynch, Whitman Breed or Enron regarding Brown's whereabouts, vacation, absence, unavailability, any communications with Brown, as well as Brown's personal telephone and e-mail records for this same time period.

D. The Government Must Produce Any And All Evidence, Statements, Or Otherwise That Brown Did Not Participate In The So-Called "Trinkle" Call.

The government' case against the Merrill defendants necessarily hinges in large measure on an internal phone conversation, the substance of which was testified to by Merrill employee, Tina Trinkle. The government identifies this phone call as one of the "overt acts" allegedly committed in furtherance of the alleged conspiracy. Government indictment at ¶31(e). This phone call among Merrill executives allegedly took place on December 22, 1999.

The government's only "evidence" that Brown "joined the conspiracy" required placing him on this so-called "Trinkle call" and having him join the conspiracy by his silence on that call.

Otherwise, the government's evidence proves that Brown consistently opposed the deal. **After the first trial, the government produced telephone records that show that Brown did not join the Trinkle call that morning from his office**.[13]

Any evidence tending to show that Brown was not on this phone call would tend to materially alter the quantum of proof in Brown's favor as to his claim of innocence. Indeed, such evidence is as to "relevant, important and material matters which directly b[ear] on the main issue being tried: the participation [or lack of participation] of [Jim Brown] in the [alleged] crime." *Gordon*, 344 U.S. at 418-19, 73 S.Ct. at 373. *Cf*. FED. R. CRIM. P. 16(a)(1)(E).

Accordingly, Brown is entitled to production from the government of any and all telephone, travel records, calendars or any other document, interview report or statement of any kind tending to show that Brown was not a participant in the Trinkle call, including but not limited to: telephone records for any of Brown's phones, calendars of any participant in the so-called "Trinkle call," notes of any agent, or any statement by any witness to any grand jury or agent about the participants on the Trinkle call.

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

E. The Government Must Produce All Correspondence or Other Recorded Material To Or From Ben Glisan And/Or His Counsel, Either Before Or After The First Barge Trial, Regarding Meetings With Or Possible Benefits From The Government Pursuant To Testimony Given At Barge I, Including But Not Limited To Testimony And Exhibits Offered At The Lay/Skilling Trial, And Any Additional Materials Tending To Impeach Or Discredit His Testimony.

One of the Government's star witnesses in Barge I was Ben Glisan, former Treasurer of Enron and a cohort with Andrew Fastow in a wide range of admittedly illegal enterprises. Given that Glisan was the most intimate confidante of Fastow to testify in Barge I, his testimony was particularly crucial for the government. Had the defendants been aware of any cooperation or negotiations between Glisan and the government, it could have made all the difference in the jury's estimation of his credibility. *Schledwitz v. United States*, 169 F.3d 1003, 1016 (6th Cir. 1999) (Reversal for *Brady* violation where government's presentation of witness as "neutral" was all the "more egregious" because individual was "key" or "essential" witness.). *See generally Banks v. Dretke*, 540 U.S. 668, 124 S.Ct. 1256 (2004) (When prosecution places heavy reliance on a single witness' testimony, evidence of that witness' cooperation with government is vital impeachment evidence.).

In Barge I, Glisan was presented as a reluctant witness, "forced" to testify under a grant of use immunity and without any motive to do anything other than offer the "objective" truth. However, during the Lay-Skilling trial, it was revealed that his presentation to the Barge trial jury as a non-cooperating witness had been a sham. A letter from September 30, 2005, introduced at the Lay-Skilling trial on March 22, 2006, set forth the terms of his cooperation agreement with the government. Exhibit "C," pp. 1-33 . Specifically, in return for his ongoing cooperation, beginning with Barge I, the Enron Task Force (ETF) arranged for Glisan's transfer to his favored prison: a

minimum security camp in Beaumont, Texas, where he had much better conditions of confinement. *Id*. He also soon obtained long-weekend furloughs home. *Id*. The ETF also later countenanced Glisan's entry into a drug rehabilitation program which shaved another year off his five-year sentence. *Id*. The various correspondence between Glisan's counsel and the ETF suggests that negotiations for Glisan's cooperation began before Barge I. *Id*. Accordingly, Brown requests all of this correspondence, reports or recordings in any form of any communications between the government and Glisan or his counsel, reflecting any and all negotiations, requests for better conditions, or any other fact that had any effect or related to his conditions or sentence.

As with the other government witnesses who offered second and third-hand hearsay that Fastow allegedly told Bayly that Enron would guarantee a buy-out, or made any guarantee, the unequivocal testimony now available from Fastow clearly contradicts Glisan's trial testimony–the existence of his negotiations and arrangement with prosecutors which casts additional shadows on Glisan's eroded credibility is vital impeachment material critical for preparation of the defense in this matter. *Wilson v. Whitley*, 28 F.3d 433, 439 (5th Cir. 1994), *cert. denied*, 513 U.S. 1091, 115 S.Ct. 754 (1995) (Evidence that "would seriously undermine the testimony of a key witness on an essential issue" is material and must be produced.). Indeed, the "contradictions to [Glisan's] testimony relate not to collateral matters but to the very incrimination of [defendants]." *Gordon*, 344, U.S. at 421, 73 S.Ct. at 374 . "Except the testimony of this [and other lying] witness[es] be believed, th[ese] conviction[s] could not have been had." *Id*. *See Wilson*, 289 F.Supp.2d at 816-17 ("[W]hile the government may choose to prosecute, it may not prosecute without telling the whole truth."). The material requested herein is vital impeachment evidence, critical to impeaching Glisan

and bolstering Brown's defense. The government must produce this material forthwith. *See Bagley*, 473 U.S. at 676, 105 S.Ct. at 3380; *Wlliams*, 400 F.2d at 800; FED. R. CRIM. P. 16(a)(1)(E).

F. The Government Must Produce Any Recording In Any Form Of Statements Or Other Evidence That Jim Brown Hated, Disliked, Opposed Or Objected To The Barge Transaction And/Or That Brown Disliked Or Distrusted Enron.

As exculpatory in tending to preclude the trial jury from finding the requisite criminal intent for either conspiracy or fraud,[14] the government must now produce any evidence tending to show that Brown disliked the Barge transaction and distrusted Enron. *Sipe*, 388 F.3d at 479; *Ross*, 511 F.2d at 763; FED. R. CRIM. P. 16(a)(1)(E). Every witness in the first Barge trial who had any relationship with Brown testified that Brown was opposed to Merrill's participation in this transaction, voiced objections to it, or even that he "hated" it (13:1035-37, 1053, 1059, 1084-88, 1090-1105, 1109-17, 1147, 1149-50; 16:1968, 1971-2, 2034-35; 22:4053-54, 4060-62, 4074; 23:4202-04; GX200.4, 207, 208, 208.1). Brown is entitled to the grand jury testimony and any 302s and underlying notes, not previously produced, of each and every person who has voiced his or her knowledge of Brown's opposition and objections to the transaction, and his concerns for Merrill's risks, including but not limited to the following individuals: Schuyler Tilney, Troy Bloom, Geoffrey Wilson, Kathy Zrike, Gary Dolan, Doug Madden, Gary Carlin, Joe Valenti, Gerard Haugh, Kira Toone, Tina Trinkle, Frank Conley, Carlos Valle, Bob Lyons, Rob Jones, Richard Gordon, Mark McAndrews,Vince DiMassimo, Kevin Cox, Mark DeVito, Paul Wood, Tom Davis, Dan Gordon, Alan Hoffman, Jeff McMahon, Dan Boyle, and Lea Fastow.

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[14] *Schledwitz*, 169 F.3d at 1016-17 (*Brady* violations required reversal of mail fraud conviction given that undisclosed evidence would have invalidated intent element of government's proof against defendant.)

In addition, every witness in Barge I who had any relationship with Brown testified that Brown disliked and distrusted Enron itself. *Id*. Brown is entitled to the grand jury testimony and any 302s and underlying notes, not previously produced, of any and every person who has voiced his or her knowledge of Brown's dislike or distrust of Enron, including but not limited to the following individuals: Schuyler Tilney, Troy Bloom, Geoffrey Wilson, Kathy Zrike, Gary Dolan, Gary Carlin, Joe Valenti, Doug Madden, Gerard Haugh, Kira Toone, Tina Trinkle, Frank Conley, Carlos Valle, Bob Lyons, Rob Jones, Richard Gordon, Mark McAndrews, Vince DiMassimo, Kevin Cox, Mark DeVito, Paul Wood, Tom Davis, Dan Gordon, Alan Hoffman, Jeff McMahon, Dan Boyle, and Lea Fastow.

G. The Government Must Produce Any Recorded Material, In Whatever Form Regarding Joe Valenti's Involvement, Execution, Understanding Or Knowledge Of the Nigerian Barge Transaction, Including But Not Limited To Any Evidence Regarding Valenti (1) Creating Or Signing Any Documents, (2) Booking, Recording Or Accounting For The Transaction, And (3) Any Evidence Regarding Interactions Between Jim Brown And Valenti During The Course Of Or Concerning The Barge Transaction, In Addition To Any Evidence Of Who Was Present When The Documents Were Signed.

It is now undisputed that Merrill Lynch executive Joe Valenti signed, and others prepared, all of the transaction documents for the Barge sale. Nevertheless, the government continues to allege that Brown was involved in the preparation and finalization of the deal documents, including but not limited to the final engagement letter between Enron and Merrill. Government Indictment at ¶ 31(g). Therefore, any evidence tending to demonstrate that someone other than Brown, specifically including Valenti, was responsible for preparing, finalizing, or signing any deal documents, including the engagement letter, must be produced forthwith. *See Kyles*, 514 U.S. at 441-42, 115 S.Ct. at 1569 (Evidence tending to show another individual may have been responsible for crime is

clearly material under *Brady* and its progeny.). *And see Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir. 1985) (New trial where withheld *Brady* evidence "carried with it the potential ... for the ... discrediting ... of the [investigative] methods employed in assembling the case.").

Specifically, Brown requests this Court order the government to now produce any recorded material in any form of questions of or to Joe Valenti or any other individual (specifically including but not limited to Gary Dolan, Doug Madden, Mark McAndrews, Gary Carlin, and Kira Toone) regarding (1) putting the Barge transaction on Merrill's books; (2) finalizing the deal documents; whether Brown did not want the deal on his department's books; and, (3) whether Valenti or someone else signed any version of the engagement letter, in Brown's name or otherwise. *See* FED. R. CRIM. P. 16(a)(1)(E).

H. The Government Must Produce Any Recorded Material, In Any Form, Of Testimony, Evidence Or Otherwise Regarding Bob Lyons' Understanding Of The Barge Transaction, What Lyons Meant When He Responded To Brown's Email Regarding The Barge Transaction With The Statement, "Let's see if we can tie this up a bit more legally," And How That Statement Related To The Continental Airlines Transaction Which Was The Subject Of That Email.

The central item of evidence, erroneously introduced, to prove Brown's guilt in Barge I was an off-the-cuff, hearsay-based, and unreliable email Brown wrote over one year after the alleged conspiracy regarding an entirely unrelated business transaction.[15] The email was written by Brown to a colleague at Merrill named Bob Lyons and related to a Continental Airlines transaction.

[15] 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 asurances [sic] from [the Company] ceo or Cfo, and schulte was strongly vouching for it. We had a similar precedent with Enron last year and we had Fastow get on the phone with Bayly and lawyers and promise to pay us back no matter what. Deal was approved and all went well" (G240; 19:3242-43).

Deliberately going beyond this Court's ruling, the government also managed to introduce Lyons' response in the email chain.[16] In summation, the government improperly argued to the jury that the email exchange demonstrated that Brown had proposed a second fraud in the Continental Airlines (CAL) transaction, and therefore he must have similarly committed fraud in the Nigerian Barge transaction. Pointing to the CAL email, the government argued: "This is someone who proposes oral side deals, if that's what it takes to get the ball across the goal line."[17] (31:6508-09, 6516). *See Kyles*, 514 U.S. at 444-45, 115 S.Ct. at 1571 (Severity of damage measured by prosecutor's reliance on unchallenged/unimpeached testimony.)

Any evidence tending to explain or clarify the email–its inaccuracies, irrelevance, context, etc.–would therefore tend to meet the government's trial theory head-on and would be exculpatory as defeating the one shred of evidence the government believes it has as to Brown's criminal intent. FED. R. CRIM P. 16(a)(1)(E). As the recipient of the email, Bob Lyons is the only individual who can confirm its context and meaning, and the facts that the email is both erroneous and is not proposing

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[16] And the prejudice was clearly exacerbated by this wrongful admission of Lyon's response that included the remark: "One let us try and tie up CAL a little bit more legally" (19:3242-43; GX240). Prior to trial, Brown moved to exclude Lyon's response, and the government did not oppose (Dkt: 247). Inexplicably and without warning, the government read the Lyon's response to the jury (19:3243). The government knew it violated the rules and later redacted the exhibit (20:3663), but the bell had been rung. (RSR19:3294, 3298; 31:6578). The Fifth Circuit did not reach this issue on appeal. *Brown*, 459 F.3d at 509.

[17] The government pointed to the email repeatedly as key evidence. It even used it in rebuttal, in violation of a motion *in limine* and the court's ruling, and argued in violation of Rule 404(b) that this showed the illegal lengths to which Brown would go to close a deal (Dkt: 379; 11:330-53; 18:2973; 31:6508-09, 6516). The government's conduct was inconsistent with the law, its obligations, and prior rulings of this Court, as it knew the email was false and did not mention anything illegal. Indeed, Brown understood lawyers to have been on the Fastow-Bayly call, and thus even his *misunderstanding* evidenced his belief that any assurance was legal.

anything improper, let alone illegal, as to any other Merrill transaction.[18] Lyons is also the only individual who can explain and clarify his reply to the email. Brown requests the Court order government to produce in full any and all recorded material from Lyons as to the context, meaning, and subject of this email and his reply.

I. The Government Must Produce Any Recorded Material, In Any Form, Of Testimony, Evidence Or Other Material Which Tends To Confirm Fastow's Testimony That Enron Did Not Guarantee It Would Buyback The Barges, Or Make Any "Guarantee," Including But Not Limited To Any And All Testimony Or Statements Of Kelly Boots And/Or Any Other Individual Who Was On The Phone Call Between Andrew Fastow And Dan Bayly.

J. The Government Must Produce Any Recorded Material, In Any Form, Of Testimony, Evidence or Other Material Which Tends To Confirm That Fastow Told Merrill Lynch That The Take-Out Would Be A Purchase By A Third Party And Who That Third Party Was, Including But Not Limited To Any Testimony, Statements, 302's Or Notes Underlying Them Of Ben Glisan, Andrew Fastow, Or Any Other Individual Who Has Evidence Of What Merrill Lynch Was Told About A Third-Party Take-Out.

The government theorized in Barge I, and continues to allege today, that in selling an equity interest in three power barges stationed off the coast of Nigeria, Enron simultaneously promised Merrill Lynch that Enron would repurchase that interest within six (6) months. Government Indictment at ¶¶ 11-15, 30-33. The government premises this theory in large part on a single undocumented phone conversation between Andrew Fastow of Enron, Dan Bayly of Merrill Lynch, and others, in which, the government contended Fastow promised Bayly that Enron would buyback the equity interest. No party to this conversation testified at the first Barge trial, although a handful of witnesses testified to rank hearsay statements about what was allegedly said on this phone call.

[18] Bankruptcy trustee testimony excluded from the first Barge trial included Brown's sworn explanation that he was exaggerating the strength of the promise in the email. Brown stated, "[s]o what I effectively did was exaggerate what we got before [with Enron] *up to the standard that I wanted* out of Continental Airlines." (19:3286; 20:3317; X980A) (emphasis added).

Toward the end of Barge I, and more clearly on appeal to the Fifth Circuit, the government has conceded that a promise to find a third-party buyer for Merrill's equity interest, as opposed to a promise to buy back the barges, would not be criminal, and would not have "ruined" Enron's accounting for its equity interest sale to Merrill (23:4520; GBr. 234). Therefore, any testimony or evidence confirming that Fastow did not "guarantee" an Enron "buyback" or make any other kind of "guarantee" would be categorically and materially exculpatory. By the same token, any testimony or evidence that Merrill Lynch was told that the take-out would be by a third-party and who that third-party was would be categorically and materially exculpatory. *Brady* , 373 U.S. at 87, 83 S.Ct. at 1196; FED. R. CRIM. P. 16(a)(1)(E). Accordingly, the government should be ordered to produce any and all materials tending to demonstrate that (1) Enron never guaranteed it would buyback the Barge interest; (2) Fastow did not make any "guarantee"; (3) Enron, or Fastow, instead, gave only an assurance that it would use its best efforts to locate a third-party purchaser of Merrill's interest; (4) that Merrill Lynch was told the take-out would be by a third-party; and (5) names of third parties were told to Merrill, and any documentation of their interest in purchasing the barges.

K. The Government Must Produce Any And All Recorded Materials, In Any Form, Regarding Alan Hoffman And His Involvement In The Barge Transaction, Including But Not Limited To, Any Testimony, Recommendations, Observations, Or Written Memoranda Demonstrating That Hoffman Believed Or Was Told Or Understood That Merrill's Investment In The Barges Was At Risk.

Alan Hoffman of Whitman Breed was the primary outside attorney who reviewed and worked on the Nigerian Barge transaction. In fact, Hoffman was in charge of preparing the actual deal documents. Defendant believes that Hoffman may have given testimony or interviews which are materially exculpatory. Specifically, any information from Hoffman tending to show that Brown

believed that Merrill's $7 million investment in the Barges was at risk must be produced by the government, including, but not limited to statements, notes, testimony, emails, or evidence in any form by or from Hoffman confirming that (1) Brown told Hoffman to make sure that Merrill did not lose more than $7 million on the investment, (2) Brown told Hoffman he believed that Merrill would lose its $7 million investment after learning that Nigeria had backed out of the overarching Barge agreement, and (3) Brown refused to countenance the incorporation of E-Barge in the Cayman Islands for fear that it would increase Merrill's risk beyond the $7 million investment.

Again, the fact that Brown believed Merrill's investment was "at risk" would completely rebut the government's theory of *any* kind of guarantee that Merrill would not lose its money, and would be materially exculpatory. *Brady*, 373 U.S. at 87, 83 S.Ct. at 1196 . This evidence, in whatever form, would tend to demonstrate (1) an absence of *mens rea* on Brown's part, and/or (2) the absence of any fraudulent or criminal activity on the part of anyone at Merrill. Brown requests this Court order the government to produce this material immediately and in its entirety.

L. The Government Must Produce All Recorded Materials, In Whatever Form, Including But Not Limited To Transcripts Of Testimony, Notes Of Testimony, And Notes Of Interviews Of All Attorneys Who Were Involved In Whatever Capacity With The Nigerian Barge Transaction, Including But Not Limited To Zrike, Dolan, Madden, Hoffman, Jafaar, Andrade, Apasu, And Enron In-House And Outside Counsel, Specifically Regarding The Risks Transferred To Merrill or Transferred *From* Enron.

The Nigerian Barge transaction between Enron and Merrill was scrutinized by Merrill Lynch experts during the drafting and reviewing of written agreements. Merrill Lynch in-house attorneys, Kathy Zrike and Gary Dolan, reviewed the drafts and documents memorializing the transaction. Outside counsel, Whitman Breed Abbott & Morgan, was also brought in to review the transaction documents, with at least three lawyers at that firm participating in the review–Alan Hoffman, Ranad

Jafaar and Eduardo Andrade. IBK Counsel Doug Madden was present at the special meeting called on 12/29/99 at which the formation of Ebarge was approved and funded with $7 million.[19]

We believe that many, if not all of these attorneys have given either (1) sworn testimony to the Enron Grand Jury, the SEC and/or the Bankruptcy Examiner, or (2) interviews to the Enron Task Force. None of these attorneys have been charged criminally–each are believed to have material exculpatory information that the government must produce. For example, Ms. Zrike, who provided legal advice to Merrill during the course of and on the propriety of the transaction, stated during an SEC interview that "she concluded that Enron's willingness to assist Merrill Lynch in disposing of its interest [in the Nigerian Barge transaction] was not a binding guarantee but a 'verbal businessman's understanding' that would not preclude the transaction from being considered a true sale." (22:4101-05; 4108). Similar, if not identical statements are likely to exist from other attorneys who reviewed this transaction.

The indictment in this case alleges that the defendants conspired to defraud Enron's shareholders and to falsify Enron's books and records in connection with the Barge transaction. This transaction involved complex accounting, legal and structured finance issues that were reviewed and analyzed by numerous experts from Enron, Merrill and numerous third party accountants and attorneys affiliated with the two entities. None of these experts voiced any objections to the transaction to the Merrill defendants.

Materials in the government's actual or constructive possession demonstrating that these experts (1) approved the transaction, (2) did not voice objection to the transaction, (3) knew of any

[19] Gary Carlin, Mark McAndrews, Gary Dolan and Joe Valenti were also present. Jim Brown was not. This is the same day all the deal documents were signed, including the engagement letter.

kind of verbal understanding, or (4) had ultimate legal or other authority for approving the transaction will directly rebut the theory that the Merrill defendants willfully conspired to defraud Enron's shareholders and/or falsify Enron's books and records. Testimony or other evidentiary materials consistent with the above would be exculpatory in rebutting the government's contention that the Merrill defendants had the intent to defraud or do anything improper, let alone criminal.

Given the clear exculpatory nature of the material requested by Brown as outlined above, including but not limited to transcripts of testimony, notes of testimony and notes of interviews with Merrill and Enron legal counsel, the government should be required to produce these materials forthwith under authority of Rule 16 and *Brady* and its progeny.

M. The Government Must Produce Any And All Evidence In Whatever Form Demonstrating That LJM2 Was A Legitimate And/Or Appropriate Independent Third Party, Accounting Entity, Or Related Party, As Determined By Arthur Andersen Or Any Other Accountant Or Government Regulatory Agency.

The government theorizes that LJM2 was simply a proxy for Enron and not a legitimate third-party entity. Therefore, when LJM2 purchased the barge interest from Merrill it was as if Enron had bought back its interest, thus ruining Enron's accounting and turning an appropriate business transaction into a large conspiracy of fraud. Government Indictment at ¶ 15. But the record shows otherwise[20] and Brown is entitled to any and all recorded material, in whatever form, demonstrating that: LJM2 was a legitimate third-party entity; that Merrill and others had done substantial due diligence on the newly-formed LJM2; **that LJM2's purchase of the Barge interest was a legitimate third-party "buyout" of Merrill's interest under accepted legal and accounting principles; and that nefarious conduct, if any, between LJM2, Fastow, and/or Enron was kept**

[20] (14:1284, 1286-88, 1522-24; 21:3713, 3796-3802).

secret from Merrill and/or all LJM2 investors.[21] This material is clearly exculpatory as the government has conceded that a third-party "buyout" of Merrill's interest would not invalidate Enron's accounting .

Further, even assuming that LJM2 engaged with Enron in various improper or illegal transactions, Merrill is entitled to any and all evidence in whatever form that Merrill and Brown were unaware of these secret dealings, and did not even know who was lined up to purchase the interest LJM2 bought, that Brown was displeased to learn that LJM2 had bought it, and therefore could not have committed (or conspired to commit) fraud insofar as (1) they believed LJM2 to be a legitimate third party, and (2) they had no role in selecting or arranging the sale to LJM2. Any evidence tending to show LJM2's status as an independent, legitimate third party and Merrill's lack of involvement in that sale would be exculpatory. In other words, if Brown believed that LJM2 was a legitimate third-party, even if related to Enron, then the ultimate transfer of Merrill's interest to LJM2 would not have appeared improper, let alone illegal, when Brown finally learned of it. Brown therefore could not have had the requisite criminal intent.

The material requested is clearly necessary to rebut the government's theory that the LJM2 "buyout" was in effect an Enron "buyback" for purposes of accounting for the Nigerian Barge

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[21] Brown and approximately 100 other Merrill employees, and Merrill itself, invested in a Merrill partnership that then invested in LJM2 along with numerous other financial institutions. Brown's investment was only $32,500 of the $400 million LJM2 fund, the smallest amount permitted by Merrill. At least sixty (60) Merrill executives invested at least twice as much as Brown. Merrill did extensive due diligence before investing in LJM2, and the only evidence is that Merrill believed LJM2 to be a valid third-party entity, independent of Enron, approved by Arthur Andersen and by Enron's board–as they were told (14:1364-65; 15:1685-88; 19:3092-93, 3253-54; 21:3800-01;GX235; GX252).

transaction as a true sale. Brown is therefore entitled to the above referenced material under authority of both Rule 16 and *Brady* and its progeny.

N. The Government Must Produce Any And All Accounting Evidence In Whatever Form, Including Internal Reports Or Memorandum Regarding Enron's, Merrill's, or LJM2's Accounting For The Nigerian Barge Transaction, Which Tend To Rebut The Government's Theory Of Impropriety Or Illegality.

As discussed *infra*, the government has conceded that a promise by Enron to use best efforts to obtain a third-party purchaser for Merrill's barge interest, even within a confined period, was perfectly lawful and would not have constituted anything improper, let alone a criminal fraud.[22] At the same time, the government has consistently relied on innuendo and hyperbole regarding the closeness of the LJM2-Enron relationship to imply guilt.[23] However, the available record is replete with evidence that Arthur Andersen and outside counsel (Vinson & Elkins, et. al.) reviewed Enron's accounting of the barge transaction and determined that it was consistent with accepted accounting principles and conformed to the dictates of existing legal authority. (14:1364-65; 15:1685-88; 19:3092-93, 3253-54; 21:3800-01;GX235; GX252).

Significantly, Andersen *approved* LJM2's purchase of approximately $300 million in Enron's assets in 1999 with *Enron booking the gains*. (14:1471-75; 15:1685-88; 19:3254; 21:3753-

[22] In other words, an assurance or a promise to find a third-party to buy an asset or interest in an asset in the future does not abrogate sale accounting as long as Enron unloaded its risks. It was therefore appropriate for Enron to book a gain at the moment the Barge interest was sold to Merrill, as long as *Enron* did not retain the risk, and the fact that Merrill later shed its interest to LJM2 does not effect Enron's accounting or render that accounting improper, let alone illegal.

[23] For example, the government used the phrases (or relied on the use of phrases) like "bridge financing" or "warehousing" to imply that the transaction was not a "true sale"; that the transaction was, in fact a "loan" and not a transfer of "equity." But it is perfectly appropriate and legal, if done properly and consistent with generally accepted accounting principles, to provide bridge equity, or "warehouse" a transaction while still permitting the counter-party to book a sale and/or gain.

54, 3800-02; GX806:105). The government must therefore produce all recorded material, in whatever form, that demonstrates the legality and appropriateness of Enron's accounting for the Barge transaction,[24] including but not limited to the following propositions:

- The definition of an "independent third party" and evidence from Andersen and/or other outside experts confirming their determination that LJM2 met the standards for this accounting characterization in 1999 and 2000 with respect to the purchase of any Enron assets.

- The definition of a "related third party" and evidence from Andersen and/or other outside experts confirming their determination that LJM2 met the standards for this accounting characterization, and that purchasing of assets from Enron or other "related" party was legally appropriate, and Enron could properly book those gains in 1999 or 2000.

- It is not improper or unlawful for a company to book year-end gains or manage earnings at year-end by/from selling assets or interests in assets, as Enron did in this case. In other words, even if the sole purpose of the transaction was "earnings management," such conduct is not inherently or necessarily unethical, improper, or illegal.

Under authority of Rule 16 and *Brady* and its progeny, and because any evidence tending to confirm the above and similar propositions would be material and exculpatory, Brown requests this Court order the government to produce such materials forthwith.

O. The Government Must Produce Any And All Recorded Material, In Whatever Form, Demonstrating That Brown Believed That Merrill's Equity Interest In The Barges Was At Risk, Including But Not Limited To Evidence Demonstrating That Brown Opposed The Incorporation Of Ebarge In The Cayman Islands Because Such A Maneuver Might Increase Or Expand Merrill's Risk Of Loss Above And Beyond The Original $7 Million Investment.

[24] This request for production, as with all others herein, includes material in the government's possession which was received from the Bankruptcy Examiner, Neal Batson, or from the *Newby* litigation, and any other materials in the possession of the SEC or any arm, branch, bureau, or agency of the government. *See Auten*, 632 F.2d at 481.

As a correlate to the government's charges of conspiracy and fraud, the government has alleged that the Barge transaction was rendered improper because Merrill's equity interest was never "at risk"–that the "risks" had not been transferred from Enron to Merrill; and, therefore, it was improper, if not illegal, for Enron to book a gain as if they had consummated a "true sale." The government theorized and contended to the jury during the Barge I that Merrill's equity interest in the Nigerian Barges was never "at risk," and therefore Enron's accounting for the transaction as a "true sale" was improper and illegal. Government Indictment at ¶¶ 11, 13-14. Therefore, any evidence tending to demonstrate that Merrill's investment was, in fact, "at risk," or that Enron had divested itself of risk, would be completely exculpatory. If Enron transferred or unloaded its risk, or Merrill's investment was at risk, then Enron's accounting was appropriate, and no fraud was committed even under the government's theories.

Further, even assuming *arguendo* that Merrill's equity was not "at risk," the fact that Brown believed that Merrill's investment was "at risk," would demonstrate the absence of any criminal intent on the part of Brown and rebut any allegation that he was involved in a criminal conspiracy. In other words, any evidence tending to demonstrate that Brown believed Merrill's investment to be "at risk," or that Enron had unloaded its risks, would be material and exculpatory insofar as such evidence would demonstrate that Brown had no criminal intent and/or was unaware of any conspiracy to account improperly for the Barge transaction. Therefore, any recorded material, in whatever form, demonstrating that Brown verbalized or believed that Merrill's interest was "at risk," or any evidence that Enron personnel sought or intended to unload or shift its risks to Merrill must be produced forthwith.

Specifically, during the negotiations preceding and coinciding with the Barge transaction, Enron requested that Ebarge– the entity Merrill formed to purchase the equity interest–be domiciled or incorporated in the Cayman Islands. Presumably, Enron believed that this relocation would create additional tax or other financial benefits to Enron. Brown advised against acceding to Enron's request, believing that such relocation might create a tax problem for Merrill or expose Merrill to unknown liabilities, thereby putting *more than* Merrill's already risk-laden investment of $7 million at risk. Moreover, Brown opposed this relocation because he had been given explicit orders from Bayly that Merrill insure that no more than $7 million could be lost on the transaction. Any one of these facts, if shown, demonstrates that Brown believed that Enron had shifted its risks to Merrill and that Merrill's original investment was "at risk," thereby proving that Brown did not have the requisite criminal intent as per the crimes charged.

Under authority of Rule 16 and *Brady* and its progeny, and because any evidence tending to confirm the above and similar propositions would be material and exculpatory, Brown requests this Court order the government to produce such materials forthwith.

P. The Government Must Produce Any And All Recorded Material, In Any Form, Demonstrating That Brown And The Other Merrill Defendants Believed That Merrill's Equity Interest In The Barges Was At Risk, Including But Not Limited To Evidence Demonstrating That Brown And/Or Merrill And/Or Merrill's Outside Counsel Retained And/Or Consulted Nigerian Counsel To Investigate And Report On Potential Liabilities From Merrill's Ownership Of Equity In The Nigerian Barges.

As noted in Section O, *infra*, any evidence tending to demonstrate that Merrill's investment was, in fact, "at risk," or that Enron had divested itself of risk, would be completely exculpatory. If Enron transferred, or unloaded its risk, or Merrill's investment was at risk, then Enron's accounting was appropriate and no fraud was committed even under the government's expansive

view of the law. Further, even assuming *arguendo* that Merrill's equity was not "at risk," the fact that Brown or other Merrill employees believed that Merrill's interest was "at risk," would demonstrate the absence of any criminal intent on the part of Brown and rebut any allegation that he was involved in a criminal conspiracy.

During the negotiations preceding and coinciding with the Barge transaction, Brown and/or Merrill and/or Merrill's outside counsel retained Nigerian counsel to report and advise on potential liabilities from Merrill's equity investment in the Barges. Merrill believed that the equity purchase might create potential liability–risk–*over and above* their initial $7 million equity investment, based on possible accidents involving the barges, civil unrest, etc. Any evidence that Brown and/or Merrill and/or Merrill's outside counsel retained or consulted Nigerian counsel regarding potential liabilities would demonstrate that the Barges were at risk, Defendants believed Merrill had risk, and that Merrill's potential exposure could exceed the already risk-laden $7 million equity investment. Such evidence would rebut the government's theory that Merrill's investment was not "at risk"; such evidence would be material and exculpatory. In the alternative, evidence that Brown and/or Merrill consulted outside counsel would suggest at a minimum, that Brown *believed* that Merrill's equity investment was at risk, and such evidence would be material and exculpatory insofar as it would rebut any inference of criminal intent on the part of Brown.

Under authority of Rule 16 and *Brady* and its progeny, and because any evidence tending to confirm the above and similar propositions would be material and exculpatory, Brown requests this Court order the government to produce such materials forthwith.

Q. The Government Must Produce All Recorded Material, In Whatever Form, Demonstrating That The Barge Transaction Was Not Done To Meet Enron's And Financial Analyst's Earnings Per Share (EPS) Projections; That Earnings Projections Continuously Change Up To The Time They Are Issued (In This Case, January 18, 2000); That In Any Event The Nigerian Barge Transaction Was Not "Material" For Purposes Of The Federal Securities Laws; And That Enron Numerically Accounted For The Total Gain On The Barges In 1999 And 2000 And Did Not Double-Count Any Of It.

The government has continuously theorized that the Barge transaction was conducted for Enron to meet its Earnings Per Share (EPS) projections (i.e. to "manipulate its earnings"), both internal and as projected by outside analysts. Government Indictment at ¶¶ 11-12.[25] Therefore, if there is any recorded material, in any form, which tends to demonstrate that the Barge transaction was not done to meet internal or external earnings projections and/or was otherwise immaterial to those earnings projections, such evidence would be material and exculpatory and the government must produce same forthwith.

Specifically, at the recent Lay/Skilling trial, Mark Koenig, the head of investor relations at Enron during the relevant period(s), testified that he learned on January 14, 2000, three weeks *after* the Barge transaction, that Enron's EPS was projected to be only $.30 per share instead of the recent consensus estimate of $.31 per share. Koenig testified that he then alerted Rich Causey, Enron's Chief Financial Officer, that they would miss the forecast. On January 17, 2000, two days before Enron's earnings announcement, Koenig saw a draft memorandum stating that Enron would earn $.31 per share. Finally, on January 19, 2000, the day after the earnings release, Koenig testified he discussed the flip-flop on earnings with Ken Lay, who seemed surprised and told Koenig that "he

[25] More generally, the prosecutors have repeatedly wrapped themselves in the mantle of "Enron shareholders" and "investors," and they pleaded with the jury in Barge I in defense of "the integrity of our publicly traded markets and companies," as if this were a securities fraud prosecution (30:6141, 6143, 6144; 31:6557).

went to bed and we were at 30 cents and, when he woke up, we were at 31 cents." All of this evidence significantly undermines, if not disembowels, the government's theory of the indictment–that the Barge transaction was entered to meet EPS projections, and therefore worked a fraud on Enron's shareholders. Under authority of Rule 16 and *Brady* and its progeny, and because any evidence tending to confirm the above and similar propositions would be material and exculpatory, the government should be required to produce such materials forthwith.

Furthermore, there can be no doubt that the Barge transaction was immaterial as a matter of law, and therefore not subject to criminal sanction under the securities laws. In other words, *if* Brown can be charged with a felony conspiracy to violate the books and records provisions, then materiality must be an element, and any and all evidence tending to demonstrate that the Barge transaction was legally immaterial would be exculpatory on that charge.[26] Despite decades of federal securities law, Brown has uncovered *no case* that does not include dissemination of a material misstatement in a discussion of the elements for a felony conviction for any kind of misrepresentation or false reporting under the Exchange Act. If, after 20 years of virtual oblivion, the provision under which Brown was convicted is to become a federal felony *per se*, and to be utilized as the "new darling of the prosecutor,"[27] then materiality must be imposed as an essential element of an offense that would carry a 20-year term of imprisonment.

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[26] The indictment also cites the *internal* accounting control provisions, hereinafter collectively referred to as "books and records." Brown will also file a Motion to Dismiss the Indictment.

[27] After these 20 years of virtual oblivion, the Department of Justice has breathed unforseen life into this provision as its new securities charge of choice, as evidenced by the increasing number of cases in the last two years.

Materiality surfaced throughout the first Barge trial (18:2668, 2753; 19:3196; 20:603). From its opening statement forward, the government sought to inflame this Houston jury with the losses suffered by Enron shareholders. Prosecutors said this case was about "cheating and lying to shareholders," and Merrill helping Enron "cook its books" (11:389; 21:3952; 30:6141; 31:6511-12). To buttress its point, the government paraded evidence of Enron's SEC filings, press releases, and earnings reports (each of which would require a material misstatement to evidence a crime) (18:2768-71, 2876, 2893-96, 2902; 20:3570, 3575-77; GX806 - Enron 10-K for 1999). The legal standard in securities fraud cases remains whether the transaction or statement "has a natural tendency to influence, or is capable of influencing, the decision of investors." *United States v. Gaudin*, 515 U.S. 506, 509-23, 115 S.Ct. 2310, 2313-20 (1995).

Any evidence tending to show that Brown and/or Merrill believed that the Barge transaction was "immaterial" would tend to rebut the government's allegations that Brown and/or his co-defendants possessed the requisite criminal intent. Specifically, if Merrill viewed the transaction as primarily a "relationship enhancer," worth the $7 million potential liability (risk), then the fact that Merrill did not conduct significant "due diligence" and/or failed to closely monitor the barges, would not be suspicious and/or evidence that Merrill's investment was not at risk.[28] Further, any evidence that Enron reported the *total amount* of the gain correctly would show that the transaction was not material, and that Enron's earnings were not even inflated.

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[28] For example, in assessing the transaction, corporate counsel Zrike opined to Bayly, Brown and the others that: (i) Merrill was at risk; (ii) it was a true sale; (iii) the agreement was for Enron to remarket it to a third party; (iv) it was not a material or unusual transaction for Enron; (v) Enron's inside and outside accountants and lawyers were aware of the assurances and the temporary nature of the deal, and had approved it; and (vi) there were no legal impediments to proceeding (22:4101-06, 4108-13, 4115-16, 4118, 4136-38; 23:4238-39, 4241). She even knew of the "business man's understanding."

Therefore, to the extent the government has any recorded material, in whatever form, demonstrating under either accounting or legal principles *or otherwise* that the Barge transaction was "immaterial," or that Brown and/or Merrill *believed* the Barge transaction was "immaterial," and that the total gain reported on the barge transactions in the 1999 and 2000 filings combined accurately stated Enron's total gain received, Brown requests this Court order that evidence to be produced forthwith under authority of Rule 16 and *Brady* and its progeny. In addition, any statements in any form by any Merrill employee in the DMCC meeting regarding any discussion of materiality must be produced, and any documents showing the gain Enron reported on the barges in 1999 and 2000, and any documents showing the value of the barges.

R. The Government Must Produce All Recorded Materials, In Whatever Form, Which Show Agreements Or Negotiations Between the Government Or Its Agents, And All Witnesses For The Government Or Their Attorneys Or Representatives Which Might In Any Fashion Influence The Witnesses' Testimony Based On Any Form Of Compensation, Concession, Or Consideration In Return For The Testimony.

As noted in the case of Ben Glisan, one of the government's star witnesses in Barge I, the government was either in negotiations for an agreement or had reached some agreement that provided Glisan with significant concessions and benefits (in terms of, for example, both identity of prison or work camp, long weekend furloughs to return home, and subsequently, a reduction in sentence) in exchange. Glisan testified falsely on this issue in Barge I, and the Defendants were unaware of these negotiations and/or agreement. They were therefore deprived, erroneously, of vital impeachment materials which could have undermined, if not completely discredited, the testimony of Glisan, himself a convicted felon self-enriched by some of the worst of the illegal activities engaged in by Enron. It is likely that other agreements or negotiations are evidenced in the

government's files,[29] and the Defendants are entitled to this material *before* trial this time, and under authority of both Rule 16 and *Brady* and its progeny.

If Defendant makes a specific request to the prosecutor for information regarding any of the below requested material–agreements, negotiations, leniency, consideration, promise, assurance, etc. with witness or person of concern to the witness–the prosecutor is obligated to produce that information so long as it is material to the preparation of the defense, FED. R. CRIM. P. 16(a)(1)(E); *Lloyd*, 992 F.2d at 348, or otherwise *might* affect the outcome of the trial. *Brady*, 373 U.S. at 87, 83 S.Ct. at 1196. If these promises are not disclosed, the jury is deprived of evidence crucial to assessment of the witness' testimony (and credibility); Rule 16 is rendered void of meaning; and defendant's right to a fair trial is thereby violated.

Defendants hereby request production of all such agreements or negotiations, whether written or oral, regardless of when they were made, including, but not limited to, the following:

1. Any promise or assurance of any kind, express or implied:

   (a) not to prosecute the witness for any crime or crimes;

   (b) not to prosecute a third party for any crime or crimes;

   (c) to obtain any special privileges while in custody;

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[29] Ironically, Glisan's Plea Agreement states "no promises, agreements or conditions have been entered into by the parties other than those set forth in this Agreement and none will be entered into unless memorialized in writing and signed by all parties. This Agreement supersedes all prior promises, agreements or conditions between the parties . . . " (GX909). Apparently, however, from his testimony in Lay-Skilling, it appears that Glisan was negotiating a secret side deal with the government while he was presented as an unbiased witness "compelled" to testify in Barge I. *See* Section E, *supra*. Under authority of *Auten*, 632 F.2d at 481, the government must produce any and all agreements or negotiations in the hands of other arms of the government, including but not limited to the FBI, the RTC, the FDIC, the OTS, the IRS, and the SEC.

(d) to provide the witness a grant of immunity of any sort, and any promise or assurance of any kind, express or implied, that the witness will not be prosecuted in connection with any testimony, information or cooperation that the witness provides;

(e) to recommend leniency or a particular sentence for any crime or crimes of which the witness has been convicted, or for any crime or crimes of which the witness might be tried, regardless of whether any criminal prosecution has been commenced for such crime or crimes;

(f) to provide favorable treatment or consideration such as money, a job, a "new start," etc., to the witness or to friends or relatives of the witness in return for the witness' testimony, information or cooperation;

(g) to recommend to any professional, occupational, state or federal agency, bureau, department or other unit, that the witness receive any sort of favor, leniency, benefit, compensation, or consideration or acquiesce on the same; and

(h) to recommend to any professional, occupational, state or federal agency, bureau, department or other unit, that any friend or relative of the witness receive any sort of favor, leniency, benefit, compensation, or consideration.

2. Any and all threats, express or implied, direct or indirect, aimed against the witness or any person of concern to the witness, and any type of coercion or intimidation by any agent of the government, or such threats, coercion or intimidation related in any way to the ability or willingness of the witness to provide any testimony, information or cooperation, including, but without limitation, threats of multiple prosecution.

3. Any sort of information described in Paragraphs 1 and 2 above, where an agent of any state had made an agreement with, or promise or assurance of any kind to, or threat against, the witness, and the government is aware, becomes aware of or by due diligence should become aware of, such agreement, promise, assurance or threat.

4. Any financial settlement, promise, lenience, or assurances regarding liability to any federally insured institution, the RTC, the FDIC, the FSLIC, the OTS, the IRS, the FBI or the SEC, whether made by the Department of Justice or any other of the above-named agencies.

5. Any statements of witnesses inconsistent with any other statement of the witness; facts or evidence indicating the unreliability of any witness; evidence or information indicating the untruthfulness of any witness; instructions or discussion with a witness not to speak with defense counsel or to do so only in the presence of government

> counsel; and any evidence which would indicate any person other than defendants committed or is responsible for the offenses alleged.

In addition to the information requested above, the Defendant also requests the Court order the government to reveal any other consideration or promise of consideration, formal or informal, direct or indirect, express or implied, made by any agent of the government of which the government is aware, or by the exercise of due diligence should become aware, to any government witness. By "consideration," Defendant refers to absolutely anything, bargained for or not, given to, promised in any way to, or hoped for by the witness or any person of concern to the witness, of which could arguably reveal an interest, motive, or bias on the part of the witness in favor of the government and/or against the Defendant, or which could induce or affect the witness' testimony, information or cooperation in any way.

Under authority of Rule 16 and *Brady* and its progeny, and because any evidence tending to confirm the above and similar propositions would be material and possibly exculpatory as bearing on the credibility and believability of witnesses and the nature and conduct of the prosecution, Brown requests this Court order the government to produce such materials forthwith.

CONCLUSION

For the foregoing reasons, and pursuant to Rule 16(a)(1)(E) and *Brady* and its progeny, Defendant Jim Brown requests this Court order the government immediately to produce all of the documents sought by Defendant.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I hereby certify that at approximately on August 6, 2007, Mr. Spencer advised he opposes production of any further *Brady* materials, Rule 16 materials, or any other discovery materials. .

/s/ Sidney Powell
Sidney Powell

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served upon Arnold Spencer, counsel for the United States, via the ECF system on August 13, 2007.

/s/ Sidney Powell
Sidney Powell

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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

O R D E R

The Court has carefully considered Defendant James A. Brown's Motion To Compel The Production of Documents And *Brady* Material and it is hereby ORDERED that said motion is GRANTED.

SO ORDERED this the _____ day of _____, 2007.

_____
HONORABLE EWING WERLEIN, JR
UNITED STATES DISTRICT JUDGE