05-20319

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee
v.

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

On Appeal From The United States District Court
For The Southern District Of Texas, Houston Division

PETITION FOR PANEL REHEARING
OF APPELLANT JAMES A. BROWN

SIDNEY POWELL
Texas Bar #16209700

1854 A Hendersonville Rd., No. 228
Asheville, NC 28803
828-651-9543
Fax: 828-684-5343

1920 Abrams Parkway, No. 369
Dallas, TX 75214
214-653-3933
Fax: 214-319-2502

ATTORNEY FOR DEFENDANT-APPELLANT
JAMES ARTHUR BROWN

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The majority opinion rests on mistakes of fact and law which require rehearing pursuant to FED.R.APP. P. 40 and mandate Brown's acquittal. The opinion affirms perjury and obstruction convictions against Brown, despite the fact that the "crucial" email contained *multiple* layers of hearsay and was inadmissible. The majority conflates a lawful buy-*out* with an Enron buy-*back*, demonstrating that the questions Brown was asked violate *Bronston.* Calling for Brown's *understanding* of what *others* believed or wrote, the questions inquire about only legally immaterial, admittedly lawful conduct–a third-party buy-*out*–not an *Enron* buy-*back*. *Dunn* prohibits affirmance on the basis of a buy-back when the perjury and obstruction charges rest on questions about a third-party take-out. Moreover, Brown's *sworn testimony* was consistent with that of government witnesses and the wrongly excluded evidence of Fastow himself. Finally, the points of "evidence" on which the majority relies are either wrong on the record or were simultaneously rejected as innocuous as to Fuhs. Rehearing should be granted to acquit Brown.

I. REHEARING SHOULD BE GRANTED TO CORRECT SEVERAL MISTAKES OF LAW.

A. The "Brown Email" Contains Multi-Level, Inadmissible Hearsay.

This Court has previously granted panel rehearing to correct an almost identical error of law. *United States v. Dotson*, 821 F.2d 1034, 1035 (5th Cir. 1987).

While the majority acknowledges that Brown "argues that any knowledge he had of the call was based on hearsay," it simply refers to FED.R.EVID. 801(d)(2)(A), or alternately, Rule 801(c), to hold the email admissible. *United States v. Brown*, __F.3d__, 2006 WL 2130525 (5th Cir. 2006) at 13 n.17 [hereinafter *Brown* at __]. The majority overlooked the *multiple* layers of **unattributed** hearsay necessarily embedded in the email for which no rule justifies admission.

Ignoring Brown's explanations, the prosecution originally used this hearsay in opening statement, and again in closing, and argued that Brown's perjury was "as black and white" as "promise" versus "no promise" (11:346, 431; 30:6274-76). Viewing the email as its "most powerfully probative evidence" at "the nub of" its case, the prosecution tried repeatedly to admit it, finally succeeding on its *third* attempt, under FED.R.EVID. 804 (b)(3) (statement against interest), and without any justification for its multiple layers of hearsay (11:330-53; 18:2954-81; 19:3241-42; Dkt. 283:74; Dkt. 290:6-7). That rule does not apply either, however, and the majority of this panel, instead, held it admissible under Rule 801 (c) and/or (d)(2)(A).

However, prior panels of this Court have held that these rules are governed by FED.R.EVID. 805 "hearsay within hearsay." In *United States v. Dotson*, 817 F.2d 1127, 1133 (5th Cir. 1987), a panel of this Court first asserted that FED.R.EVID. 805 did *not* apply to prior consistent statements. The panel recognized its error, however,

granted rehearing, and found that "line of reasoning misplaced." *Dotson*, 821 F.2d at 1035. Similarly, in *Southern Stone Co. v. Singer*, 665 F.2d 698, 703 (5th Cir.1982), this Court held that even if one level of a double-hearsay statement was not hearsay according to FED.R.EVID. 801(d)(2)(A) (admission of a party opponent), the second level of hearsay was not excepted from the hearsay rule, and the document was inadmissible. *Southern Stone*, 665 F.2d at 703. "The mere fact that one level of a multiple-level statement qualifies as 'non-hearsay' does not excuse the other levels from Rule 805's mandate that each level satisfy an exception to the hearsay rule for the statement to be admissible." *Dotson*, 821 F.2d at 1135; *cf. Southern Stone*, 665 F.2d at 703; *In re Pequeno*, 126 FED. APPX. 158, 165 (5th Cir. 2005) (an admission of a party-opponent "does not eliminate the need to identify a hearsay exception to cover" the second layer of hearsay); *accord Vazquez v. Lopez-Rosario*, 134 F.3d 28, 34 (1st Cir. 1998) (unattributed statements repeated by party-opponents are not admissible).

Asserting that "Fastow promised to pay us back no matter what," the email contains *at least* three layers of hearsay–two of which the majority overlooked–rendering the writing utterly inadmissible. First, the email itself is an unsworn, out of court statement, almost *15 months after the charged transaction*, in

an unrelated and irrelevant transaction.[1] Second, the government's evidence is consistent that Brown *opposed the transaction* through the last meeting in which *he* participated. Brown was *not* in: (i) the subsequent meeting with Zrike and Bayly, or (ii) the next meeting where Davis instructed Bayly to make the call, or (iii) on the subsequent call with Bayly and Fastow. Necessarily then, the second embedded layer of *substance*–for which Brown stands convicted–*is what someone else said Fastow said.* That declarant is *to this day unknown.* There is no evidence that *whoever* made the assertion Brown transmitted was a co-conspirator, was on the phone call with Fastow, or even made this assertion directly to *Brown or during* the alleged conspiracy. Indeed, the assertion could have mutated through *multiple others* as late as *14 months after the transaction.*[2] Accordingly, *there is no hearsay exception possible for this layer.* FED.R.EVID. 805; *Southern Stone*, 665 F.2d at 703. "[U]nattributed statements repeated by party-opponents cannot be admissible. As the original declarant is unknown, it is impossible to determine whether the original

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[1]The dissent recognizes the email as "an overly simplified, shorthand description of the barge investment made after the fact in an effort to secure a subsequent, entirely unrelated deal." *Brown* at 21 (DeMoss, J., dissenting). No reasonable jury could construe it as more than this.

[2]There is at least a third layer of hearsay. Because Fastow never had a conversation with Brown, whatever was relayed from Fastow to Brown's declarant, or more likely to *multiple* unknown persons in between, is another layer, or additional layers, of hearsay. One wonders whether Brown's declarant even heard it from Fastow–or from yet other intermediaries?

declarant also fits within the party-opponent definition, and thus the exclusion of such office gossip [i]s proper." *Vazquez*, 134 F.3d at 34.

This email was the worst sort of "evidence." It "emphatically illustrates" the classic problem with hearsay: "unreliability." *Southern Stone*, 665 F.2d at 704 n.5 (reversing where no party to the conversation testified). Although nine people were on the Fastow call, not a single *participant* testified to the conversation. The prosecution painted the picture it wanted solely through the rankest hearsay, riddled with ambiguities. Gossip is not grist for a perjury or obstruction conviction. Even the government concedes the email is factually erroneous on its face (no lawyers were on the call). And, it is *directly refuted by the original declarant*–Fastow himself–in *Brady* material wrongly excluded from the trial. This "telephone chain" of unidentified hearsay is both legally inadmissible and an untrustworthy basis[3] on which to ruin a man's reputation and impose a prison sentence for perjury and obstruction. "Especially in perjury cases, defendants may not be assumed into the penitentiary." *United States v. Brumley*, 560 F.2d 1268, 1277 (5th Cir. 1977).

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[3] The majority contradicts itself. It says that Fuhs' email (written *during and about* the alleged wrongful transaction)–"only if i can *guarantee* a make-whole at par + return in case of civil unrest/war," to Brown's query, "wanna buy a barge?"–was merely a "jocose reply," but characterizes Brown's similarly flippant (and factually incorrect) email *15 months later* as substantive proof of perjury in his response to the grand jury's questions about an entirely different transaction. *Brown*, at 3, 11, 13.

No exception exists for the layer(s) for which neither declarant or time can be identified. *In re Pequeno*, 126 FED. APPX. at 164-65. This error was a clear abuse of discretion and affected Brown's substantial rights.[4] The government has conceded as much by referring to the email as the "most powerfully probative evidence" at "the nub of" its case, when the email was not admissible at all.

B. The Fastow *Brady* Material Was Erroneously Excluded And Requires Reversal Of Brown's Convictions.

The panel did not reach the issue of whether the Fastow *Brady* material was erroneously excluded, and Brown respectfully requests that it do so.[5] This material (i) undermines Brown's convictions on all counts; (ii) fully corroborates Brown's

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[4]The prejudice from the admission of this evidence was substantial. It is the only evidence that even pretends to contradict Brown's grand jury testimony, and the prosecution repeatedly focused on it. When the judge did admit it, he wrongly proclaimed its "reliability" twice in front of the jury (19:3241-42, 3298-99). In flagrant misconduct, the government deliberately introduced, read and published to the jury Lyon's *admittedly inadmissible* response–all to imply that Brown knew something was illegal, when there was nothing unlawful about the CAL deal whatsoever in the record or in fact (19:3242-44; 20:3663). Third, the government exacerbated the prejudice and inflamed the jury by using it to argue, in rebuttal when Brown could not even reply, that "Brown was proposing a fraud in a completely separate transaction later. He's proposing the exact same thing in another deal . . . This is someone who proposes oral side deals if that's what it takes to get the ball across the goal line." (31:6516, 6578-79). Again, the prosecutor said in summation, the email is "a critical document that you should focus on when you're back in the jury room deliberating" (30:6274). The government deliberately made the email the focus of every count against Brown. *See United States v. Quattrone*, 441 F.3d 153, 180-81 (2nd Cir. 2006) (reversing convictions for obstruction and witness tampering). Here, as in *Quattrone*, the erroneous admission of the email and the government's rank abuse of it "could unduly inflame the passion of the jury, confuse the issues before the jury, or inappropriately lead the jury to convict on the basis of conduct not at issue in the trial." 441 F.3d at 186. All these wrongs existed here.

[5]This is also a basis on which to reverse all charges against all the Merrill defendants (Furst Br. 41-53; Reply 14-24; Brown Br. 18; Bayly Br. 94-95; Fuhs' Br.1-2).

grand jury testimony; and (iii) directly contradicted the government's case. Even though Fastow pled guilty to other charges and has cooperated fully with the government, he flatly denied that he guaranteed to buy back the barges. Instead, *Fastow gave Merrill verbal assurances to create a "high level of confidence" that Enron would find a third-party buyer* (14:1612). This was both lawful conduct (23:4520) and corroborates what Brown told the grand jury. No reasonable jury could have convicted Brown of perjury and obstruction if the jury had heard that *Fastow himself did not say he promised to pay Merrill back no matter what* (19:3289).

"[A]ny evidence that would have been admissible to impeach [Fastow] had he testified, was admissible to impeach [Fastow] even though he did not testify." *United States v. Scott*, 48 F.3d 1389, 1397 (5th Cir. 1995); *cf. United States v. Moody*, 903 F.2d 321, 328-29 (5th Cir. 1990). Because Fastow's statements to investigators could have been used to impeach Fastow had he testified, the *Brady* material should have been admitted to impeach the hearsay statements attributed to him. FED.R.EVID. 806 plainly required its admission–a fact that the district court, with the aid of the government, simply misapprehended.[6] *Id.* The trial court's contrary determination

[6]The government, on appeal, conceded: "The application of Rule 806 in the instant case turns on a different issue [than the question of availability]." Gov. at 217 n.84. Even entertaining the government's belated argument on appeal that the Fastow *Brady* material was not "inconsistent"

was error requiring reversal on all counts. *Moody*, 903. F.2d at 328-29.

C. Brown's Testimony About A Lawful Buy-Out Was Legally Immaterial To An Enron Buy-Back.

Assuming *arguendo*, that the "central issue" before the grand jury was whether there was an "oral *buyback* agreement" and who was "culpable," *Brown* at 14, the majority has misapprehended a critical factual and legal distinction. The questions and answers for which Brown stands convicted of perjury do not inquire as to an oral buyback. Rather, they address only a *buy-out by a third party. The government ultimately conceded that a promise of a buy-out by a third party was not unlawful* (23:4520; GBr. 234). According to the panel's own identification of "the central issue," the questions and answers for which Brown stands convicted are legally immaterial because (i) they involve only a *lawful buy-out by a third party*–not an Enron buy-back, and (ii) because the answers are not "knowing misrepresentations" at all. *Id.* Indeed, Brown was *never* asked about an *Enron buy-back* scheme, and

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with other Fastow statements to which other witnesses testified, clear circuit precedent dictates reversal. A statement is inconsistent if it would "lead one to question" whether the hearsay statements sought to be impeached were "untrue" or "unreliable." *United States v. Graham*, 858 F.2d 986, 990 (5th Cir. 1988). The Fastow *Brady* material directly contradicts statements attributed to Fastow by Kopper and Glisan (14:1486-88; 15:1641; 20:3614). Each of these government witnesses categorically said that Fastow told them he made a *buyback* promise (31:6523-24) (government summation). To the contrary, Fastow told investigators that he never promised or guaranteed a buyback (Furst RE 8:5). The government's entire case depended on Fastow's hearsay. The inconsistency was clear, and it was critical to the defense. Under no circumstances can the denial of this testimony be deemed harmless. *Moody*, 903 F.2d at 328-29.

regardless, a "buy-back" cannot be used to prove perjury or obstruction on different questions. *Dunn v. United States*, 442 U.S. 100, 99 S.Ct. 2190 (1979).

The first question inquired of Brown's "*understanding* of why *Enron* would *believe* it was *obligated* to Merrill to get them out of the deal on or before June 30th?" Brown's answer reflects nothing more than that his own understanding that the final agreement was inconsistent with the question–a position confirmed by the government, Fastow, and this Panel. *Brown* at 10 (revisions to documents "suggest no more than an understanding that a buy-back agreement was desired by Merrill and was at some point, but not ultimately, a part of the proposed deal."). Questions 2 and 3 inquire about someone at *Enron's* reference to "*a promise to Merrill that it would be taken out by sale to another investor by June 2000*?" Brown's response demonstrates only that whatever preliminary discussions occurred, he understood that an enforceable obligation or promise did not survive–even as to a third-party sale. As above, this is legally insufficient for perjury or obstruction. *United States v. McAfee*, 8 F.3d 1010, 1014-15 (5th Cir. 1993) (differences must be more than vague, uncertain or equivocal); *United States v. Crippen*, 573 F.2d 535, 537 (5th Cir. 1978), *cert. denied.* 439 U.S. 1069, 99 S.Ct. 837 (1979); *see United States v. Serafini*, 167 F.3d 812, 818-24 (3rd Cir. 1999).

Because the subject matter of the questions for which Brown was indicted involved a lawful transaction, Brown's answers did not have the tendency to influence the grand jury's investigation of a crime. For example, even had Brown answered that there was talk of a promise of a third-party sale to another investor by June 30, he still would have explained, like other witnesses, that it was not a binding obligation. The government still had no more evidence of a crime.[7] Nor did Brown's initial "no" answer cut off the grand jury's inquiry. To the contrary, it continued to question him on these issues, albeit indirectly, and he continued to explain his answers over the next 120 pages (G965A).

Moreover, the very fact that the concepts of a lawful third-party buy-out and an *Enron* buy-*back*, are and have been so easily conflated, proves the ambiguity of the grand jury's questions and invalidates them under *Bronston v. United States*, 409 U.S. 352, 93 S.Ct. 595 (1973). The fact that the questions inquired only as to Brown's *personal understanding* of the writings and *beliefs* of *others* about a transaction to which he was not a party exacerbated the ambiguity. As a matter of

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[7]This is very similar to what Brown did say, and another reason there is neither perjury nor obstruction on this record. Brown explained his answer in testimony the prosecution tried to exclude and said he understood assurances to that effect had been given (19 :3238-41). It is the prosecution that has rested criminal convictions on meaningless semantic differences–contrary to law–not Brown. It is the prosecution who characterized his perjury simplistically as "as black and white" as "promise" versus "no promise" (11:346, 30:6274), continually blurring or ignoring the distinction of a lawful, third party takeout (23:4520; GBr. 234).

law, Brown's expressions of his personal, hearsay-derived, understanding to questions about lawful conduct–whether he described it as a "promise" or as an "assurance"–did not constitute perjury or obstruction.[8] Many witnesses described the hearsay representations as "assurances" without being convicted of perjury–including Trinkle and Fastow.

D. *Williams* And *Griffin* Do Not Support Brown's Obstruction Conviction Or Overrule *In Re Michael.*

The substance of Brown's grand jury testimony is clear: Brown testified to his understanding and carefully endeavored to provide truthful answers to the questions presented. At no time did Brown engage in flat denials, or a failure of recollection. Even assuming that Brown's three responses could constitute perjury, this case falls well outside this Court's holdings in *United States v. Griffin*, 589 F.2d 200 (5th Cir. 1979), *cert. denied*, 444 U.S. 825, 100 S.Ct. 48 (1979); and *United States v. Williams*, 874 F.2d 968 (5th Cir. 1989) on which the majority relied. While *Griffin* and *Williams* implicitly found that perjury alone could form the basis for an obstruction of justice conviction, that finding was limited to instances where the perjury had the

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[8]The government's failure to prove materiality alone requires reversal of perjury and obstruction. *United States v. Ballis*, 28 F.3d 1399, 1407 (5th Cir. 1994) (reversing obstruction conviction for exclusion of defendant's evidence of what was said); *United States v. Cosby*, 601 F.2d 754, 756-59 (5th Cir. 1979) (acquitting of perjury for failure to prove materiality upon exclusion of transcript).

effect of closing off avenues of inquiry. There, responses given under oath consisted of flat denials and blatantly evasive answers.[9] Nothing remotely approaching such conduct occurred in this case.

Brown testified exhaustively and expansively. The distinctions he drew in what he understood of the hearsay parallel those of government witnesses and Fastow. Nothing was foreclosed by his answers. To the contrary, he explained *later*: "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 use best efforts, that is my understanding." (19:3238-41). Brown's understanding cannot have obstructed the work of the grand jury when government witnesses and Fastow corroborated his sworn testimony. Nowhere did Brown "falsely deny knowledge of events and individuals." *Griffin*, 589 F.2d at 204.

Moreover, it is no answer to say, as did the majority, that Brown's challenge to his obstruction conviction fails because in convicting him of perjury, the jury rejected Brown's presupposition "that his voluntary and complete testimony was true" *Brown* at 15. Such circular reasoning begs the question and is factually wrong.

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[9]In reconciling the two cases, this Court in *Williams* noted that "Griffin's grand jury testimony on which his section 1503 conviction rested consisted in significant part of the same sort of short, flat, and wholesale false denials of knowledge as those of our appellants here." *Williams*, 874 F.2d at 981. Indeed, the record of grand jury testimony in *Williams* is replete, if not dominated by "nos," without any explanation or clarification.

Brown's jury specifically found no "substantial interference with the administration of justice." (35:6967). Obstruction requires proof of additional elements. Similar bootstrapping was rejected by the Supreme Court in *Bronston* (no answer to say the jury found intent to mislead, statute does not reach literally true answer even if the defendant intended to mislead); by the Tenth Circuit in *United States v. Farmer*, 137 F.3d 1265, 1268-69 (10th Cir. 1998) (no answer to say jury "heard" or "decided"; jury is not entitled to guess); and, by this Court in *Cosby*, 601 F.2d at 757 (indictment cannot be used to prove materiality). It is the government's *burden* to prove each essential element of the two *distinct* offenses, and obstruction requires *evidence* of more than perjury. Indeed, it must prove Brown also had the requisite corrupt intent to impede. *United States v. Aguilar*, 515 U.S. 593, 115 S.Ct. 2357 (1995). The majority's holding on these facts has effectively collapsed the essential elements of the two offenses into one–contrary to *In Re Michael*, 326 U.S. 224, 227-28, 66 S.Ct. 78-80 (1945) and *Ex Parte Hudgings*, 249 U.S. 378, 383-84, 39 S.Ct. 337, 339-40 (1919), which the majority does not cite.

II. THE RECORD PROVES SEVERAL MISTAKES OF FACT.

A. Brown Did Not See The Engagement Letters Or Sign The Final One.

The majority found as "circumstantial evidence of Brown's knowledge of the details of the transaction," *Brown* at 13, that "[t]hree versions of the engagement letter

were circulated among Brown and others." *Id.* This is wrong. **The record contains no evidence to support this assertion.** *The government's record excerpts show that Brown does not appear on the email chain circulating these documents. No witness ever testified that Brown saw the drafts or signed the final one.*[10] *No copies were found in Brown's files or on his computer.* Indeed, trial prosecutors did not prove–or even argue–that Brown reviewed the drafts *or* signed the final engagement letter (GRE32, 33(email and first draft engagement letter); 14, 37(black-lined letter); 39(final draft); 16(final letter) (16:1965, 2010-11). Finally, there was no reason to copy Brown on these emails because he was gone, and, regardless, everyone at Merrill knew how strongly he opposed the deal (13:1036-37, 1094-1104, 1149-50 (Trinkle); 22:4061-63 (Zrike); 24:4554, 4568-69, 4630 (Fuhs)).

The majority's statement that Brown signed the final "engagement letter" came from the government's self-proclaimed assertion of this "devastating proof" against Brown on appeal (GBr. 101). *Brown* at 3, 13. However, the government never proved that Brown signed this engagement letter, (which *does not even contain a buy-back guarantee*) nor could it. Brown was not in the office, but on vacation and then

[10]At sentencing, however, the district court ordered the PSR to be revised, recognizing that the most that could be said was: "The signatures on the engagement letter *indicated* that the letter had been endorsed by Fastow, on behalf of Enron, and Brown, on behalf of Merrill Lynch." (41:11-12; Dkt. 741:12) (emphasis added). The government provided no evidence that Brown signed it.

in Scottsdale, Arizona, from December 23 well into January.[11] Brown signed nothing

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[11] The government's patently false assertion, and the fact that this Court trustingly relied on it, makes the court's exclusion of Brown's proffered testimony even more prejudicial. *Ballis*, 28 F.3d at 1407; *Cosby*, 601 F.2d at 756-59. There Brown testified:

"Q. Do you remember where and when you went on vacation?
A. Yeah. I went to the Gainey Ranch in Scottsdale, Arizona from December 24th through, I think, like January 2nd or 3rd."

* * *

Q. If you turn with me to the last page of the document, is that your signature there where it says James A. Brown?
A. No.
Q. Okay. Do you know - - do you know who signed your name to this document?
A. No."

* * *

"Q. This document is dated December 29, 1999. It pertains to the Nigerian barge transaction between Merrill Lynch and Enron. It's got a signature that purports to be your name on the back, and it's on your letterhead.
A. Right.
Q. What I am trying to understand is what do you know about how this document was created?
A. I presume somebody else wrote it and signed my name to it."

* * *

"Q. If I understand your testimony correctly, you've never seen this agreement or this document signed by you and - - or signed by James A. Brown. You said it isn't your signature. . . . You never saw this document or knew anything about it until a year ago?
A. That's correct." Bankruptcy Transcript (X980B:31, 121, 122)

* * *

"Q. Did you ever see any engagement letters in connection with the Nigerian barge transaction?
A. I saw them in prep work.
Q. Did you ever see them before that?
A. No, sir."

* * *

"Q. You'll notice that the final or you may have noticed that the final engagement letter was dated the 29th of December?
A. Yes, sir.
Q. And were you on vacation on that day or were you back in the office by that point?
A. I was on vacation until like January 2nd or 3rd."Grand Jury Transcript (G965A:204, 211).

* * *

(X975A:31, 141; Dkt. 621 GX List). The actual exhibit is *not even the original letter* but rather a *facsimile* with a cover sheet from Geoff Wilson at Merrill to Merrill counsel Gary Dolan, and it was obtained from *Dolan's files–not Brown's*. Fuhs, acquitted by this Court, testified that Geoff Wilson was responsible for closing the deal for Merrill (24:4551-52). Unlike Brown's list of risks, there was no stipulation that the signature on the engagement letter was his handwriting; and, the trial lawyers knew from Brown's *excluded testimony* that it was not (15:1938; 16:1959, 1983-85; 19:3126). The government's own exhibit list recites: "Brown denies signing"(GX List: GX 216[12]; see also 15:1938; 16:1959; 19:3126; Dkt. 621). *If* the government had *any evidence* that Brown saw the drafts and signed the letter, it would have used it and argued it, and Brown's answers to those questions would have provided better fodder for a perjury and obstruction indictment than the case the government brought.

Thus, no reasonable inference is possible that Brown, after the Trinkle call, knew whether Merrill actually had a buy-back agreement with Enron, and that is not

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"Q. So as far as you were concerned, once - - the deal got closed while you were on vacation, right?
A. Right.
Q. Who signed the relevant documents for Merrill Lynch?
A. I really don't know.
Q. You weren't asked to sign anything, I take it?
A. No." S.E.C. Transcript (X975A:141)

[12]The government's exhibit list reads: "12/29/1999 Facsimile Cover Sheet from Geoff Wilson to Gary Dolan with a 6 page attachment of the engagement letter between Enron and Merrill Lynch signed by Jim Brown and Andy Fastow. **(Brown denies signing)**" (emphasis added).

the question for which he was indicted anyway. Indeed, the panel specifically recognized this, holding that "the revisions of the engagement letter and other pre-deal memos received by Fuhs suggest no more than an understanding that a buyback agreement was desired by Merrill and was at some point, but not ultimately, a part of the proposed deal." *Brown* at 10. As with Fuhs–who *was* copied on and processed the letters and documents–this panel cannot "simply assume the linchpin of [the government's] case against" Brown. *Brown* at 10. Brown did not negotiate the deal or participate in it. Instead, he consistently objected to it; he told Fuhs to make sure that their department did not lose more than the $7 million; and then, Brown left for vacation. As with Fuhs, "it is an unacceptable stretch to conclude from these documents that [Brown] had knowledge the transaction ultimately included an oral promise to be kept secret . . . to effect a fraudulent accounting." *Id.*

B. The Trinkle Call Proves Brown's Testimony Is True.

The majority also points to the Trinkle call, but in any light, it proves nothing more than the documents just discussed. Nothing in that preliminary, internal discussion reflects Brown's *knowledge of an ultimate, unlawful buy-back agreement with intent to defraud* between Enron and Merrill. It is *no evidence* that he lied in expressing his own personal understanding of what *someone at Enron believed* or *wrote* about a promise of a *third-party* buy-*out*. Further, Trinkle's testimony

corroborated Brown's.[13] As the majority recognized with Fuhs, and should recognize as to Brown, the only way the government's case against Brown works is to presume him guilty from the beginning. This fundamental error pervades the majority opinion.

C. The Majority Condemns Brown With Evidence It Held Innocuous As To Fuhs.

The panel points to preliminary discussions between Furst and Brown as circumstantial evidence of Brown's "understanding" of the proposed transaction.[14] Earlier in the opinion, however, the majority writes that "[t]he Government's claim that '. . .Enron was "selling" the barges only so that it could book $12 million in earnings by the end of 1999,' is neither here nor there–selling an asset quickly to book earnings by a certain date is not, by itself, fraudulent." *Brown* at 10; *see also* at 2 ("That same day, Brown *and Fuhs* received an email from Furst's office. . . describing some of the material terms of the deal including that Bayly would confirm

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[13] Brown told the grand jury that it was his "understanding that *we had told Enron or that Enron understood that we didn't want to own this after June 30th*"; "my understanding . . . 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*" (GRE 77). This is also what Trinkle said she heard (13:1071, 1199, 1200). Trinkle also testified that "*somebody at Enron*" (never identified) had given "*his strongest verbal assurances*" ("*his word*") that Merrill "won't own these past June 30th"(13:1047, 1072). The government proved that Brown's testimony was literally true.

[14] Specifically, the Court cites to Furst's statement that Enron had asked Merrill to purchase an equity interest "'in a special purpose vehicle that would allow Enron to book $10 [million] of earnings,' and that the transaction 'must close by 12/31/99.'" *Brown* at 13. Further, "Furst ... explained to Brown that 'Enron is viewing this transaction as a bridge to permanent equity and they believe [Merrill's] hold will be for less than six months.'" *Id.*

Enron's *promise* with senior Enron management.") (emphasis added).

Furthermore, the exchange between Furst and Brown, relied upon by the majority, occurred before Brown disseminated his list of objections to the proposed deal, a list which included "*no repurchase obligation.*" As to those objections, in vacating Fuhs' convictions for insufficiency, this same majority writes, "Brown's suggestion, passed on by Fuhs, that Merrill might face reputational risk for aiding income manipulation does not imply the specific understanding that such income manipulation was to be effected by deception and fraudulent accounting." *Brown* at 10. Brown, like Fuhs, understood that counsel had obtained approval of the transaction, and there was no unlawful agreement. Indeed, this is why Brown continued to express his concern for Merrill's risk of loss. Because his grand jury testimony was entirely consistent with his, and Fuhs', subjective understanding of the deal, a reasonable jury could not convict Brown of perjury or obstruction. He cannot be "assumed into the penitentiary." *Brumley*, 560 F.2d at 1277.

III. CORRECTION OF THESE MISTAKES MANDATES BROWN'S ACQUITTAL ON ALL COUNTS.

For these reasons, the evidence was insufficient, and Brown should be acquitted of all counts. Brown's role in the transaction was even less than that of Fuhs whom this Court acquitted. The email Brown wrote 15 months later is inadmissible

against Brown under any scenario. The government's only other evidence is that Brown opposed the transaction and never agreed to anything illegal–much less with the requisite knowledge and specific intent to defraud. Brown is entitled to an acquittal on all counts. *United States v. Wieschenberg*, 604 F.2d 326, 336 (5th Cir. 1979) (reversing where "[t]o sustain [these] convictions the Government would have [this Court] hold, first that it is permissible for the jury to infer an illegal purpose from conduct which supports both a legal and an illegal inference and second, for the jury to infer that the discussions that took place were in furtherance of the illegal, not the legal, activity.").

CONCLUSION

For these reasons, Brown requests that this Court grant rehearing and reverse all counts of conviction against him and order him acquitted, and/or, in the alternative, remand to the district court for further proceedings consistent with the judgment.

Respectfully submitted,

SIDNEY POWELL
Texas Bar #16209700

CERTIFICATE OF SERVICE

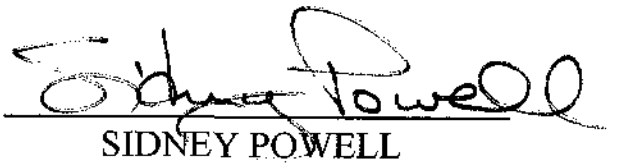
I hereby certify that a true and complete copy of the foregoing Petition for Panel Rehearing of Appellant James A. Brown was served via FedEx to counsel for government and via U.S. regular mail on counsel for appellants this 13th day of September, 2006 at the following addresses:

Stephan Oestreicher
Department of Justice
P.O. Box 899
Ben Franklin Station
Washington, DC 20044-0899

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

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

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



SIDNEY POWELL