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
No. CR H-03-363

REPLY BRIEF OF APPELLANT JAMES A. BROWN

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SUMMARY OF THE ARGUMENTS IN REPLY[1]

The government never proved any illegal *Enron* guarantee, much less that Brown agreed to one, and its carefully orchestrated case implodes upon exposure of several fatal fallacies. First, it is legally irrelevant to *Enron's accounting* whether *Merrill's* investment was at risk. The only relevant accounting issue–in this unprecedented prosecution which *imprisoned Merrill employees* for *Enron's bookkeeping*–is whether *Enron* lawfully booked this gain. This depends solely on whether *Enron* actually divested *its risks* in December 1999. Although the government admitted "the key question is one of accounting" (23:4528, 4530), it never proved by legal or accounting evidence that Enron could not legally book the gain.[2] Compounding this failure, the government's hearsay case actually proved what it belatedly realized was lawful–Enron's assistance in finding a third-party buyer, which was confirmed by LJM2's purchase.

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[1] Brown adopts the reply briefs of his co-defendants Bayly and Furst, and the sufficiency argument of Fuhs.

[2] *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 100, 115 S.Ct. 1232, 1239 (1995) ("Financial accounting . . . is a process that involves continuous judgments and estimates.") (internal citations omitted); *see United States v. Cochran*, 109 F.3d 660, 669 (10th Cir. 1997) (reversing honest services wire fraud conviction: "[O]ur responsibility to construe the evidence and its inferences in the light most favorable to the government does not allow us to supply missing evidence on complicated tax questions.").

The government's second casuistry conflates Enron and LJM2. The government did not prove that LJM2 was *not* a legally *separate accounting entity*. In December 1999, LJM2 had only recently been formed–an event for which Merrill and many sophisticated investors had done substantial due diligence before capitalizing LJM2 with $400 million. Enron owned none of LJM2. LJM2 had separate legal counsel, auditors and tax accountants. Enron's inside and outside counsel, board of directors, and Arthur Andersen had approved it–including Fastow's dual roles (14:1284, 1286-88, 1522-24; 21:3713, 3796-3802). And, at the same time as *this* transaction, auditors had approved LJM2's purchase of more than $300 million of Enron's assets–with *Enron* booking gains (14:1471-75; 15:1685-88; 19:3254; 21:3753-54, 3800-02; GX806:105).

With LJM2 a legally separate accounting entity, Fastow could have given Merrill a written guarantee that *LJM2* would buy the barges, and *Enron* still could have legally booked the gain. Fastow's *Brady* material, its use so wrongly denied to the defense, proves that Fastow *never* made a guarantee that would render this transaction improper.[3] Fastow never guaranteed *that Enron* would buy back the barges–nor would he have (14:1484, 1487; Furst RE8).

[3] Fastow began cooperating with the government *after* this case was indicted.

According to Kopper, Fastow was watching the barges for LJM2–waiting for the risks to decline[4] and the value to escalate (14:1299-1306, 1426-38; 15:1643). Fastow literally "giggled" at the opportunity: LJM2 bought the *three*-barge interest from Merrill *the day before* Enron signed a *nine*-barge agreement with Nigeria; *five days before* Citibank "gold-plated" them with a $60 million letter of credit; and, Fastow knew AES was "in the wings" to provide a $53 million profit for *Enron* (14:1311, 1442-54, 1532, 1567, 1569-70; 21:3745-49; BrownX354). He disclosed nothing to Merrill (14:1450-54).

Prosecuting this case-without-a-crime necessitated an unprecedented Procrustean approach to the law. Although, the government hacked and stretched several statutes, these tortured provisions still do not criminalize the conduct of the Merrill Defendants who engaged in no self-dealing, bribery or kickbacks, and deprived no one of honest services.[5] Indeed, they neither sought nor obtained money or property, and could not actually "falsify" Enron's bookkeeping–yet they stand convicted.

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[4] Like Brown, Kopper thought the barges were too risky in December 1999, so LJM2 declined to buy the barges (14:1301, 1310, 1464-66; 21:3755, 3810).

[5] Fastow knew how to "line his own pockets" and did so in *other* transactions, but there is no evidence that *even he personally profited from this transaction*. Nor is there any evidence he intended to involve Merrill in a crime, although he knew how to do that too. The NatWest bankers he corrupted pocketed $7.3 million. Brown only did his job (14:1328-30, 1409-12, 1414; 1stSR41:27).

Correspondingly, the government perverted this circuit's pattern instructions, persuading the court to insure conviction by: (i) expanding "conspiracy" and diluting specific intent; (ii) telling the jury that it did not have to find that Brown knew his conduct was unlawful; (iii) omitting materiality from this new genre of securities fraud; while (iv) gutting the defense of the two instructions that would have allowed the jury to acquit–good faith *and* the re-marketing agreement. As in *Arthur Andersen LLP v. United States*, __ U.S. __, 125 S.Ct. 2129, 2136 (2005), the instructions allowed conviction for innocent conduct.

Even assuming the government proved Enron's improper accounting, Brown must be acquitted. The government concedes he opposed Enron's proposal *before* the Trinkle call. Otherwise, it misrepresents the record. Its own case-in-chief confirms that Brown agreed to nothing on the call and continued identifying risks and objecting *after* the call. Brown's opposition was consistent. Thus, the government proved *only* Brown's lawful conduct and intent.

Contrary to the government's self-proclaimed "devastating proof," the final engagement letter is no evidence that Brown agreed to an Enron guarantee. It does not contain one. Trial counsel did not even argue that Brown saw prior drafts, or the final letter, and he was not copied on emails regarding them. Even the inadmissible "Brown email," 14 months later, reflects nothing unlawful, and reveals no time-frame

or source for its admitted hyperbole. Instead, it evidences only Brown's consistent belief in the legality of this transaction. Government witnesses *and* Fastow corroborated Brown's Grand Jury testimony, and the government did not prove that Brown's testimony (about conduct it now concedes was lawful) was material to the Grand Jury. The injustice of Brown's convictions mandates full acquittal.

ARGUMENTS AND AUTHORITIES IN REPLY

I. THE GOVERNMENT FAILED TO MEET ITS BURDEN OF PROOF THAT BROWN JOINED ANY ILLEGAL AGREEMENT.

In attempting to implicate Brown (GBr. 96-101), the government: (i) concedes that Brown opposed the proposal *before* the Trinkle call; (ii) complains that Brown never told Zrike about McMahon's alleged oral guarantee discussed in the Trinkle call; and (iii) ignores its own agent's testimony while relying heavily on its erroneous assertions of Brown's actions *following* the Trinkle call. As evidence, the government relies on: Brown's presence on the Trinkle call, his list of risks, his failure to object specifically to some oral guarantee–either on the call *or* to Zrike, a fax sheet bearing his typed name to transmit the APR cover page, the Brown email, and the engagement letter. These amount to no evidence of any crime.[6]

[6] Viewing the evidence in hindsight magnified by the enormity of Enron's deceit, much of the government's brief draws inferences from within Enron that it may not impute to Brown who had no knowledge of them. Even Enron insiders testifying for the government said they did not see anything wrong with this transaction, or begin to realize Enron's

A. Brown Opposed This Risky Deal From Its Inception.

Brown immediately listed and explained multiple risks (GRE9) to Trinkle and Wood (13:1090-1105).[7] According to Trinkle, the government's *only* witness who dealt with Brown:

- She "received a 20-25 page fax from Jim Brown's office that described these barges," and Brown's handwritten list of risks. She and her boss, Paul Wood, met with Brown (13:1034-35; Brown RE7).

- "He was very negative on the deal, and he felt that it had a lot of risks. And he went through a bunch of risks that he saw in the transaction." It was "pretty clear that he wasn't supportive [of the deal]." (13:1036-37, 1117).

- "I felt that it probably wasn't going to go anywhere because Jim was obviously not supportive" (13:1037).

- "He went through a number of risks," including that the barges were in Nigeria where 'the assets could be taken away,' they could 'default,' something could 'happen with the government of Nigeria'" (13:1094-95).

- "The project wasn't completed and . . .we'd be taking risks that it wouldn't be completed." (13:1096, 1121).

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problems until much later (Long: 17:2380-85; Glisan: 20:3641-44; Garrett: 13:1002-03, 1021-22). They admittedly lied to Merrill (21:3721, 3789-90). Fastow's frauds on Enron in *other* deals, so freely recited by Kopper and Glisan for this jury, were not revealed until *after* Enron's collapse *two years later*.

[7] He explained the same risks to corporate counsel Zrike and Dolan (22:4061-63; 23:4201-04).

- "Environmental risk"– 'if there was an oil spill or a fuel supply spill, that could affect the project, . . . the company could incur additional costs to clean up any environmental spills'" (13:1098).

- "Performance risk"–" if they didn't perform under the contracts, then the project could be in jeopardy and–as well as the fuel suppliers." (13:1099-1100).

- ". . . foreign currency risks" (13:1102).

- "He ran through a number of risks, one after another; . . . environmental risks, political risk" (13:1102, 1145).

- Brown did not mention any illegality–but all the business risks that jeopardized Merrill's investment (13:1147-48).[8]

- Brown was very negative on the deal because of all the risks. She agreed that "he was so negative on the deal that it was striking . . . " (13:1149-50).

[8] Brown's list of risks included that Enron had "no repurchase obligation," and, from Davis' memo, that Merrill had a "reputational risk i.e. aid/abet Enron income statement manipulation." Trinkle testified that reputational risk is a standard consideration as Merrill does not want to engage in any conduct that might even appear improper or adversely affect its reputation (13:1083-88; Brown Br. 7, 27). There is no evidence, however, that Brown thought, much less intended or agreed, that Merrill would engage in *any* illegal conduct. He was concerned with risk to Merrill's reputation even from Enron's aggressive, permissible, accounting. Like Zrike, he expressed concerns about control of the asset, the voting rights, the amount of gain and the fact that Enron could not guarantee a buy-back and book a sale (19:3137-38). Trinkle herself said Brown did not mention any potential illegality (13:1113, 1147-48), and the entire record confirms Brown's belief that the transaction proceeded lawfully. Indeed, the government never proved otherwise.

B. The Trinkle Call Proves Nothing, And The Government Cannot Shift The Burden Of Proof To Brown.

The burden was on the government to prove that Brown knowingly and intentionally joined a conspiracy and fraud scheme with the specific intent to violate the law. It cannot prove this by piling inference upon inference. *United States v. Rahseparian*, 231 F.3d 1257, 1262 (10th Cir. 2000) (reversing conspiracy and mail fraud convictions for insufficient evidence of knowledge of fraud). This Court does not lightly infer a defendant's participation in a conspiracy. Even "placing a defendant in a climate of activity that reeks of something foul" is insufficient. *United States v. Dean*, 59 F.3d 1479, 1485 (5th Cir. 1995). There is far less here.

1. Trinkle Did Not Testify That McMahon Guaranteed Enron Would Buy Back The Barges.

The government attempts to place Brown in a conspiracy through the Trinkle call.[9] This preliminary, internal discussion of a proposal does not evidence *any* criminal agreement, much less one *with* Brown.

[9] The government argued at trial that Brown joined its alleged conspiracy during the Trinkle call by going "along with it," and by not arguing against the proposal then (30:6199; 6202). That is a legally and factually insufficient basis for his conviction.

Trinkle believed Brown was a party to a conference call, only hours after he had voiced his opposition to her and Wood (GRE 72).[10] On this call, Furst or Tilney first informed Merrill executives of Enron's *proposal* to sell Merrill an interest in three-power generating barges in December 1999. Enron "had said that they would help us find a third-party to buy these barges" (13:1043). "Somebody at Enron" had "told Merrill Lynch that they would help us find a third-party to buy the barges . . ., and if that did not happen by June 30th of 2000, Enron Corporation would buy the barges back from us"[11] (13:1044).

Cox or Bayly asked about a written guarantee. Either Furst, Tilney or Brown said, "No, they can't do that because, otherwise, they won't get the right accounting treatment." Bayly asked "what are they giving us then?" Furst or Tilney answered: "He gave me his word. He gave me his strongest verbal assurances. He said we won't own these past June 30th" (13:1045-47, 1072). The call concluded with Bayly's declaration: "Well, they better understand we expect to be taken out [by] June 30th"

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[10] *After trial*, the government produced *Brady* material consisting of Merrill phone records, showing no call from Brown's office to join that conference (Dkt. 723).

[11] *No* witness admitted *making* such a representation. Even Enron realized that it could not guarantee to buy back the barges and book a gain, and if it repurchased the barges, it would have to unwind the sale. Both alternatives were unacceptable, and therefore, neither happened (12:872; 15:1756-59, 1875, 1906; 17:2527; 18:2798; 21:3866). Consequently, unbeknownst to the jury, Fastow admitted he referred repeatedly to LJM2 in his conversation with Merrill and *assured only* that Enron would find a third-party buyer (FurstRE:8).

(13:1071). Trinkle said nothing was secret or suggestive of anything wrong (13:1073).

Shifting its burden of proof and misconstruing the evidence, the government now attempts to saddle Brown with some obligation to object during the Trinkle call and to the alleged "oral guarantee specifically" (GBr. 98).[12] Not only did Brown have no legal obligation to speak, but nothing in the call informed Brown (as the government asserts) that "Enron Treasurer Jeff McMahon had already given Furst or Tilney an oral guarantee. . . . that Enron . . . would buy the barges back" (GBr. 64). Trinkle did not say that. Speakers, referring only to "someone at Enron" and "he," *did not* mention McMahon or "an oral guarantee" (13:1044-48).

Zrike's absence from this preliminary call is meaningless–especially as to Brown. She already knew where he stood (GBr.99; 22:4061-63; 23:4202-04, 4253). Contrary to the government's assertions, Trinkle admitted that lawyers were never involved at her level, no vote was taken, and *nothing was approved* on the call. Trinkle confessed that, at most, "it sounded like he [Bayly] was supportive of the deal." She admitted that company lawyers routinely attend the DMCC meeting, and

[12] Brown did warn against any Enron "oral guarantee," but this was wrongly excluded by the government's surgical approach to the facts in its pursuit of convictions–not truth or justice (GX965A:189), defying *Berger v. United States*, 295 U.S. 78, 84, 55 S.Ct. 629, 631 (1935).

she confessed her ignorance that the proposal was vetted there (13:1074-75, 1078, 1198-99; 19:3251-52).

2. Silence Does Not Constitute Unlawful Agreement.

There was neither a legal burden nor a factual reason requiring Brown to object on the call, and his silence does not support conviction. *United States v. Dyar*, 574 F.2d 1385, 1388-89 (5th Cir. 1978); *Armco. Indus. Credit Corp. v. SLT Warehouse Co.*, 782 F.2d 475, 485-86 (5th Cir. 1986). Only hours before this call, Brown had objected to the proposal to the two people on the call with the responsibility to evaluate Merrill's risks (13:1091-1104). He knew nothing could be decided then.

There is no evidence that Brown agreed to anything on this call. A discussion about *what cannot be done* does not constitute an agreement to commit a crime by another means. Trinkle herself left the call with no concern of illegality–only that Merrill might lose its investment (13:1147-48). None of the "assurances" reportedly made by "*someone at Enron*" could even be verified (no one from Enron participated), and the only guarantee suggested was rejected in the conversation. This was an initial, internal conference, discussing unconfirmed representations, and the possible parameters of a *proposed* business transaction. No agreement had been

reached, even *within* Merrill–much less, *with* Enron, and nothing in this conversation evidences a criminal agreement *with* Brown.[13]

C. The Government's Case-In-Chief Proves Brown Continued To Oppose The Proposal *After* The Trinkle Call, And He Did Not Close The Deal.

1. The Government Proved Brown Consistently Objected.

Still blurring important chronology, the government asserts that none of its "evidence suggests that he still opposed the deal after the call" (GBr. 98). However, Brown's unceasing concern for Merrill's risks is the *only* point on which the government's case is consistent.

The jury never heard any testimony that the DMCC actually met *after* the Trinkle call. Instead, the jury was mislead. Trinkle and the government had the date wrong–and the government objected throughout its case-in-chief to every defense effort to correct it. Finally, *late* in the trial, the government was forced by irrefutable, documented fact to admit an exhibit proving that Trinkle (and it) had the chronology wrong all along. What the jury heard, however, only obfuscated the significant

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[13] Even assuming that this conversation could be sifted to uncover some preliminary "consideration" of an illegal enterprise, it would be insufficient to convict Brown. *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.")

timing of the Trinkle call and the *two subsequent* meetings at which Brown continued to object (13:1060-62, 1075; 19:3251-52, 3257-59, 3261; 28:5913-14; 30:6156, 6201-02; GRE72).

With chronology corrected, the government's own case-agent proved Brown's persistent opposition at the *subsequent* DMCC meeting:

- Brown told the DMCC, *inter alia*: ". . . it would be impossible to do any due diligence on these assets and that . . . the barges were not even almost built. They weren't half built or whatever."

- ". . . these were big risks and that we had no time to try and understand the details of that sort of thing or really review the, like, legality of a contract in Nigeria. . ." (19:3157-58, 3258).

If Merrill had accepted an Enron guarantee against loss (and if Brown knew that), there would have been no reason for him to continue to oppose this investment and raise all the risks, or, for the DMCC to discuss them. Instead, consistent with Brown's understanding and list of risks, Enron had "no repurchase obligation" (GRE9).

2. The Engagement Letter Does Not Evidence An Illegal Guarantee, And The Prosecutors Did Not Prove Or Even Argue That Brown Signed It.

The government's arguments now hinge on what it misrepresents as "devastating proof" of Brown's guilt: that "on the day of closing, Brown and Fastow executed the official engagement letter" (GBr. 101). Yet, the government cites to no

testimony–not even to argument of trial counsel–because there is none. Brown did not close the deal. And, the engagement letter is no evidence that Brown agreed to an Enron guarantee or concealed anything. It does not mention one, and he did not see the prior drafts.

The prosecutors did not prove–or even argue–that Brown reviewed or signed the draft or final engagement letters. Brown was not even in the email chains distributing them (GRE33(first draft engagement letter), 37(black-lined letter), 39(final draft), 18("demand letter"), or wiring the fee (GRE15, 38) (16:1965, 2010-11). 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). Brown was out of state and on vacation from December 23 through January 3. He signed nothing (X975A:31, 141; Dkt. 621 GX List).

D. Brown Raised All Risks With Zrike *Before* and *After* The Call.

The government's case proved only Brown's opposition to the deal. The government cannot legitimately complain about what it says Brown did not tell Zrike, because it did not call her as a witness (GBr.99).[14] Regardless, the record shows that

[14] In reviewing the sufficiency of the government's evidence, this Court can rely only on the evidence the government produced in its case in chief (Brown Br. 26; Fuhs' reply brief).

Brown and Zrike were "on the same page." They fully shared their concerns and agreed: There could be no Enron buy-back (23:4253).[15] Zrike's testimony only confirmed the government's evidence that Brown opposed the deal *before* and *after* the Trinkle call:

- They had "a dialogue about the issues it raised, . . . it was coming right at year-end. And we talked about the risks. . . ." (22:4061-62).

- "We talked about the Nigeria risks. * * * "both of us were wondering why this had to be done by Christmas. . . . a number of different issues that were discussed" (22:4062-63).

- **Brown presented to the DMCC the concerns he had expressed to Zrike and Dolan** (23:4208-09).

- Zrike, Brown, McAndrews, and DeVito **met with Bayly following the DMCC meeting; Brown's concerns were raised again**, and **it was agreed there could be no Enron buy-back** (22:4095; 23:4209). **The only agreement would be for Enron to continue to remarket the barges to a third party** (22:4101).

- Zrike, admittedly having considered "earnings management," and whether this was "a sham," "fraudulent" or "material," said *in Brown's*

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[15] Brown and Zrike shared concern that Enron might be engaging in "earnings management" or "income statement manipulation" (22:4097, 4102-05; GRE9). Even *if* this were inherently unlawful, *which it is not* (16:2151; 21:3682-85, 3690), "suspicion" *even* "*of illegal activity* . . . is insufficient to prove participation in a conspiracy." *Rahseparian*, 231 F.3d at 1264 (emphasis added); *United States v. Johnson*, 381 F.3d 506, 511 (5th Cir. 2004) (generalized suspicion does not establish actual knowledge); *United States v. Beckner*, 134 F.3d 714, 719 (5th Cir. 1988) (reversing conviction for insufficient knowledge of client's fraudulent activities); *Wieschenberg*, 604 F.2d at 335-36 (juries are "not permitted to convict on suspicion and innuendo").

presence that she believed the risk of loss was passing, the transaction was not material to Enron, and it was a true sale (22:4101-05; 4108).

Zrike presented it to CICG President Davis (without Brown) (22:4094). Davis approved it and instructed Bayly to call a senior person at Enron to "make sure they understood we expected that they would proceed with the sale to the third party as quickly as possible . . . " (22:4116-19). *Although it did not do so in front of the jury*, the government finally conceded this was lawful (23:4520).

Zrike knew Brown's objections,[16] had seen the documents,[17] knew Merrill was a temporary buyer with oral assurances, and she believed the deal was valid and so stated to Brown (22:4101, 4110). Zrike also knew the Merrill-Fastow call transpired without her (23:4300); and, corporate counsel reviewed all the letters.[18] Thus, she

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[16] Wood, DeMassimo, Cox, McAndrews, DeVito and others who were also on the Trinkle call, said nothing, did not oppose the deal, or even promoted it, but none were indicted for conspiracy (13:1039-40, 1195). Obviously, this call did not create a criminal conspiracy, and Brown's superiors on the Trinkle call were also at the later meetings with Zrike, where Brown *continued* to object (22:4095; 23:4209).

[17] The APR and DMCC memo showed proposed fees to be paid to Merrill, and referenced a take-out by third-party investors. They reflected nothing illegal, and Zrike said that nothing in the documents caused her any concern (16:1978-80; 22:4135-39; 4216-20; GBr. 101; GRE13). Businesses routinely and lawfully collect fees, and Merrill's transaction fee is no evidence that Brown agreed to an alleged Enron buy-back. *See Cochran*, 109 F.3d at 667, and *United States v. Ballard*, 663 F.2d 534, 540 (5th Cir. 1981), *modified*, 680 F.2d 352 (5th Cir. 1982) (reversing conviction; even envelopes of cash kickbacks could evidence a non-criminal back-scratching scheme).

[18] The draft, black-lined, and final engagement letters went through corporate counsel's offices at Merrill (and at Enron, and outside counsel) (16:1983-84; 23:4316-24;

knew *more* than Brown, whose email 14 months later expresses his belief that Zrike was on the Fastow call and completed the transaction lawfully.[19] That Brown

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GRE14, 16, 23; BaylyX355, 356)

[19] Brown's inadmissible double-hearsay assertion, 14 months later, in another context, that "we had Fastow get on the phone with Bayly and lawyers and promise to pay us back no matter what" was admitted hyperbole, as to "the promise," contained no time reference, and did not evidence his knowledge or agreement in 1999. It no more indicates an Enron buy-back than a permissible Fastow or LJM2 buy-*out*. It was inadmissible even as to Brown because of the embedded hearsay, which the government ignores. *Barry v. Simmons Airlines, Inc.*, 2000 WL 1741622 (5th Cir. 2000) (embedded hearsay inadmissible, unknown declarant, timing and context). His use of the royal "we" does not reflect his personal involvement. It is undisputed that Brown was not in the meeting with Davis who instructed Bayly to make the call, and Brown was not on the call with Fastow. Moreover, Brown's belief that lawyers were on the phone shows that he believed that it was handled lawfully.

The government's improper use of this email at trial, and on appeal (Dk. 379; 11:330-53; 31:6516; GBr. 193), to argue that Brown admitted one illegal deal, and proposed another just like it–acting in conformity therewith–violates Rule 404(b), Fed.R.Evid. There is no evidence in this record, or in reality, that what Brown proposed on the CAL transaction was unlawful at all. However, the government made it seem that way by reading to the jury Lyons' *admittedly inadmissible* response–even though it knew from his *Brady* material that was not what Lyons meant, and it had to *redact* Lyons' response *after* it made sure the jury heard and saw it (19:3242-43; 20:3663). These blatant abuses highlight the government's desperation–at trial and on appeal–to do anything to convict Brown–even by breaking the rules it is sworn and entrusted to uphold–because it has no evidence that Brown committed any crime. *See Berger*, 55 S.Ct. at 631. Brown moved for mistrial (Dkt. 247, 379; 31:6578-79; Brown Br. 63; Bayly brief). This alone requires reversal. *United States v. Jimenez*, 613 F.2d 1373, 1376, 1378 (5th Cir. 1980).

Moreover, the government's witnesses fully corroborated Brown's Grand Jury testimony–*not* the email. If Brown's email assertion were accurate, then Fastow had: guaranteed *he* would pay Merrill out of his own pocket, even if the barges sank or Nigeria confiscated them (*Cf.* Garrett, 13:1003). Actually, such promises–by Fastow personally or for LJM2–would *not* have invalidated *Enron's* accounting (Bayly brief). In any event, not a single government witness understood Fastow's hearsay representation as Brown's email exaggerated it. Fastow's *Brady* material *expressly disavowed this interpretation* and

steadfastly objected to the risks proves that he always believed there was no guarantee of anything–and did not agree to one.

E. The Record Is Replete With Evidence That Brown Always Believed Enron Had Shifted Its Risks To Merrill, And There Was No Guarantee.

- Fuhs' emails to Brown upon the sale to LJM2 confirmed Brown's dislike for the barges, that everyone knew it, and his concern of loss because of Nigerian civil unrest (19:3225-26; 24:4571-72).

- Brown instructed Fuhs to make certain Merrill did not lose more than its cash investment (23:4464).

- Brown did not want this transaction on his section's books because he thought it would lose money (FuhsX23; 23:4465).

- As late as February or March, when Brown saw publicity of civil unrest in Nigeria, he again expressed concern about Merrill's risks (24:4554).[20]

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demonstrates that Fastow always intended for LJM2 to buy the barge interest (Furst RE8; Furst and Bayly briefs).

[20] The government argues that no one at Merrill monitored the barges, and there was no negotiation over price, proving that there was a guarantee. These contentions are both factually wrong and legally irrelevant to Brown. This transaction was not on Brown's group's books–so there was no requirement for him to "monitor" them. Nonetheless, Brown's concern of Merrill's risk of loss persisted–evidencing *only* his belief there was *no guarantee*. Likewise, there is no evidence that Brown was involved in the sale to LJM2. But, the record does reflect that the amount in the draft demand letter (never sent) did *not* match the amount LJM2 paid. Instead, it was derived from the liquidation schedule and the *cap* on Merrill's return in the signed deal documents (18:2703, 2726, 2729-31, 2733, 2740-41; 20:3520; 24:4557, 4561-62).

- Brown was not even copied on the email chain of the never-sent "demand" letter (16:1965, 2010-11; GRE18).

Joinder in an unlawful agreement cannot be ambiguous. *Dyar*, 574 F.2d at 1389; *see United States v. Parker*, 839 F.2d 1473, 1478 (11th Cir. 1988) (reversing for lack of common agreement to violate the law). And, as to Brown, the evidence is not ambiguous or even in equipoise. *United States v. Reveles*, 190 F.3d 678, 686 (5th Cir. 1999) (reversing because when "the evidence is in equipoise, as a matter of law it cannot serve as a basis of a finding of knowledge"); *Wieschenberg*, 604 F.2d at 334-45 (reversing conviction based on inferences from conversations susceptible of an illegal or legal interpretation).

There is no evidence of Brown's criminal knowledge or intent–much less of *his agreement* to an Enron buy-back or guarantee. Every witness who dealt with Brown testified that he *opposed* this risky investment (13:1036-37, 1094-96, 1149-50 (Trinkle); 19:3157-58 (Bhatia); 22:4061-63 (Zrike); 23:4208-09; 24:4554, 4569, 4630 (Fuhs)). His perpetual concern for Merrill's risk of loss proves that he never agreed to, or believed there was, any Enron guarantee against Merrill's loss. The government's entire case proves only Brown's lawful conduct and intent.

II. BROWN DEPRIVED NO ONE OF HONEST SERVICES.

This Court's controlling decision in *Ballard*, 663 F.2d at 540, requires Brown's acquittal.[21] The government avoids the plethora of analogous decisions reversing convictions and demonstrating that Brown engaged in no conduct that would constitute a deprivation of honest services. Its contention that it need only "show that the defendants violated a duty imposed by state law" (GBr.145), ignores the conduct to which this statute has uniformly applied, its legislative history, and decades of precedent across the circuits.[22]

Neither all violations of state criminal law, *United States v. Brumley*, 116 F.3d 728, 734 (5th Cir.) (*en banc*), *cert. denied*, 522 U.S. 1028, 118 S.Ct. 625 (1997), nor "all fiduciary breaches," "involve the loss of an intangible–an employee's faithful and honest services." *Ballard*, 663 F.2d at 540-41 (rejecting government's theory because it "sweeps too broadly and does not correctly reflect the quantity and quality of fraud

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[21] In *Ballard*, this Court acquitted a defendant situated similarly to Brown, despite the fact that defendants had received in excess of $2 million in kickbacks in envelopes of cash. 663 F.2d at 544.

[22] *Cochran,* 109 F.3d at 667 (even assuming §1346 reaches private actors in a commercial transaction, "it would give us great pause if a right to honest services is violated by every breach of contract or every misstatement made in the course of dealing"); *United States v. Murphy*, 323 F.3d 102, 104, 109-18 (3rd Cir. 2003) (lack of duty despite kickbacks and bribes); *United States v. Czubinski*, 106 F.3d 1069, 1077 (1st Cir. 1997) (no personal gain to defendant); *United States v. Bloom*, 149 F.3d 649, 656-7 (7th Cir. 1998) (no personal gain); *United States v. Jain*, 93 F.3d 436 (8th Cir. 1996) (reversing despite kickbacks), *cert. denied*, 520 U.S. 1273, 117 S.Ct. 2452 (1997).

necessary to invoke the criminal sanction"). No case has affirmed an honest services conviction without secret bribery, kickbacks, or self-dealing to the employer's detriment, and there are none here.

Moreover, Congress enacted the statute in response to *McNally*, specifically to prohibit public officials from abusing their offices for *personal gain*. *McNally v. United States*, 483 U.S. 350, 355, 107 S.Ct. 2875 (1987). Any extension to the private sector must be applied, cautiously, to that kind of conduct. *See Brumley*, 116 F.3d at 734 ("something close to bribery"); *United States v. Rybicki*, 354 F.3d 124 (2nd Cir. 2003) (*en banc*); *Cochran*, 109 F.3d at 667. The government's approach would render every employee wrong a federal crime–the very risk this Court expressly rejected in *Ballard*. 663 F.2d at 540. *Nothing* about Brown's conduct approaches *any* previous application of the honest services statute, and he had no fair warning of its reach here (Brown Br. 43).[23] His convictions on Counts I, II and III must be reversed, and acquittal rendered. *Yates v. United States*, 354 U.S. 298, 77 S.Ct. 1064 (1957).

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[23] Bayly and Brown moved to dismiss the indictment and repeatedly raised these issues (Dkt.120:4-8, 10-11;134, 135, 160, 179, 416, 439). Regardless, conduct that does not constitute an offense requires reversal as plain error. *United States v. Angeles-Mascote*, 206 F.2d 529, 530-32 (5th Cir. 2000) (*en banc*).

III. MULTIPLE INSTRUCTIONAL ERRORS REQUIRE REVERSAL.

With the facts obfuscated and the statutes re-crafted, Brown's conviction was then insured by the *dilution of mens rea*, as if this were a securities fraud, and the *omission of materiality*, as if it were not. The government obtained an expansion of "conspiracy," while eliminating instructional support for the two critical defenses: good faith *and* the lawful remarketing agreement (Furst brief)–either of which justified acquittal. Under any standard of review, reversal is required.[24]

A. The Court Erred In Denying Defendants The Absolute Defense Of A Good Faith Instruction.

Brown was entitled to an explicit instruction on "good faith"–an absolute defense to the charges against him. The government's contention that Defendant's "good faith" instruction was sufficiently covered by other instructions fails. The authority on which the government relies, *United States v. Giraldi*, 86 F.3d 1368, 1376 (5th Cir. 1996), requires reversal.

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[24] Because the conspiracy, *mens rea* and materiality errors involve significant misstatements of essential elements, Brown is entitled to *de novo* review. *United States v. Guevara*, 408 F.2d 252, 257 (5th Cir. 2005) (Brown Br. 75). These errors were preserved (GBr. 177). Brown requested correct instructions on all these issues and objected to those given, specifically including conspiracy, and deviations from this Circuit's pattern instructions (Dkt. 207, 227, 232, 415, 416, 439; 29:6037-52; 30:6092). The government concedes that Brown's "good faith" argument, which is reviewed for abuse of discretion, was preserved.

A "sufficient evidentiary foundation" existed for the "good faith" instruction. *Giraldi*, 86 F.3d at 1376; *United States v. Lewis*, 592 F.2d 1282, 1286-87 (5th Cir. 1979). Brown repeatedly and strongly articulated the risks associated with the barge deal and opposed Merrill's investment in it. He followed Merrill protocol to the letter. He did not agree to any Enron guarantee or even believe there was one. He reasonably believed that attorneys and senior Merrill officials had handled the transaction lawfully.

Neither the trial court nor the government contested the content of Brown's "good faith" instruction, nor could they. This Court has approved it. *United States v. Cavin*, 39 F.3d 1299, 1310 (5th Cir. 1994). Even while twisting *Cavin* (GBr. 186), the government admits that good faith is a complete defense to conspiracy and wire fraud. *Cavin*, 39 F.3d at 1310 (reversing because court wrongly charged the jury that it "may" acquit upon finding good faith; it was not optional but *mandatory*); *United States v. Aubin*, 87 F.3d 141, 148 (5th Cir. 1996).

Giraldi, a bank fraud case, also requires reversal. This Court upheld refusal of a good faith instruction only because the trial court had given "specific" and "detail[ed]" instructions on specific intent and "defin[ed] 'willfully' and 'knowingly"–**according to the instructions Brown requested but was denied**. *Giraldi*, 86 F.3d at 1376; *United States v. Upton*, 91 F.3d 677, 683 (5th Cir. 1996)

(same); *United States v. Mann*, 884 F.2d 532, 537 (10th Cir. 1989) ("[G]eneral instruction on willfulness ... is not adequate ... to present the defense of good faith.").

Where a court's refusal to offer a defendant's good faith instruction has been upheld, significantly stronger and more detailed instructions on "intent" were given. *See*, *e.g. United States v. Storm*, 36 F.3d 1289, 1294-95 (5th Cir. 1994), *cert. denied*, 514 U.S. 1084, 115 S.Ct. 1798 (1995) (instructions specifically defined "knowing" and "willful" and were otherwise consistent with pattern instructions); *United States v. Chaney*, 964 F.2d 437, 445 (5th Cir. 1992) (bank fraud case where "willfulness" was required, "knowingly" was defined with specificity, and there was, "in essence, a good faith instruction").

In this case, the court's instructions did not substantially cover "good faith." First, the court expanded "conspiracy" beyond all precedent by adding "*or understanding*." Second, it disregarded this Court's pattern instructions, and did not give the requisite instructions as to either "*knowingly*" or "*willfully*," for the conspiracy or aiding and abetting counts. Third, the court rejected the good faith defense instruction because it "is just the opposite" of criminal intent (29:6045). The court expressed, but failed to comprehend, the significance of its own words. Brown was entitled to the good faith instruction because it *is* "*just the opposite*" of fraudulent intent. "Acquittal is not optional upon a finding of good faith," but rather "is

mandatory because a finding of good faith *precludes* a finding of fraudulent intent." *Cavin*, 39 F.3d at 1310.

Finally, the court's assertion that an instruction regarding reliance on counsel substantially covered the requested instruction is wrong. "Advice of counsel" is a distinct instruction and does not substitute for the absolute defense of good faith.[25] For the same reasons, the government's argument that Brown could and did argue his "good faith" to the jury fails. He was wrongly limited by the instructions given. In any event, this Court has held that "argument alone will never suffice to compensate for an omitted instruction." *United States v. Rubio*, 834 F.2d 442, 447 (5th Cir. 1987).

A general "intent to defraud" instruction is inadequate where, as here, the evidence supports, and the case turns on, a defense of good faith.[26] *Lewis*, 592 F.2d

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[25] By the plain terms of the court's instruction, "[a]dvice of counsel is not a defense to the crimes of conspiracy or wire fraud" (30:6135).

[26] While *Lewis* pre-dates the *explicit* "totality" inquiry used in *United States v. Gray*, 751 F.2d 733 (5th Cir. 1985), *Lewis* did explicitly assess the entirety of the charges and whether defendant was able to lay his "theory squarely before the jury." *Gray*, 751 F.2d at 736. *Lewis* warrants reversal here. *See United States v. Regan*, 937 F.2d 823, 826-27 (2nd Cir. 1991) (wire fraud and conspiracy charges, "the court's general instructions on specific intent were not adequate to inform the jury that if it believed the defendants' theory, it was entitled to conclude that they did not have the requisite intent to be convicted of the offense charged"); *United States v. Casperson*, 773 F.2d 216, 223-24 (8th Cir. 1985) (in light of the centrality of good faith, reversible error to omit good faith instruction, even though detailed instructions defining "specific intent" and "willful" were given).

at 1286-87. Brown was entitled to the instruction and to the argument that his acquittal on all counts was "mandatory" upon a finding of his good faith. *Cavin*, 39 F.3d at 1310; *United States v. Harris*, 498 F.2d 1164, 1168 (3rd Cir. 1974) ("good faith" as a defense to perjury).

B. The Court's Erroneous *Mens Rea* Instructions Allowed Conviction Without Culpability.

The court redefined and expanded "conspiracy" to include even a unilateral "*understanding*," and significantly deviated from this Circuit's pattern instructions throughout (30:6115-6140). The "gist" of conspiracy is agreement. *United States v. Falcone*, 311 U.S. 205, 210, 61 S.Ct. 204, 206 (1940). *Understanding*, which is ambiguous and even unilateral, cannot substitute. The government does not even attempt to support this over-reaching instruction, nor could it. It redefines conspiracy in contravention of decades of Supreme Court decisions and deviates beyond the pattern instructions and precedent of the First (§ 4.03), Second,[27] Third,[28] Fourth,[29]

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[27] *United States v. Jones*, 393 F.3d 107, 111 (2nd Cir. 2004).

[28] *United States v. Cartwright*, 359 F.3d 281, 286-87 (3rd Cir. 2004).

[29] *United States v. Ellis*, 121 F.3d 908, 922 (4th Cir. 1997).

Fifth (§ 2.20), Sixth (§ 3.01A), Seventh (§ 5.08), Ninth (§ 8.16), Tenth,[30] Eleventh (§13.1), and D.C.[31] Circuits.

"*Understanding*" connotes merely a "mental grasp," whereas "*agreement*" requires an "arrangement" between two or more persons of "a course of action." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED (1981). Especially harmful to Brown, it allowed the jury to convict for his unilateral, "mental grasp" even after the fact–though he never agreed to anything unlawful.[32] Not only did the prosecution repeatedly refer to *his* "understanding," but almost 600 expressions of unilateral "understanding" riddle the government's case-in-chief (19:3238-41; Brown Br. n. 39). This alone mandates reversal on Counts I, II and III.

Making matters worse, the conspiracy instructions omitted the requirement that Brown "intended to further the unlawful purpose of the conspiracy." Brown requested, but was denied, this Circuit's pattern instructions.[33] By (i) omitting

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[30] *United States v. Dowlin*, 408 F.3d 647, 657 (10th Cir. 2005).

[31] *United States v. Wilson*, 160 F.3d 732, 737 (D.C. Cir. 1998).

[32] This very problem is exemplified by an exchange between trial counsel: they had an "understanding" *but not* an "agreement" (19:3139).

[33] While the government cites *United States v. Hunt*, 794 F.2d 1095, 1099 (5th Cir. 1986) to argue that this Court "has never mandated unswerving obedience to the[] recommended forms of instruction," innumerable cases from this Court have upheld jury instructions because they essentially tracked those pattern instructions. *See*, *e.g. United States v. Arditti*, 955 F.2d 331, 340 (5th Cir. 1992).

"*intending*" from the conspiracy instruction, (ii) disassembling the "*to further*" language from the "*unlawful purpose*" language, and (iii) acceding to the prosecutor's "*knowledge of illegality not required*" instruction, the district court disemboweled the requisite conspiracy instruction (Brown Br. 53-55).

The government's cases require reversal. *United States v. Ismoila*, 100 F.3d 380, 399 (5th Cir. 1996), explicitly states that the "requisite intent" for a wire fraud conviction is satisfied only if the Government proves beyond a reasonable doubt that the defendant acted "knowingly *and* with the specific intent to deceive." *Ismoila*, 100 F.3d 399 (emphasis added); *United States v. Keller*, 14 F.3d 1051, 1056 (5th Cir. 1994) (same). In this case, the jury instructions conflated knowledge and intent (30:6117, 6119-21). Because "*and*" does not mean "*or*," reversal is required.

Similarly, while *Arditti*, 955 F.2d at 340, in *dicta*, does assert that "willfulness is not an element of conspiracy to commit wire fraud," *id*. at 340, the jury instruction found "adequate" in that case (i) did include "willfulness," *id.*, and (ii) "essentially track[ed] the *Fifth Circuit Pattern Jury Instructions*." *Id*. Moreover, (iii) this Court specifically disapproved, citing *United States v. Burroughs*, 876 F.2d 366, 369 (5th Cir. 1989), of an instruction which did not require that the defendant "inten[d] to further the illegal purpose" of the agreement. *Arditti*, 955 F.2d at 340. Indeed, the court approved an instruction allowing the jury to "convict [] only if it found that

[defendant] joined the plan *knowing that it was unlawful*." *Id.* at 341 (emphasis added). Brown did not receive such an instruction, and there was no evidence that he ever "intended to further the illegal purpose."

The trial court's instructions on aiding and abetting were equally defective. Because these charges refer directly to the court's instructions on the substantive counts, and a *Pinkerton* instruction was given, the same errors infected the aiding and abetting/substantive charges and convictions. *Ismoila*, 100 F.3d at 387. In *Ismoila*, this Court held that to prove aiding and abetting, the government must show that defendant "associated with the criminal venture such that he had the same criminal intent as the principal." *Id*. This necessarily rests on an adequate substantive instruction. Here, because of the conspiracy and substantive charge failings, the court's admonition that defendant must have the "requisite criminal intent" (30:6132) was meaningless.

Eliminating any "intent to further the unlawful purpose" from the instructions effectively created strict liability. Indeed, the government has long and amazingly asserted that it need only show that these Defendants "intend to accomplish *an objective*. *They do not have to show that the objective is illegal*" (Dkt. 283:65) (emphasis added). Thus, anyone who deliberately processed any document in the

barge transaction could have been convicted under the government's theory and these instructions.

However, the fundamental *mens rea* of "intent to further the unlawful purpose" is required for any crime with specific intent. *See Liparota v. United States*, 471 U.S. 419, 434, 105 S.Ct. 2085, 2092-93 (1985) ("To prove that [defendant] knew his [conduct] was unauthorized, . . . the government need not show he had knowledge of specific regulations. . . . Rather, as in any other criminal prosecution requiring *mens rea*, the Government may prove . . . that [defendant] knew that his conduct was unauthorized or illegal."); *see generally United States v. Anderson*, 853 F.2d 313, 318-19 (5th Cir. 1988).[34] The requirement that the government prove a defendant knew his conduct was "unauthorized or illegal" is fundamental and sensibly imposes the level of "culpability . . .we usually require . ..to impose criminal liability." *United States v. Aguilar*, 515 U.S. 593, 602, 115 S.Ct. 2537, 2563 (1995). Here, as in *Arthur Andersen*, the same prosecutors removed critical elements from, and broadened, the instructions. Indeed, "it is striking how little culpability the instructions required."

[34] Nor does this simple and inarguable construction create a "mistake of law" defense. See *Liparota*, 471 U.S. at 425 n.9, 105 S.Ct. at 2088 n.9. *Cf. United States v. Trevino-Martinez*, 86 F.3d 65, 69 n.4 (5th Cir. 1996). To the extent that *United States v. Dockray*, 943 F.2d 152, 156 (1st Cir. 1991), and *United States v. Porcelli*, 865 F.2d 1352, 1358 (2nd Cir. 1989), hint, in *dicta*, to the contrary, they are neither legally correct nor controlling.

They "simply failed to convey the requisite consciousness of wrongdoing." 125 S.Ct. at 2129. Reversal is required on Counts I, II, and III. *Yates,* 354 U.S. at 312.

C. The Court Erroneously Omitted The Essential Element Of Materiality From The Books And Records Charge.

United States v. Wells, 519 U.S. 482, 117 S.Ct. 921 (1997), provides the framework to determine whether a federal statute contains an implicit materiality requirement. The plain language and framework of *Wells*, when applied to 78m(b)(2), in the context of *Neder v. United States*, 527 U.S. 1, 20, 119 S.Ct. 1827, 1839 (1999), and other interpretations of the Exchange Act, lead inexorably to a single conclusion: 15 U.S.C. 78m(b)(2) must be read to require materiality.[35] The government's own case supports this reading, and this was not harmless error.

The Books and Records provision–15 U.S.C. 78m(b)(2)–is not a "false statement" statute analogous to 18 U.S.C. § 1014 or those upon which the government relies (GBr. 166). *Wells* draws a clear distinction between federal statutes criminalizing purely false statements and those criminalizing mis- or false representations. *Wells*, 519 U.S. at 491, n.10, 117 S.Ct. at 927, n. 10. Specifically, *Wells* states that "misrepresentations," as utilized in federal criminal statutes, will

[35] Contrary to the government's assertion (GBr.167 n.69), Brown casts no reliance on the second clause of 78ff(a) for a materiality requirement. The cited materials (Brown Br. 39 n. 28, 40), are simply uniform precedent that Exchange Act convictions require materiality.

more frequently carry an implicit materiality requirement *from the common law*. Even though *Wells* did not read materiality into §1014, it found that the elements of the offense essentially required proof of materiality. *Id*. *See also Kungys v. United States*, 485 U.S. 759, 108 S.Ct. 1537 (1988); *Fedorenko v. United States*, 449 U.S. 490, 101 S.Ct. 737 (1981).

The *Wells* framework dictates an implied materiality requirement in 78m(b)(2), similar to the discrete interpretations made in *Neder*, 527 U.S. at 20, 119 S.Ct. at 1839 (following *Wells*, materiality is an implied element of securities fraud), and numerous circuit court decisions. *See, e.g. United States ex rel. A+ Homecare, Inc. v. Medshares*, 400 F.3d 428, 442-43 (6th Cir. 2004) (materiality is an essential element under 31 U.S.C. § § 3729(a)(1), 3729(c), and 3729(a)(7), even though not stated in the text); *United States v. Nash*, 115 F.3d 1431, 1436 (9th Cir. 1997) (materiality requirement for [18 U.S.C.] § 1344 survives *Wells* even though not stated in the text); *see also Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1446 n.9 (5th Cir. 1993) (materiality is an essential element of a claim under the 1933 and 1934 Acts). The government addresses none of this authority.

Wells provides the framework for assessing whether, in the absence of plain language, a federal statute criminalizing false statements or misrepresentations incorporates "materiality." The initial inquiry examines: (1) whether the plain

language of the statute contains a materiality requirement; if not, (2) can the party demonstrate that the terms of the statute –e.g. fraud, misrepresentation–"acquired any implication of materiality that came with it into" the statute. *Wells*, 519 U.S. at 490-91, 117 S.Ct. at 926-27. Courts "presume that Congress incorporates the common-law meaning of the terms it uses . . ." *Id*. *See Neder*, 527 U.S. at 21-22, 119 S.Ct. at 1840 (same); *Field v. Mans*, 516 U.S. 59, 69, 116 S.Ct. 437, 443 (1995) ("'[F]alse pretenses, a false representation, or actual fraud,' carry the acquired meaning of terms of art. They are common-law terms, and … they imply elements that the common law has defined them to include.").

If the primary tests are inconclusive, *Wells* contemplates additional inquiries: (3) whether the legislative history casts light on the terms of the statute, 519 U.S. at 496, 117 S.Ct. at 929-30; (4) whether, upon a test of triviality, materiality should be read into the statute "to avoid the improbability that Congress intended to impose substantial criminal penalties on relatively trivial or innocent conduct," 519 U.S. at 498, 117 S.Ct. at 931;[36] and (5) if the Court "can make no more than a guess as to

[36] *See Williams v. United States*, 458 U.S. 279, 286-87, 102 S.Ct. 3088, 3092-93 (1982) (statute not applicable where it "made a surprisingly broad range of unremarkable conduct a violation of federal law"); *Basic Inc. v. Levinson*, 485 U.S. 224, 238, 108 S.Ct. at 978, 987 (1988) ("It is not enough that a statement is false or incomplete, if the misrepresented fact is otherwise insignificant."); *see also Virginia Bankshares v. Sandberg*, 501 U.S. 1083, 1096, 111 S.Ct. 2749, 2760 (1991) ("[T]o recognize liability … without any demonstration of materiality would authorize … litigation confined solely to … the impurities of a[n] [officer's] unclean heart.").

what Congress intended," 519 U.S. at 499, 117 S.Ct. at 931, whether the rule of lenity requires incorporating materiality. *Id*.

While the plain language of the Foreign Corrupt Practices Act ("FCPA"), specifically 15 U.S.C. § 78m(b)(2), does not specify "materiality" as an element for conviction under the books and records provision, there is no indication Congress envisioned the use created by the Enron Task Force. The FCPA was hastily enacted to address the pressing issue of corporate bribery of foreign officials. Specifically, "[t]he house version of the bill did not contain the accounting provisions at all, and they were never debated on the House floor or in a House committee. In the Senate, the accounting provisions were overshadowed by the looming issue of overseas payment." *Guide to the New Section 13(b)(2) Accounting Requirements of the Securities Exchange Act of 1934 (Section 102 of the Foreign Corrupt Practices Act of 1977)*, A *Report*, 34 Bus. Law. 307, 309 (1978-1979).[37] Nothing in the legislative history demonstrates a conscious determination to exclude materiality or supports an interpretation that Congress intended to do so. *See Wells*, 519 U.S. at 496, 117 S.Ct.

[37] Numerous commentators have described the "peculiar, almost accidental character of [the FCPA's] legislative origins." *Id*. at 321. *See Hazen, Thomas Lee*, LAW OF SECURITIES REGULATION § 22.5 (2005) (FCPA "amendments were inspired by concerns over foreign kickbacks and other corrupt practices."); *United States v. Kay*, 359 F.3d 738, 746-47 (5th Cir. 2004) ("Congress enacted the FCPA in 1977, in response to recently discovered but widespread bribery of foreign officials by United States business interests.").

at 929 ("[I]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law"). No circuit has explicitly addressed this issue, but Courts have consistently held that all actions under the Exchange Act demand a materiality finding–i.e., that the error or omission of information impacted the decision of investors. *Basic*, 485 U.S. at 230, 108 S.Ct. at 982-83; *Krim*, 989 F.2d at 1446 n.9; *Greenhouse v. MCG Capital Corp.*, 392 F.3d 650, 660 (4th Cir. 2004) ("the securities laws are only concerned with lies about material facts").[38]

This provision proscribes "corrupt practices" in the keeping of books and records generally–not false statements specifically. The plain language of 78m(b)(2) ("accurately reflects," "knowing circumvention") equates more readily with the common law terms, "misrepresentation" and "fraud" than with the term, "false statement." Under common law, materiality must be read into the statute absent clear contrary directions from Congress. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 579, 116 S.Ct. 1589, 1600-01 (1996) (fraud has always required that

[38] *Greenhouse* rejected an argument similar to the government's contention here that any fraud is material. "Reading the law otherwise, as Appellants would have us do, simply reads materiality out of the statute. Under their theory, almost any misrepresentation by a CEO–including, perhaps, one about his or her marital fidelity, political persuasion, or golf handicap–that might cause investors to question management's integrity could, as such, serve as a basis for a securities-fraud class action. The law simply does not permit such a result." *Greenhouse*, 392 F.3d at 660. Under the government's theory that any fraud is material, even the deliberate inflation of an asset by $10 or intentional "rounding" would be a federal felony.

misrepresentations or omissions be material to be actionable); *Equitable Life Ins. Co. v. Halsey, Stuart & Co.*, 312 U.S. 410, 423-26, 61 S.Ct. 623, 629-31 (1941) (common law fraud in the sale of securities requires materiality); *Lewis v. Bank of America*, 343 F.3d 540, 545 (5th Cir. 2003) (elements of common law fraud include materiality).

Both the test of triviality and the rule of lenity dictate that materiality is an implied and essential element. First, the disclosure and accounting provisions of the FCPA, separate from provisions criminalizing the payment of bribes (15 U.S.C. §§ 78dd-1-2), are appropriately characterized as *internal* accounting controls. *See* H.R.CONF.REP.NO. 100-576 at 916, *reprinted in* 1988 U.S.C.C.A.N. 1547, 1946. Further, "Congress' use of the terms 'records,' suggests that any tangible embodiment of information made or kept by an issuer is within the scope of 13(b)(2)(A)." *S.E.C. v. World-Wide Coin Investments, Ltd.*, 567 F.Supp. 724, 749 (N.D.Ga. 1983). When enforced as a federal felony, the books and records provision must have substantive parameters to guide both prosecutors and issuers. *See Williams*, 458 U.S. at 286, 102 S.Ct. at 3092 (statute should not be interpreted to "make a surprisingly broad range of unremarkable conduct a violation of federal law"). No case has addressed or established the essential elements for a conviction.

Under the rule of lenity, where the statutory history is this ambiguous, and the materiality requirement is so integral to the Exchange Act, statutory language more

explicit than that of 78m(b)(2) is needed to find that Congress *intended* to place the Department of Justice in the business of prosecuting federal conspiracy charges against all sides of a business transaction for every wrong entry–no matter how insignificant–in the books of every public company. A narrow construction is required. *Williams*, 458 U.S. at 290, 102 S.Ct. at 3094 ("a statute that is not unambiguous in its terms and that if applied here would render a wide range of conduct violative of federal law, a legislative history that fails to evidence congressional awareness of the statute's claimed scope, . . . " must be narrowly construed). *Accord United States v. Enmons*, 410 U.S. 396, 411, 93 S.Ct. 1007, 1015 (1973); *see also United States v. Orellana*, 405 F.3d 360, 370 (5th Cir. 2005) (applying rule of lenity because of the "ambiguity" of the statute, the "questionable interpretation" used to criminalize conduct, "and the absence of binding case law"). The rule of lenity requires an implied materiality requirement here.

The way the government prosecuted this case necessitates implying materiality (GBr. 168). It tried this case and obtained jury instructions as if this were a "securities fraud." The government repeatedly waved the banner of Enron shareholders and a defrauded public to convict and sentence Brown.[39] It premised

[39] "This is a case about cheating and lying to deceive shareholders" (11:389); ". . . they cooked the books" (21:3952; 30:6141, 6511-12); "This is a case about the integrity of our public markets . . . " (31:6557).

this conspiracy on a theory of fraud on the market and stock price manipulation (11:389; 18:2768-71, 2876, 2893-96, 2902; 20:3570, 3575-77; 21:3952). Even as late as sentencing, the prosecutor argued: "Congress mandated jail time for *securities fraud offenses like this* that resulted in losses" (Dkt. 809:45). Thus, the government's theory of this "securities fraud" alone requires grafting a materiality element onto this charge. These crimes uniformly require proof of materiality. *Basic Inc.*, 485 U.S. at 230, 108 S.Ct. at 982-83; *Krim,* 989 F.2d at1446 n.9; *Greenhouse*, 392 F.3d at 660.

Assuming an implicit materiality element, the government next characterizes the barge deal as *material*, and it pleads "harmless error." Both arguments fail. The standard test for materiality in the securities context asks whether "the reasonable investor might have considered [the omitted or misrepresented facts] important in the making of [an investment] decision." *TSC Industries, Inc. v. Northway, Inc*. 426 U.S. 438, 447, 96 S.Ct. 2126, 2131 (1976); *ABC Arbitrage Plaintiffs Group v. Tchuruk*, 291 F.3d 336, 359 (5th Cir. 2002) (same). While there is no numerical benchmark, *Basic,* 485 U.S. at 236, 108 S.Ct. at 986, and materiality is a case-specific determination, *id.* at 250, 108 S.Ct. at 993, courts must be guided by some parameters.[40] In any comparable context, the barge deal would be immaterial (Brown

[40] *Neder* held that, where the trial court ruled on the question of materiality as a matter of law, failure to submit materiality to the jury is subject to harmless error analysis. *Neder*, 527 U.S. at 22-24, 119 S.Ct. at 1840-41. Here, however, no charge or determination on materiality was made *by either* judge or jury. *Blakely v. Washington*, 542 U.S. 296, 124

Br. 42 n. 32, 33). *See also In re Westinghouse Securities Litigation*, 90 F.3d 696, 714-15 (3rd Cir. 1996) (0.54% of net income not material); *Shuster v. Symmetricon, Inc.*, 1997 WL 269490, at *8 (N.D.Cal. Feb. 25, 1997) (2% not material as a matter of law).

The government has no authoritative source or meaningful data for its contention that Enron knew it would fail to meet its earnings projection but for the barge deal, or that missing $.31 a share would have been material (GBr. 168-70). Instead, it relies on general testimony from lower Enron employees, but even that conflicted. Some analysts projected $.30 share, which Enron met without the barge earnings (20:3544-48; 21:3881; GX401). Government witness Sean Long admitted that he could not imagine that his APACHI unit's failure to meet earnings would have any effect on the market (16:2274). Boyt said this one-shot deal had little impact on income (18:2750, 2753; 21:3783-86).

Enron had $40 billion in revenues and $957 million in net profits (21:3770; GX801, 806). The barge deal represented *less than 1%* of Enron's *net* profits for the

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S.Ct. at 2531 (2004), and *United States v. Booker*, ___US___, 125 S.Ct. 738 (2005), entitled Brown to have this essential element decided by a jury, and its omission is not harmless. *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310 (1995). This same Task Force *lost* its next case against the Broadband defendants–where materiality was a jury issue–even though Enron's stock jumped $13 (25%) a share upon the Broadband announcement (21:3783).

year (*See* Brown Brief 42-43). This is the *only* Enron–related case the government has brought without a standard securities fraud charge, and, it did so because it could *not* prove materiality. Under all precedent, this deal was not material.[41]

Ignoring its own concessions, the evidence, and the fact that it specifically told the jury: "the government doesn't have to prove materiality with respect to Enron's books and records" (31:6526), the government now asserts that the failure to submit this essential element to the jury was harmless. However, this is not a case where "the error [does] not warrant correction in light of the overwhelming and uncontroverted evidence" *supporting* materiality. *Neder*, 527 U.S. at 15, 119 S.Ct. at 1836-37. Here, the evidence proves it was *not* material. Indeed, constituting less than 1% of Enron's earnings, the barge deal was not material as a matter of law. *Shuster*, WL 269490.

The government rallied and inflamed this jury to protect the public and shareholders. The last thing the jury heard was the government's impassioned mantra:

> **"This is a case about the integrity of our public markets. Publicly traded companies mean that the public own that stock. Members of the public, moms, dads, pension funds, people of all races, all creeds,**

[41] *Contrast Gebhardt v. ConAgra Foods*, 335 F.3d 824, 829-30 (8th Cir. 2003) (material where Defendant "overstated its net income for 1999 and 2000 by 8%"); *Ganino v. Citizen Utilities Co.*, 228 F.3d 154, 166 (2nd Cir. 2000) (alleged misrepresentation affected 11.9% of after-tax net income).

> **all beliefs, people just like you. They didn't have a right to much. They didn't have a guarantee like these guys had. . . .They weren't entitled to much, but they were entitled not to be lied to. They were entitled not to be cheated. And don't forget that as you deliberate"** (31:6557).

These Merrill Defendants were the first individuals tried in Houston amid the outrage following Enron's collapse. It cannot be said "beyond a reasonable doubt that the error complained of did not contribute to the [jury] verdict obtained." *Neder*, 521 U.S. at 15.

The failure to require materiality has produced an absurd and unjust result: *Brown himself could have announced Enron's gain on the barge deal directly to the public or personally signed Enron's 10-K* (both of which require materiality) and **not** committed a crime, but he is in prison now because *Enron* recorded an *immaterial* gain on *Enron's* internal books on a transaction he always opposed. Reversal is required. *Yates*, 354 U.S. at 312.

IV. BROWN'S CONVICTIONS FOR PERJURY AND OBSTRUCTION MUST BE REVERSED AND RENDERED.

The government has ignored the Supreme Court's decisions in *Bronston* and *Gaudin*, and the controlling decisions of this Court, all of which require reversal of Brown's convictions for perjury and obstruction.[42] The government mischaracterizes

[42] It cited *Bell* and *Cosby* on the standard of review, but did not distinguish them on the merits. Both *reversed* convictions for errors like those made here. Legal insufficiency is reviewed *de novo*. The Government's argument as to standard of review is erroneous.

the few arguments it addresses. Brown has consistently explained that his testimony was truthful, expressed his own understanding in response to legally infirm questions, and argued that the government did not prove this testimony was material to the grand jury. Brown must be acquitted on both charges. *Cosby*, 601 F.2d at 757; *Bell*, 623 F.2d at 1137; *United States v. Ballis*, 28 F.3d 1399 (5th Cir. 1994); *United States v. Abrams*, 568 F.2d 411, 419 (5th Cir. 1978).

Challenges based on the "literal truth" of defendant's testimony are reviewed *de novo*. *United States v. Roberts*, 308 F.3d 1147, 1152 (10th Cir. 2002) ("We review *de novo* whether a conviction for perjury should be reversed because the sworn statements were literally truthful."); *United States v. DeZarn*, 157 F.3d 1042, 1046 (6th Cir.1998) (same). To the extent that language in *United States v. Bell*, 623 F.2d 1132, 1136 (5th Cir. 1980) is contrary, it is expressly confined to "interpretations" and not to the question of "literal truth." Similarly, a challenge to the refusal to admit the transcript of defendant's testimony is reviewed *de novo*. *United States v. Cosby*, 601 F.2d 754, 756-57 (5th Cir. 1979). To the extent that exclusion of the entire transcript implicated the materiality inquiry, notwithstanding *Gaudin*, that challenge must also be reviewed *de novo*. *Id*. *Cf. Bell*, 623 F.2d at 1135. Furthermore, on defendant's challenge to whether a question is *fundamentally* ambiguous, most courts apply a *de novo* standard of review. *United States v. Farmer*, 137 F.3d 1265, 1268-69 (10th Cir. 1998) (listing circuits who conduct *de novo* review, and distinguishing from an inquiry premised on "arguable" ambiguity); *see also United States v. Brumley*, 560 F.2d 1268, 1277 (5th Cir. 1977) (ambiguity of questions precluded conviction for perjury). Under such circumstances, fundamental ambiguity dictates that the truth or falsity of defendant's statement is not susceptible of proof. *Kolaski v. United States*, 362 F.2d 847, 848 (5th Cir. 1966). Even assuming the government's "sufficiency" review, the record and the law require reversal of Brown's convictions and acquittal rendered for failure to prove the essential elements. *See Bell*, 623 F.2d at 1135-37; *Brumley*, 560 at 1275-77; *United States v. Davis*, 752 F.2d 963, 968 (5th Cir. 1985). The government did not even "endeavor" to prove the elements of obstruction. (See Brown Br. 76).

A. The Government's Questions Do Not Pass The *Bronston* Test,[43] And The Government Did Not Prove Brown's Answers Were Material To The Grand Jury.

Brown does not claim that the government had to show the Grand Jury "threw in the towel" because of his testimony or that its questions were "so unclear that he gave false responses" (GBr. 127). Rather, the questions themselves were so imprecise as to require reversal for legal insufficiency.

Brown was convicted on the following three questions, themselves only partially quoted in the indictment and stripped of context from extensive Grand Jury testimony that the jury never heard. None passes the *Bronston* test:

> Q: Do you have any *understanding* of *why Enron would believe* it was *obligated* to Merrill to get them out of the deal on or before June 30th?[44]

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[43] *Bronston v. United States*, 409 U.S. 352, 93 S.Ct. 595 (1973).

[44] This question actually was preceded by and referenced something Enron Treasurer Glisan had written, but that Brown had never seen: "Do you see where it says, 'To be clear, Ene. (Enron) is obligated to get Merrill out of the deal on or about June 30th. We have no ability to roll the structure?'" (GX965A; 77-80; 20:3334-40).

Highlighting the ambiguity, the government's own witnesses conflicted on the "obligation." Glisan admitted he wrote this email to pressure his subordinates. He "wanted to create a firm deadline for those who were trying to find *a third-party purchaser*." He "*felt*" Enron was obligated to do that (20:3608). Ironically, even Kopper referred to Fastow's representation to find a third-party buyer as a "moral obligation" (14:1456). Garrett said Enron had no obligation to buy the barges and Merrill could be stuck with them (13:1003, 1015). Even among the government's witnesses, there was no consensus of anything more than an assurance to find a third-party buyer in six months–which was not unlawful. *See Cochran*, 109 F.3d at 666 (reversing because even among government witnesses, no consensus existed regarding required disclosure).

A: It's inconsistent with my understanding of what the transaction was.

* * *

Q: ....Again, do you have any information as to a promise to Merrill that it would be taken out by sale to another investor by June 2000?[45]

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

Q: So you don't have any *understanding* as to why there would be a reference [in the Merrill Lynch document] [sic] to a promise that Merrill would be taken out by a sale to another investor by June of 2000?[46]

A: No.

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[45] The government omitted most of this question–actually three questions in one–all referencing an LJM2 document by Ace Roman that Brown had never seen. The first two parts read: "Now, do you see in this document where it describes the transaction, and the document is dated June 29th of 2000? Do you see in the first sentence where it says, 'Enron sold barges to Merrill Lynch in December of 1999, promising that Merrill would be taken out by sale to another investor by June 2000.'" The prosecutor did not even stop between the three questions for Brown to answer (GX965A: 88; 20:3320-21, 3325). Brown's hesitation and confusion is evident in his halting opening.

[46] The indictment called this a "Merrill Lynch document" when it was actually written by Ace Roman for LJM2 (20:3320-21, 3325-6, 3340; Brown RE2).

1. *Bronston* Requires Precise Questioning.

These questions do not support perjury or obstruction. *Bronston*, 409 U.S. at 362; *Abrams*, 568 F.2d at 419 (reversing a perjury conviction for *Bronston* problems because questions asked what *would* have happened). *Bronston*, which the government ignores, holds that a literally true answer does not constitute perjury, and "[p]recise questioning is imperative as a predicate for the offense of perjury." 409 U.S. at 362, 93 S.Ct. at 602, 34 L.Ed.2d at 576. There was nothing precise in the government's questions to Brown.

Instead, the government's questions were infected with ambiguity regarding time and subject-matter. They called for Brown's understanding, and his understanding of the understandings, actions or beliefs of others. Aside from the ambiguous questions, Brown's own construction, opinion, and interpretation are not matters of *fact* and cannot form a legal basis for perjury or obstruction.[47] No question inquired of an Enron buy-back. The questions specified no time-frame, and Brown neither had personal knowledge of, nor was a party to, the "obligation" mentioned. His unilateral understanding rested entirely on hearsay, which could have changed

[47] Court's have long held that perjury is not committed by a statement that represents a conclusion, opinion or understanding. These are matters of construction. *See Nurnberger v. United States*,156 F. 721, 736 (8th Cir. 1907) (mere conclusion, opinion or understanding).

through time and conversations he was never even asked to identify.[48] The questions for which he was indicted referenced materials written by *Enron* personnel who never spoke to Brown.[49]

Although the government had hours of opportunity before three separate tribunals, it never asked a direct question, such as: "Have you ever said or written that 'Fastow promised to pay us back no matter what'?" Or–"Did anyone tell you in December 1999 that Fastow guaranteed Merrill that *Enron* would buy back the barges?" At least, these questions might have been precise, fact-based and legally relevant. The questions for which he stands convicted were not. *Bronston*, and this Court's decision in *Abrams*, require reversal. *Abrams*, 568 F.2d at 423 (failure to "pin down" required reversal and acquittal); *accord*, *Brumley*, 560 F.2d at 1277 (reversing perjury for lack of specificity, critical questioning, and unequivocal answers).

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[48] In the Grand Jury, Brown could have been referring to his hearsay understanding at the time of the transaction. In the email 14 months later, he could have been referring to an understanding from more recent hearsay, a promise *personally* by Fastow, or, on behalf of LJM2–*not Enron*.

[49] As in *Abrams*, careful scrutiny of Brown's answers shows they are literally true. There is no evidence that Brown had any basis for understanding what Ace Roman, Glisan or "Enron" believed, and even if he did, he was asked for and expressed *his own understanding*.

2. The Government's Concession That It Was Lawful For Enron To Agree To Remarket The Barges To A Third Party Renders Brown's Answers Legally Immaterial.

The questions and answers for which Brown stands convicted are legally immaterial because they inquire about conduct the government belatedly conceded is *lawful*. 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 was inconsistent with the question. This is legally insufficient for perjury or obstruction. It is neither false nor material. *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*, 570 F.2d 537, 539 (5th Cir. 1978); *see United States v. Serafini*, 167 F.3d 812, 818-24 (3rd Cir. 1999); *Nurnberger*, 156 F. at 736.

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*?" The government finally conceded late at trial, although not in front of the jury, and now on appeal, that an agreement for a sale to another investor is lawful (23:4520; GBr. 234). As a matter of law, Brown's expressions of his personal understanding to questions about *lawful* conduct could not have been material to the Grand Jury, have impeded its criminal investigation, or constituted perjury or obstruction.

3. The Government Failed To Prove Materiality, And The Court Erred In Excluding All Of Brown's Testimony.

The government ignores the exclusion of Brown's full testimony because it cannot prove materiality or excuse its reversible error in failing to introduce his entire transcripts. The court exacerbated this error by excluding Brown's proffers.[50] Admission of the full transcript is this Court's *preferred way* of proving materiality. *Abrams*, 568 F.2d at 421 (entire transcript is the "best way" to make perjury determination); *Gebhard v. United States*, 422 F.2d 281, 289 (9th Cir. 1970) ("The full transcript was admissible to show the materiality of perjured testimony to the subject matter of the investigation.").[51] Indeed, this Court's decisions require reversal on this basis alone. *Ballis*, 28 F.3d at 1407 (reversing obstruction conviction for exclusion of defendant's evidence of what was said); *Cosby*, 601 F.2d at 757-59 (acquitting of perjury for failure to prove materiality upon exclusion of transcript).

The government does not distinguish this controlling precedent. Regardless of how the jury was instructed, the government cites *no evidence*, and it cannot show,

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[50] Although it recognized that materiality and obstruction require examination of the entire transcript, the district court excluded all of Brown's transcripts upon the government's objections and wrongly took the materiality issue from the jury (22:3837-38, 3974-76), a decision which itself requires reversal. *Gaudin*, 515 U.S. at 522-23, 115 S.Ct. at 2320.

[51] The court also erred in denying even the small portions of extra testimony Brown offered under the basic Rule of Completeness (See Brown Brief, n. 59).

that Brown's statements were legally material to the Grand Jury. Indeed, without Brown's full testimony, the jury had *no basis* to evaluate what the government now asserts was the "central issue" before the Grand Jury. This Court has expressly disapproved of the tactics the government used here, because the result "merely attest[s]" to the government's "own purposes and actions, not the nature, scope or extent of the grand jury's inquiry." *Bell*, 623 F.2d at 1135.[52]

Moreover, Brown offered his full testimony to show his state of mind and lack of intent–critical to his defense (21:3835-37). Perjury requires proof of a materially false statement. Where, as here, the alleged obstruction of justice is based on a false statement, obstruction also requires proof of evil, corrupt intent to obstruct. *Aguilar*, 515 U.S. at 599, 115 S.Ct. at 2362 (defendant must act with evil intent to obstruct); *In Re Michael*, 326 U.S. 224, 227-28, 66 S.Ct. 78-80 (1945) (perjury alone does not constitute obstruction); *United States v. Griffin*, 589 F.2d 200, 204 (5th Cir.), *cert. denied*, 444 U.S. 825, 100 S.Ct. 48 (1979) (perjury alone does not have a necessarily inherent obstructive effect). Courts have repeatedly recognized that the entire transcript is admissible and relevant to state of mind and intent. *See United States v.*

[52] Brown repeatedly sought to introduce his full testimony from the three investigatory bodies (19:3095, 3281, 3286; 20:3317, 3660-62; 21:3835-37, 3853; X965A; X975A, X980A, Brown Br. 70-74). This was critical to correct the distortions from the government's isolated snippets, illustrate the ambiguity of the questions, and to admit Brown's evidence of what he had said. *Serafini*, 167 F.3d at 818-24; *Ballis*, 28 F.3d at 1399.

Petito, 671 F.2d 68, 74 (2nd Cir. 1982); *Ballis*, 28 F.3d at 1407 (reversing where exclusion of proffered testimony deprived defendant of his defense).

B. Trinkle Corroborated Brown's Testimony, Which Was Literally True.

The Trinkle call, on which the government so heavily relies, corroborated Brown's testimony. The call concluded with Bayly's declaration: "*Well, they better understand that we expect to get taken out by June 30th*" (13:1071, 1199, 1200).

Completely consistent with the only conclusion of the call, 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 exactly what Trinkle said, *three times*, was the stated conclusion of the call (13:1071, 1199, 1200). Even Brown's use of the word "*assurances*" comported with Trinkle's testimony that "*somebody at Enron*" (never identified) had given "*his strongest verbal assurances*" ("*his word*") that Merrill "wouldn't own these past June 30th"(13:1047, 1072). Thus, the government proved that Brown's testimony was literally true.

Ironically, the government declares it "beside the point" that Fastow said, in *Brady* material, that he did not give a guarantee, "did not recall using the word

promise," and even more significantly, assured *only* that a third-party would buy the barges (GBr. 124; FurstRE8:4). The government's contention that Brown cannot rely on Fastow's *Brady* material because it was not in evidence begs the question.[53] Fastow, who supposedly made the alleged "promise" or "guarantee" (*to others*), told the government *he never said that*.[54]

Denying use of Fastow's *Brady* material was particularly prejudicial to Brown (19:3289). Fastow's *own words* undermined the government's case on all *five* counts against Brown and specifically refuted the perjury and obstruction charges. Fastow flatly denied promising an *Enron* buy-back, and he did not use the word "guarantee" at all–much less promise to "pay Merrill back no matter what." Brown was entitled to have the jury know this, and the error in its exclusion was far from harmless.

Again the government depends on its erroneous assertion that the engagement letter and "demand" letter evidenced Brown's knowledge at the time. Appellate counsel cites only to exhibits and no testimony, however, because there is none

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[53] This is one of many injustices that facilitated these wrongful convictions. The court committed reversible error in excluding this impeachment evidence (19:3289; Furst Briefs).

[54] Fastow said he did not guarantee that Enron would buy back the barges. Rather, he gave Merrill verbal assurances to create a "high level of confidence" that Enron would find a *third-party buyer* (14:1612-14; FurstRE8)–later confirmed by LJM2's purchase. The district court belatedly recognized at Furst's sentencing that Fastow did not use the term "guarantee" (Dkt. 809:20).

(16:2011; 19:3209-10; GRE18, 32). The engagement letter contains no guarantee. Brown was not even copied on the emails transmitting the engagement letters, or the never-sent "demand letter" (GRE18,19, 20, 32). There is no evidence he even saw any of them.

The unsworn, inadmissible Brown email, written long after Merrill's sale of the barges, does not prove that Brown's Grand Jury testimony was false or obstructive either. Both statements could have been true expressions of his hearsay understanding at different times. In addition, Brown, just as many other government witnesses, under oath, understood and expressed whatever Fastow said as something less than a binding, legal obligation–which was literally true. The email does not express an Enron buy-back any more than it reflects a representation by Fastow personally–or on behalf of LJM2. Meanwhile, government witnesses, testifying under generous deals with the government, asserted that Enron made "no binding assurances" and had no legal "obligation." (Garrett, 13:1003, 1015; Lawrence, 15:1775-77; Kopper 14:1456).

Thus, the government's own witnesses, Trinkle, and even Fastow, corroborated Brown, and none were prosecuted for perjury. The questions for which Brown was indicted addressed only the lawful take-out by a third-party buyer–of which the email, in its ambiguity, was equally supportive. Fastow personally, or on

behalf of LJM2, or with a letter of credit, could have "promised to pay [Merrill] back no matter what"–fully insuring *Merrill* against loss–and *Enron* could still book the gain. (*See* Bayly briefs).

C. For The Same And Additional Reasons, The Government Failed To Prove That Brown Obstructed Justice.

Brown's obstruction conviction rests on nothing more than the alleged false statements. *See In Re Michael*, 326 U.S. at 227-28, 66 S.Ct. at 78-80 (requiring more than perjury); *Griffin*, 589 F.2d at 204 ("[P]erjury alone does not have a necessarily inherent obstructive effect on the administration of justice"). The government argues that it needed to prove only that Brown tried to mislead the Grand Jury, and that Brown did so by "denying the guarantee and any knowledge thereof."[55] However, that is not even the basis for the obstruction charge, which instead, rested upon only three lines out of 450 pages the jury never heard (BrownRE2:14-15), and the government has no additional evidence that Brown endeavored to impede or obstruct.

Brown's expression of his understanding as something different than a "promise," like that of many other witnesses, and his understanding about conduct the

[55] Brown did not "deny any knowledge" and was not even asked about a "guarantee" in the selected charge. Moreover, he admitted his personal, hearsay-based understanding, at some unknown time, that Fastow had given oral "assurances" or strong comfort that Merrill would be taken out by June 30th, and that Merrill had made plain that it expected to be taken out by June 30th. Like Fuhs, Brown's obstruction and perjury charges should have been severed and then dismissed by the government (Dkt. 392).

government finally recognized as lawful, were not an endeavor or attempt to impede justice.[56] Even the trial jury found that Brown engaged in "no substantial interference with the administration of justice." (35:6967). The government identified no evidence that Brown had the requisite corrupt intent to obstruct, or that his statements were material to the Grand Jury, and it cannot do so. Here, as in *Cosby*, 601 F.2d at 757, and *Ballis*, 28 F.3d at 1407, Brown's convictions for perjury and obstruction should be reversed and acquittal rendered.

[56] "Corruptly" must limit criminality to persons conscious of their wrongdoing. *Arthur Andersen*, 125 S.Ct. at 2136. Indeed, "corrupt" and "corruptly" are "normally associated with wrongful, immoral, depraved, or evil." *Id*; *see Aguilar*, 515 U.S. at 600, 115 S.Ct. at 2363 (reversing defendant's conviction for obstruction). If a defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct. *Pettibone v. United States*, 148 U.S. 197, 13 S.Ct. 542 (1893). False testimony alone is insufficient for obstruction. *United States v. Thomas*, 916 F.2d 647, 652-54 (11th Cir. 1990) (reversing conviction).

CONCLUSION

For these reasons and those in Defendants' original and reply briefs, adopted herein, Brown's convictions must be reversed and a judgment of acquittal rendered on all counts; the indictment dismissed; or, in the alternative, a new trial granted.

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I hereby certify that true and correct hard copies, and an electronic copy in Word Perfect version 12.0, of the Reply Brief of Appellant James A. Brown was served via Federal Express, as listed below, on this 14th day of November, 2005:

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CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32, undersigned counsel certifies this Reply Brief complies with the type-volume limitations of 5th Cir. R. 32.

1. EXCLUSIVE OF THE EXEMPTED PORTIONS OF FED.R.APP.P. 32(a)(7)(B)(iii), THE REPLY APPEAL BRIEF CONTAINS 13,985 WORDS.

2. THE REPLY APPEAL BRIEF HAS BEEN PREPARED IN PROPORTIONALLY SPACED TYPEFACE USING WORD PERFECT 12.0 FOR WINDOWS IN TIMES NEW ROMAN TYPEFACE AND 14 POINT FONT SIZE.

3. UNDERSIGNED COUNSEL IS ALSO PROVIDING AN ELECTRONIC VERSION OF THE REPLY APPEAL BRIEF TO THE COURT AND OPPOSING COUNSEL.

4. UNDERSIGNED COUNSEL UNDERSTANDS THAT A MATERIAL MISREPRESENTATION IN COMPLETING THIS CERTIFICATE, OR CIRCUMVENTION OF THE TYPE-VOLUME LIMITS IN FED.R.APP.P. 32(a)(7)(B)(iii), MAY RESULT IN THE COURT'S STRIKING THE REPLY/CROSS-APPEAL BRIEF AND IMPOSING SANCTIONS AGAINST THE PERSON SIGNING THE BRIEF.

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