No. ________

In The
Supreme Court of the United States

JAMES A. BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, in reviewing a *Brady* ruling, the Fifth Circuit erred in applying the highly deferential "clear error" standard of review instead of *de novo*, thereby exacerbating confusion, widening a Circuit split, and conflicting with this Court's approach.

2. Whether the Fifth Circuit recast and misapplied this Court's definition of materiality in *Kyles* by (i) failing to account for the cumulative impact of multiple failures to produce exculpatory evidence or (ii) postulating a theory of nonmateriality that required abandonment of the government's entire theory of the case.

3. Whether the suppressed exculpatory evidence was material as matter of law under *Brady* and *Kyles* because prosecutors (i) impaired the adversary process by providing incomplete and misleading summaries, causing the defense to assume that the concealed exculpatory evidence did not exist or (ii) capitalized on their concealment by repeatedly eliciting evidence and making representations to the jury that the suppressed evidence explicitly contradicted.

PARTIES TO THE PROCEEDING

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Prior opinions of the United States Court of Appeals for the Fifth Circuit are reported at 571 F.3d 492 (5th Cir. 2009) ("*Brown II*"), App.95a-108a, and 459 F.3d 509 (5th Cir. 2006) ("*Brown I*"). App.113a-172a.

BASIS FOR JURISDICTION IN THIS COURT

Petitioner, a former Merrill Lynch executive, seeks reversal of the denial of his motion for new trial premised on *Brady* violations. Brown was convicted of perjury and obstruction of justice for his testimony before the Enron grand jury about a transaction between Merrill and Enron in late 1999. 18 U.S.C. §§ 1503 and 1623.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Appendix (App.175a-177a) reproduces the text of the Fifth Amendment and 18 U.S.C. §§ 1503 and 1623.

STATEMENT OF THE CASE

Petitioner James Brown's convictions arise out of the government's failed "honest services" prosecution of several Merrill Lynch and Enron employees. The charges concerned alleged criminal conduct in the 1999 "Enron barge transaction" and the grand jury investigation in the wake of Enron's collapse. Brown's convictions for perjury and obstruction are the sole remaining charges in this litigation. Brown testified before the grand jury about his "personal understanding" of the barge transaction, stating his belief that the parties reached only a lawful "best-efforts" agreement to remarket the barges, and not an illegal buy-back guarantee.

For years, Brown specifically requested raw notes, FBI 302s, and testimony of all participants in the transaction, especially Merrill in-house counsel, Katherine Zrike, and former Enron Treasurer, Jeff McMahon. Zrike and McMahon were among the numerous unindicted coconspirators whom prosecutors regularly threatened to indict, thereby rendering them and other crucial witnesses unavailable to the defense. Meanwhile, prosecutors steadfastly denied

that they possessed *any Brady* evidence and claimed that their production of nineteen pages of court-ordered "summaries" exceeded their constitutional obligation. Beginning in late 2007, years after the trial, new prosecutors disclosed thousands of pages of actual notes, 302s, and testimony. The disclosures included direct, declarative statements by Zrike and McMahon that explicitly contradicted the government's central theory of the case, its hearsay evidence, and its jury arguments.

Remarkably, the prosecutors' production of additional evidence in March 2010 revealed that in 2004 the original prosecutors had *yellow-highlighted* selected exculpatory statements in the evidence they submitted for the district judge's pretrial *in camera* review. Despite highlighting the statements as *Brady* and *Giglio* evidence, prosecutors nevertheless withheld this favorable information from Brown, providing instead admittedly "meager" "summaries," which the Fifth Circuit later recognized as incomplete and misleading. To this day, prosecutors deny that their massive, belated productions included any *Brady* evidence that should have been given to Brown pretrial.

The Fifth Circuit reviewed the district court's *Brady* ruling only for "clear error," concluding that evidence was exculpatory and "plainly suppressed," but "not material." Ignoring the issue of the government's *yellow-highlighting*, the Fifth Circuit misstated the substantive *Brady* standard for materiality, corrupted the review process established in *Kyles*, and ignored the fact that the prosecutors repeatedly

elicited hearsay evidence and forcefully argued facts that were directly contradicted by the first-hand suppressed evidence. This Court must grant a writ of certiorari to resolve a circuit split regarding the proper standard of review, clarify the correct process under *Brady* and *Kyles*, and prevent prosecutors from impairing the adversary process by crafting misleading and incomplete summaries or by capitalizing on their concealment of exculpatory evidence.

A. The Underlying Transaction

1. In late 1999, Enron solicited Merrill to invest $7 million cash to purchase a minority interest in a company that would own several electrical power stations located on floating barges moored off the Nigerian coast.

2. It was a rushed, year-end deal that, ironically, Petitioner Brown opposed from the outset. Tr. 1036-37.

3. Merrill in-house counsel, Katherine Zrike, shepherded the transaction through Merrill's multi-level vetting process, and Brown's superiors approved it in discussions without Brown despite his prior objections. Tr. 4065-4113, 4115-23, 4128-30.

B. Relevant Proceedings in the District Court

1. Brown and several codefendants were indicted, tried for six weeks, and convicted of conspiracy and honest-services wire fraud. Brown alone was convicted of perjury and obstruction of justice.

2. Brown repeatedly requested *Brady* material, informing the court that no potential witness would speak with any defendant because of the government's tactics. App.203a-206a.

3. The government consistently denied that it possessed any *Brady* material, asserting that it had exceeded its obligations under *Brady*. App.207a-211a.

C. Brown's 2004 Trial

1. According to the government, Enron's unlawful "guarantee" or "promise" to buy back the barges rendered Merrill's $7 million equity investment a loan; Enron's accounting of the transaction as a sale was therefore a "sham." App.191a-197a.

2. Brown and his Merrill codefendants steadfastly maintained that Merrill received and accepted only a lawful representation that Enron would use its "best efforts" to remarket the barges to a third party within six months. Tr. 1500-08, 1695-96, 3239-40, 5701-3, 6485. "Best efforts" is a term of art describing a lawful level of commitment that is less than a guarantee. Tr. 1650-53, 4520.

3. Brown testified voluntarily before the grand jury. He was asked about his "understanding" of the transaction, "accurate or not." App.109a-112a, 178a-181a. Brown testified regarding his "personal understanding" that Enron had not made an unlawful "promise" or "guarantee," but instead had committed to use its "best efforts" to remarket the barges to a

third party. App.181a. That testimony was the sole basis for Brown's perjury and obstruction convictions.

4. Prosecutors acknowledged that a "best-efforts" agreement would have been lawful. App.191a-192a. Accordingly, government witnesses testified, and prosecutors argued, that (i) there was no "best-efforts" agreement, *id.*; *id.* at 197a-198a; Tr. 1506-8, 1650-53, 1695-96, 3520-22, 3618, and (ii) Brown lied when he testified regarding his understanding that it was a "best-efforts" representation and not "a promise." Tr. 6154, 6199, 6274-76, 6497, 6510-11, 6540.

5. Ben Glisan and Michael Kopper, Enron executives and subordinates of Enron CFO Andrew Fastow, served as the government's star witnesses. They stole millions of dollars from Enron and were highly motivated to cooperate with the government. Tr. 1311-30, 1497-1504, 3563-69. Glisan and Kopper testified that former Enron Treasurer, Jeff McMahon, "promised" or provided Merrill an illegal guarantee that Enron would buy back Merrill's interest in the barges at a guaranteed price and rate of return. Tr. 1340, 3601-03.

6. Glisan and Kopper testified that Fastow ratified McMahon's "guarantee" in a brief phone call on December 23, 1999 with several Merrill employees (but not Brown). Tr. 1339-40, 1559, 3608. The government did not call a single witness who participated in the call or heard what Fastow or McMahon actually said. Instead, it used only the double-hearsay testimony

of Glisan, Kopper, and others. Tr. 1480-81. *See* Dkt.1168, p. 22 n.30.

7. McMahon also participated in the December 23, 1999 phone call, but did not testify, largely because the prosecutors repeatedly threatened to indict him. The government stipulated that McMahon was "not available." Tr. 5260-61.

8. As to Brown specifically, only government witness Tina Trinkle testified that she believed Brown participated in an earlier internal Merrill telephone call (the "Trinkle call"), during which "somebody," "he," gave his "verbal assurances" that "sound[ed] like a guaranty." Tr. 1036-47, 1072-73. The government repeatedly argued that this imputed knowledge of the "McMahon guarantee" to Brown, App.198a-200a, although another person on the call (perhaps Brown himself) rejected a guarantee as improper. Tr. 1045-46.

D. The First Appeal and Proceedings in the District Court on Remand for a New Trial

The Fifth Circuit reversed the conspiracy and wire fraud convictions of all Merrill defendants, *United States v. Brown*, 459 F.3d 509 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 2249 (2007) ("*Brown I*"), App.113a;[1] acquitted Brown's subordinate, Bill Fuhs,

[1] The Merrill defendants' alleged conduct was "not a federal crime under the honest services theory of fraud." *Id.* at 114a, 136a-138a (reversing 12 of 14 convictions).

id. at 138a-143a; and, affirmed Brown's convictions for perjury and obstruction on a split vote. *Id*. at 144a-158a. Judge DeMoss would have acquitted Brown on those counts. *Id*. at 167a-172a (DeMoss, J., concurring in part and dissenting in part).

1. From late 2007 until March 2010, pending retrial, new prosecutors disclosed 6,300 pages of notes, 302s, and grand jury testimony that the original prosecutors had concealed. The March 2010 production of 1,500 pages revealed that the original prosecutors had *highlighted in yellow* selected exculpatory statements of McMahon and Zrike as *Brady* and *Giglio* evidence for the trial court to review *in camera* before the 2004 trial, but nevertheless withheld that information from Brown. As new prosecutors made piecemeal productions, Brown filed new trial motions and repeatedly requested an evidentiary hearing. Dkts.1004, 1020, 1030, 1160, 1168, 1201, 1217, 1227.

2. The district court denied Brown's requests for a hearing and his motions, thereby leaving the perjury and obstruction convictions standing. App.28a.[2]

[2] The repercussions of the government's tactics still loom large. It increased the stakes for Brown even as this Petition was being finalized. Brown was denied bail pending appeal and served a year in prison beginning in August 2005. Upon reversal of all conspiracy and wire fraud counts, Brown moved for immediate release, on the ground that he had already served the maximum sentence under the Guidelines applicable to perjury and obstruction. The government agreed to Brown's release *instanter* and the Fifth Circuit promptly so ordered. Since the

(Continued on following page)

The government dismissed the conspiracy and wire fraud charges against Brown three days before his scheduled retrial in September 2010. Dkt.1263. Brown appealed the denial of his motion for a new trial.

E. Applying a Clear Error Standard of Review, the Fifth Circuit Found that Exculpatory Evidence Was Suppressed But Not Material

1. The Fifth Circuit held that the first two prongs of a *Brady* violation were met regarding the statements of McMahon and Zrike. App.22a. "The McMahon notes contain numerous passages that unequivocally state that . . . there was only a 'best efforts' agreement and no 'promise,'" and they were "plainly suppressed." App.22a-23a. The court also noted that those statements could have been used to impeach Glisan and Kopper. App.23a. Addressing

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first anniversary of Brown's release, however, the government has repeatedly threatened to reincarcerate Brown and predicated any alternative resolution on abandonment of his *Brady* claims.

With full knowledge that Brown was finalizing this Petition within days, the government filed a motion on December 12, 2011, asking the Fifth Circuit to "recall and reform" its original 2005 mandate. The government asserted that Brown should be resentenced now under a higher Guidelines range. The government took this extraordinary action despite having declined the district court's invitation four years ago to seek mandamus on the resentencing issue, Dkt.1027, at p. 10 n.1, and having since acknowledged that it had waived the issue, Dkt.1152, at pp.11-12.

the government's four-line misleading summary and comparing it to McMahon's definitive denials of any guarantee, the court observed: "'No' is not the same thing as 'I do not recall.'"

2. The court assumed *arguendo* that Zrike's evidence was favorable and suppressed because it "could have helped Brown by giving the defense an argument to counter the prosecution's position that the absence of a written 'best efforts' agreement was evidence that there was no 'best efforts' agreement at all." App.25a. Nonetheless, applying a clear error standard of review, the court held the "plainly suppressed" exculpatory evidence "not material" to Brown's defense. App.1a, 16a-17a, 23a, 26a.

3. The following facts supplement the Fifth Circuit's recitation and provide the requisite context for evaluating the legal issues of the standard of review, the materiality of the evidence, the *Kyles*' protocol, and the ways in which the government exploited its suppression of favorable evidence.

a. *Jeffrey McMahon*, the original purported "guarantor," also participated in the December 23 phone call in which Fastow supposedly ratified McMahon's guarantee. Despite the fact that McMahon was never indicted, prosecutors told the jury that McMahon was "the key." They argued at least sixteen times that McMahon provided the initial unlawful buyback

guarantee.[3] Simultaneously, and until March 2010, prosecutors concealed McMahon's exculpatory statements that explicitly refuted their contentions. McMahon's repeated declarations to government agents that neither he nor Fastow ever made any guarantee but only agreed to use best efforts were crucial to Brown's case.[4]

b. *Katherine Zrike*, Merrill in-house counsel, shepherded the transaction through Merrill's extensive vetting process, going two managerial levels above Brown where his superiors approved the transaction over his objections. Under threat of indictment herself, Zrike would not speak with Brown before

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[3] "You know that Enron, through its treasurer [McMahon] and chief financial officer [Fastow], made an oral guarantee to these Merrill Lynch defendants, that they would be taken out of the barge deal by June 30th, 2000, at a guaranteed rate of return." App.196a. *See also* App.193a-194a, 199a-202a.

[4] Before the 2004 trial, Task Force Prosecutors *yellow-highlighted* (as shown in *italics* below) or highlighted around the following statements, acknowledging them to the district court as *Brady* or *Giglio* evidence, but nevertheless failing to turn them over to the defense:

> "Never made rep[resentation] to ML [Merrill Lynch] that E[nron] would buy them out at price or @ set rate of return." App.214.
>
> "Disc[ussion] between Andy [Fastow] & ML [Merrill Lynch]. *Agreed E[nron] would use best efforts to help them sell assets*." App.213a.
>
> "No – never guaranteed." "*Agreed E[nron] would use best efforts to help them sell assets*." "*Use best efforts to try to resell*." App.218a. *See also* App.215a-217a, 219a-227a.

trial. The government's court-ordered pretrial "summary" was a mere one-and-one-fourth pages, despite Zrike's hundreds of pages of sworn testimony and 302s. The summary did not mention Brown or "best efforts," although her suppressed evidence was replete with exculpatory references to both. Although Zrike was called as a defense witness by a codefendant, Brown had no knowledge of the details or force of Zrike's prior sworn testimony, which showed that she was central to the negotiation and documentation of the transaction before and long after the December 23 phone call. *Compare* App.185a-186a, *with* 228a-236a, *and* App.187a-190a.

Pointing to Zrike, the government repeatedly emphasized to the jury that no best-efforts remarketing agreement could have existed because none was ever memorialized in writing. "The written agreement between Enron and Merrill Lynch had no remarketing or best efforts provision. . . . You can spend as many hours as you would like. You will nowhere in those documents ever find a reference to a remarketing agreement or a best-efforts provision. It's not in there." App.197a-198a. The prosecutor repeatedly called upon the defense to explain: "But ask yourselves this simple question: If it's a re-marketing agreement, if that's all it is, why was it not put in writing?" App.191a-192a. *See also* App.192a.

At the same time, however, the government suppressed the exculpatory answer to that very question. It concealed Zrike's favorable evidence explaining her knowledge of the oral agreement. Prosecutors

yellow-highlighted Zrike's grand jury testimony for the district court but concealed from the defense her statement: "*The fact that they would not put in writing an obligation to buy it back, to indemnify us, all those things were consistent with the business deal and were not things that I felt were nefarious [or] problematic*." App.233a-234a (*yellow-highlighted* material in *italics*).

The prosecutors also concealed Zrike's prior testimony explaining her knowledge of the negotiations and her efforts to document the best-efforts agreement:

> The other thing that we marked up and we wanted to add was a best efforts clause, . . . that they would use their best efforts to find a [third-party] purchaser. . . . [T]he response from the Enron legal team was that – both of those provisions would be a problem. . . . [t]hey kept coming back to the fact that it really had to be a true passage of risk. . . . [W]e were not successful in negotiating that with [Enron's counsel]. App.230a-231a.

REASONS FOR GRANTING THE WRIT

Petitioner requests this Court's intervention to establish three clear rules to enforce the crucial constitutional protections established in *Brady v. Maryland*. First, consistent with the majority of Circuits, this Court should establish that *Brady* decisions must be reviewed *de novo*. Second, this Court should reject

the Fifth Circuit's novel and dangerous approach to determining materiality, and thereby refine and reinforce the *Kyles* test.[5] Third, this Court should adopt and mandate the majority rule that exculpatory evidence is material *per se* if the government corrupts the adversary process by providing deficient summaries or affirmatively capitalizing on its suppression at trial.

Recurring and widespread *Brady* violations, and the government's repeated refusal to confess error, establish the need for this Court to clarify prosecutors' constitutional duty, protect the *Brady-Kyles* rule and process, and enforce defendants' rights when the government seeks to benefit from its own misconduct.

I. THE FIFTH CIRCUIT'S "CLEAR ERROR" STANDARD OF REVIEW FOR *BRADY* INTENSIFIES THE CONFUSION AND WIDENS THE SPLIT AMONG THE CIRCUITS, MOST OF WHICH CONDUCT *DE NOVO* REVIEW

Even employing the overly deferential "clear error" standard, the Fifth Circuit reversed the district court in part, finding the evidence of Zrike and McMahon favorable, and suppressed, thus satisfying

[5] The Fifth Circuit is out of step with the majority of the Circuits and with this Court's precedents. This Court has granted *certiorari* three times to reverse the Fifth Circuit in Enron prosecutions. *See Skilling v. United States*, 130 S. Ct. 2896 (2010); *Yeager v. United States*, 557 U.S. 110 (2009); *Arthur Andersen, LLP v. United States*, 544 U.S. 696 (2005).

the first two prongs of *Brady*. App.22a-23a. As for materiality, the third prong of *Brady*, the Fifth Circuit's application of the "clear error" standard led it to conclude that the suppressed evidence was "not material" to Brown's defense. App.1a, 16a-17a, 23a, 26a. Its application of this most deferential standard of review to the crucial materiality prong of *Brady* creates a dangerous precedent, promotes inconsistent results, confuses the procedures surrounding *Brady*, and eviscerates the *Kyles* protocol.

A. The Fifth Circuit Split from the Majority of Circuits, which Review *Brady* Determinations *De Novo*

This Court has never explicitly articulated the standard of review that courts must apply to the *Brady* inquiry, and Brown's case provides an excellent vehicle to settle the issue. The Fifth Circuit's use of the clear error standard of review widens an existing split and conflicts with the majority of Circuits.[6] The

[6] The Fifth Circuit resurrected a disturbing line of cases that conflated the standards of review for *Jencks* and *Brady* determinations. It first (correctly) applied a clear error standard in *United States v. Mora*, 994 F.2d 1129 (5th Cir.), *cert. denied*, 510 U.S. 958 (1993), in reviewing a district court's *in camera* determination of whether certain materials constituted a "statement" for purposes of the *Jencks* Act. *Id*. at 1138-39. *Mora* then incorrectly extrapolated the clear error standard to the defendant's *Brady* claim. *Id.* at 1139. Other cases then picked up the clear error standard. *See United States v. Williams*, 998 F.2d 258, 268-69 (5th Cir. 1993) (citing *Mora*), *cert. denied*, 510 U.S. 1099 (1994); *United States v. Holley*, 23 F.3d 902, 913-14 (5th

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Courts of Appeals for the First, Second, Third, Sixth, Eighth, Tenth, Eleventh, and D.C. Circuits consistently review *Brady* determinations, including the materiality prong of *Brady,* using the *de novo* standard.[7]

Cir.) (citing *Mora* and *Williams* for "clearly erroneous" standard for pure *Brady* issue), *cert. denied*, 513 U.S. 1043 (1994). The Fifth Circuit revived its clear error standard of review of *Brady* issues in *United States v. Skilling*, 554 F.3d 529, 578-79 & n.74 (2009), *vacated in part on other grounds*, 130 S. Ct. 2896 (2010) (relying on the earlier Fifth Circuit cases). It then followed *Skilling* in *Brown*, but extended the clear error standard even further, to *Brady*'s materiality prong. App. 1a.

[7] *Conley v. United States*, 415 F.3d 183, 188-90, 194 (1st Cir. 2005) (applying *de novo* review to *Brady* determination); *United States v. Madori*, 419 F.3d 159, 169 (2d Cir. 2005) ("[W]e examine the record *de novo* to determine whether the evidence in question is material as a matter of law."), *cert. denied*, 546 U.S. 1115 (2006); *United States v. Risha*, 445 F.3d 298, 303 (3d Cir. 2006) ("*Brady* claims present mixed questions of law and fact. This Court conducts a *de novo* review of the District Court's conclusions of law, and a clearly erroneous review of findings of fact."); *United States v. Tarwater*, 308 F.3d 494, 515 (6th Cir. 2002) (*de novo* review applied to all prongs of *Brady*); *United States v. Phillip*, 948 F.2d 241, 250 (6th Cir. 1991) (de novo review of materiality as mixed question of fact and law), *cert. denied*, 504 U.S. 930 (1992); *United States v. Cooper*, 654 F.3d 1104, 1119 (10th Cir. 2011) ("This court reviews *de novo* claims that the prosecution violated *Brady* by failing to disclose material exculpatory evidence, 'including the determination of whether suppressed evidence was material.' ") (citing *United States v. Hughes*, 33 F.3d 1248, 1251 (10th Cir. 1994)); *United States v. Jones*, 601 F.3d 1247, 1266 (11th Cir. 2010) ("We review *de novo* alleged *Brady* violations."); *United States v. Pettiford*, 627 F.3d 1223, 1227-28 (D.C. Cir. 2010) ("The assessment of the

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The Seventh Circuit applies a more deferential standard of review where (i) materials were reviewed by the district court *in camera* before trial, and (ii) the sought-after materials constituted "confidential files." *United States v. Phillips*, 854 F.2d 273, 276-78 (7th Cir. 1988) ("When a criminal defendant seeks access to confidential [FBI] informant files, we rely particularly heavily on the sound discretion of the trial judge."). Outside those special circumstances, however, the Seventh Circuit conducts *de novo* review. *See Goudy v. Basinger*, 604 F.3d 394, 398-99 (7th Cir. 2010) (applying *de novo* standard to materiality); *United States v. Bhutani*, 175 F.3d 572, 576 (7th Cir. 1999) (reviewing *Brady* materiality question *de novo*), *cert. denied*, 528 U.S. 1161 (2000).

The Fourth Circuit picked up the Fifth's "clear error" thread in *United States v. Trevino*, 89 F.3d 187, 189-90 (4th Cir. 1996), adopting the clear error standard for the entirety of a *Brady* claim involving a confidential document. Confusingly, the Fourth Circuit has also applied *de novo* review. *See United States v. King*, 628 F.3d 693, 701-02 (4th Cir. 2011) (holding that, notwithstanding district court's *in camera* review, "we review [the court's] legal conclusions *de novo* and its factual findings for clear error"); *Walker v. Kelly*, 589 F.3d 127, 140 (4th Cir. 2009) (same).

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materiality of evidence under *Brady* is a question of law reviewed *de novo*.") (citation omitted).

The Eighth Circuit generally "review[s] *de novo* allegations of *Brady* violations," *Mandacina v. United States*, 328 F.3d 995, 1001 (8th Cir.) (reviewing *de novo*, even after two reviews by district court), *cert. denied*, 540 U.S. 1018 (2003), but, even more perplexingly, has reviewed some cases for abuse of discretion.[8]

The Ninth Circuit has sometimes applied the more deferential standards of the Fourth, Fifth, Seventh, and Eighth Circuits.[9] More recently, however, in *United States v. Kohring*, 637 F.3d 895, 901 (9th Cir. 2011), on facts remarkably similar to Brown's, the Ninth Circuit reviewed "*de novo* a district court's *Brady/Giglio* determinations and all other questions of law"[10] and awarded the defendant a new trial.

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[8] *See United States v. Willis*, 89 F.3d 1371, 1381 n.6 (8th Cir.) (citing to Seventh Circuit "exception"; abuse of discretion standard employed where *in camera* review was of juvenile's sealed statement), *cert. denied*, 519 U.S. 909 (1996).

[9] *See United States v. Strifler*, 851 F.2d 1197, 1202 (9th Cir. 1988) (applying clear error standard where *in camera* review conducted of probation file), *cert. denied*, 489 U.S. 1032 (1989); *United States v. Monroe*, 943 F.2d 1007, 1012 (9th Cir. 1991) (citing back to *Strifler* and other "privileged" materials cases as authority for using clear error standard), *cert. denied*, 503 U.S. 971 (1992).

[10] *See also United States v. Price*, 566 F.3d 900, 907 & n.6 (9th Cir. 2009) (holding that "denial of a new trial motion based on alleged *Brady* violations is reviewed *de novo*"); *United States v. Jernigan*, 492 F.3d 1050, 1053-54 (9th Cir. 2007) (*en banc*) (materiality is always reviewed *de novo*).

Kohring demonstrates how the Fifth Circuit's incorrect standard of review is outcome-determinative, and not just a minor point of procedure. As here, the government's case in *Kohring* rested primarily on two star witnesses and an FBI agent. After Kohring's conviction, the government disclosed, for the first time, "several thousand pages of documents, including 'FBI 302 reports,' [and] notes from interviews," from crucial witnesses. *Kohring*, 637 F.3d at 900. As in *Brown*, the district court denied *Kohring*'s motion for new trial without a hearing. It reasoned that while favorable, the withheld evidence did not satisfy the materiality prong of *Brady*. Reviewing *de novo*, showing the district court's materiality determination no deference, *id*. at 901-03, the Ninth Circuit held that the withheld evidence would have provided the defendant with numerous original avenues for impeachment of the prosecution's star witnesses. *Id*. at 911-12.

Such inconsistent standards and results demonstrate the current injustice, confusion among the circuits, and the pressing need for a uniform *de novo* standard of review.

B. The Fifth Circuit's Decision Cannot Be Reconciled With This Court's Precedents

This Court's precedents imply a *de novo* standard of review of *Brady* determinations. In *Ornelas v. United States*, this Court wrote that legal rules "acquire content only through application. Independent

review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles." 517 U.S. 690, 697 (1996). *Accord Lilly v. Virginia*, 527 U.S. 116, 136 (1999); *see also Thompson v. Keohane*, 516 U.S. 99, 114-16 (1995) (citing the "law declaration aspect of independent review" and requiring *de novo* appellate review of "in custody" determinations). Accordingly, it held that "ultimate questions of reasonable suspicion and probable cause . . . should be reviewed *de novo*." *Ornelas*, 517 U.S. at 691. The same standard of review should apply to *Brady* determinations, which require a similarly nuanced application of relevant constitutional standards.

Brady places the duty to disclose favorable information squarely on the shoulders of the prosecution. *See*, *e.g.*, *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). The prosecutor, who alone knows the theory and evidence he will use to convict and who "alone can know what is undisclosed," is therefore "assigned the consequent responsibility to gauge the likely net effect" of all favorable evidence before trial and to determine whether suppression would be prejudicial to the defense. *Kyles v. Whitley,* 514 U.S. 419, 437 (1995). As this Court has stressed, "the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome." *Id*. at 439. Rather, "a prosecutor anxious about tacking too close to the wind," *id*., should "resolve doubtful questions in

favor of disclosure."[11] *United States v. Agurs*, 427 U.S. 97, 108 (1976). *Cf. Cone v. Bell*, 129 S. Ct. 1769, 1783 n.15 (2009); *Strickler v. Greene*, 527 U.S. 263, 281 (1999). "This is as it should be," *Kyles*, 514 U.S. at 439, to satisfy the prosecutor's obligation "that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). Just as important, "it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." *Kyles*, 514 U.S. at 440.

In *United States v. Bagley*, 473 U.S. 667 (1985), this Court announced the substantive standard for assessing *Brady*'s materiality prong. Evidence favorable to the defense – whether exculpatory or for impeachment purposes, *see id*. at 676 – is deemed material, and its suppression by prosecutors demands a new trial without further showing of prejudice if a "reasonable probability" exists that "its suppression undermines confidence in the outcome of the trial." *Id*. at 678. In making this objective determination,

[11] Apparently, the government's 2010 production of the yellow-highlighted 2002 interview notes of McMahon was accidental. The new prosecutor denied he had produced them. Transcript, June 24, 2010, Dkt.1212 at 15-16. This fact alone illuminates the need for (i) clear instructions from this Court to the government on the breadth and depth of its duty and (ii) swift and sure consequences for its failure to honor *Brady*. To this day, the government has not produced all the material Brown has specifically requested.

Bagley showed no deference to the trial court's determination.

In *Kyles,* this Court reversed the Fifth Circuit on a *Brady* issue, holding that the only way to assess whether the absence of the suppressed evidence could "undermine confidence" in the original result was to return to the moment of pretrial suppression by the prosecutors and consider the "potential impact" of the missing evidence. 514 U.S. at 434-35. *Kyles* underscored that Petitioner need not prove that the evidence presented was insufficient to convict, *id*., or that the suppressed evidence would "more likely than not" have led to a different result, *id*. at 434. Rather, an accused can prove a *Brady* violation by showing that the favorable evidence "*could* reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id*. at 435 (emphasis added). Again, this Court applied that standard as a matter of law.

In *Kyles*, this Court reviewed the withheld items individually, considering for each how competent defense counsel could have used the evidence in the actual trial. Only after this careful review, which by definition would be impossible pretrial, did this Court conclude that the cumulative impact of the suppressed information could reasonably have recast

the entire case so as to "undermine confidence in the verdict."[12] *Id*. at 435, 441, 453-54.

The requirement that the court view the record as a whole implicates *de novo* review. In *Agurs*, for example, this Court stated that "the significance of an item of evidence can seldom be predicted accurately until the entire record is complete." 427 U.S. at 108. *See Bagley*, 473 U.S. at 683 ("reviewing court should assess the possibility that such effect [of the withholding that caused defense to be misled] might have occurred in light of the totality of the circumstances. . . ."). Appellate review of an "entire record" suggests independent, plenary review.

All the Circuits have recognized in at least some cases that the question of materiality is a legal judgment. The materiality analysis must be applied to evidence that was not tested at trial, and must be judged for its "potential impact" on the jury and on competent defense counsel, who was unaware of the evidence. Because only legal judgments are at stake,

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[12] The Fifth Circuit's deference to the district court's *pretrial* review in *Brown* contravenes the policy of *Brady* and usurps the roles of both the advocate and the jury. Pretrial, the court has little information about defense strategy, and therefore no insight into how defense counsel could use the evidence. *See Agurs*, 427 U.S. at 108, 112 ("[T]here is a significant practical difference between the pretrial decision of the prosecutor [or the trial court, who is even less capable pretrial than a prosecutor] and the post-trial decision of the judge. . . . [T]he omission [for *Brady* purposes] must be evaluated in the context of the entire record.").

appellate courts operate at no disadvantage, and a trial court is in no better position to make the required assessment.[13]

A *de novo* standard of review is necessary to bring coherence and uniformity to the Circuits' procedure in *Brady* appeals and offers full fidelity to this Court's precedents. Only *de novo* review authorizes and requires the fully independent analysis of how competent defense counsel *could* have used each piece of withheld evidence – whether to impeach a government witness, buttress an alternative theory of the case, frame the opening statement, prepare for trial generally, or raise a reasonable doubt.

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[13] Justice Alito said as much in his separate opinion in *Cone v. Bell*, writing, "[i]f the only purpose of remand is to require an evaluation of petitioner's *Brady* claim in light of the present record, the District Court is not in a superior position to conduct such a review. And even if such a review is conducted in the first instance by the District Court, that court's decision would be subject to *de novo* review in the Court of Appeals." 129 S. Ct. at 1792 (Alito, J., concurring in part and dissenting in part).

II. THE FIFTH CIRCUIT RECAST AND MISAPPLIED THE MATERIALITY TEST OF *KYLES*; ITS ULTIMATE CONCLUSION THAT THE SUPPRESSED EVIDENCE IN *BROWN* WAS "NOT MATERIAL" WAS ERRONEOUS AS A MATTER OF LAW

A. The Fifth Circuit Misstated the Materiality Test

The Fifth Circuit recast and misapplied the materiality test, further confusing *Brady*, *Kyles*, and their progeny. The Fifth Circuit recognized that prosecutors suppressed favorable testimony from Merrill counsel, Zrike, and Enron Treasurer, McMahon, that could have impeached several witnesses. Nevertheless, it summarily concluded that "the favorable evidence that Brown points to is not, even cumulatively, sufficient to give us a 'definite and firm conviction' that it *establishes a substantial probability* of a different outcome." App.26a (emphasis added).

The Fifth Circuit applied the wrong legal standard. The law has long required only a "reasonable" probability, not a "substantial" probability. Furthermore, under *Kyles*, a defendant need only show that the evidence "*could* reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." 514 U.S. at 435 (emphasis added).

This is not a small point of procedure but rather a crucial issue of due process, emphasized by this Court in discussing the "reasonable probability" standard. *See id*. at 434 ("The question is not whether the defendant would more likely than not have received a

different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence."). *Accord Strickler*, 527 U.S. at 289-90 (1999). As this Court explained, "the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal." *Agurs*, 427 U.S. at 111.

A "reasonable probability" requires less for reversal than would "more likely than not" or a preponderance standard.[14] *Washington v. Strickland*, 466 U.S. 668, 693-94 (1984).[15] This Court has consistently held that a "reasonable probability" is shown when the absence of the suppressed evidence "undermines confidence in the outcome of the trial." *Bagley*, 473 U.S. at 678; *cf. Kyles*, 514 U.S. at 434. And, the "adjective [reasonable] is important." *Id*. The Court has never suggested that a "*substantial* probability of a different result" standard could provide a fair or acceptable substitute. Because the Fifth Circuit applied the wrong legal standard (and the wrong standard of review), its decision cannot stand.

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[14] Justice Souter urged that the term "significant possibility" is more accurate and understandable. *Strickler*, 527 U.S. at 297-301 (Souter, J., concurring in part).

[15] *Strickland*, 466 U.S. at 694, borrowed the standard from the *Brady* case of *Agurs*, 427 U.S. at 104, which then returned the standard in *Bagley*, 473 U.S. at 682 (opinion of Blackmun, J.).

B. The Fifth Circuit Ignored *Bagley-Kyles* and Adopted a Novel and Dangerous Process, Reinventing the Government's Case to Render the Favorable Suppressed Evidence "Not Material"

After acknowledging that Brown's counsel could have used McMahon's suppressed statements to impeach the testimony of two star prosecution witnesses, the Fifth Circuit disregarded this Court's precedent and found the suppressed evidence was not material.[16] Yet Glisan and Kopper, who testified for 300 pages each, were essential to the government's case.[17]

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[16] Despite the lip service offered by the Fifth Circuit, its approach is disturbingly similar to the approach this Court rejected in *Kyles*, where this Court noted:

> Although the [Court of Appeals] majority's *Brady* discussion concludes with the statement that the court was not persuaded of the reasonable probability that Kyles would have obtained a favorable verdict if the jury had been "exposed to any or all of the undisclosed materials," 5 F.3d, at 817, the opinion also contains repeated references dismissing particular items of evidence as immaterial and so suggesting that cumulative materiality was not the touchstone.

Kyles, 514 U.S. at 440. In *Brown III*, as in *Kyles*, "[t]he result reached by the Fifth Circuit [ ] is compatible with a series of independent materiality evaluations, rather than the cumulative evaluation required by *Bagley*." *Id*. at 441.

[17] They were permitted to repeat McMahon's hearsay statements only because McMahon had been named an unindicted coconspirator on the substantive fraud counts. McMahon's hearsay favorable suppressed statements would have been admissible to impeach Glisan and Kopper's account because, as the

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Their primary function was to prove the alleged "McMahon guarantee." In closing arguments, prosecutors referred to Glisan's testimony at least fifty-two times, to Kopper's approximately twenty-seven times, and reminded the jurors about the "McMahon guarantee" sixteen times. Indeed, the "likely damage [to the government's case if this testimony were rebutted or impeached] is best understood by taking the word of the prosecutor." *Kyles*, 514 U.S. at 444. During closing arguments, the prosecutors contended that Glisan and Kopper were the government's best witnesses and McMahon was "the key." App.193a-194a, 196a, 199a-202a.

Beyond ignoring the centrality of the two key witnesses, the Fifth Circuit imagined that it was reviewing a case in which Glisan and Kopper did not testify about the supposed "McMahon guarantee" at all. Employing this novel approach, the Circuit *sua sponte* reinvented the government's case, hypothesizing: "Even if the net result of disclosing the McMahon notes to Brown would have been that the government would not have asked Glisan or Kopper to testify at all about what McMahon told them, that would have had essentially no impact on the government's case." App.24a.

In the Fifth Circuit's revised version of the trial, the suppressed McMahon evidence would not have

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Fifth Circuit acknowledged, hearsay can be impeached by other hearsay. App.24a n.22 (citing Fed. R. Evid. 806).

been material – there would have been no testimony to impeach. According to the Circuit, the government could have proceeded with a theory in which Andrew Fastow made an illicit guarantee,[18] rather than its actual, chosen theory and persistent refrain: McMahon made the guarantee, and Fastow merely ratified it in the December 23 phone call. *Id*.

It is hard to imagine exculpatory evidence more material than evidence that requires a total restructuring of the government's case. To accommodate the Fifth Circuit's considerable effort to render the suppressed exculpatory evidence nonmaterial, one would have to jettison the prosecution's jury opening, presentation of evidence by multiple witnesses, and closing arguments. That is the very definition of materiality.[19]

The case against Brown was already so weak that one circuit judge would have acquitted him and the jury separately found that Brown did not substantially interfere with the administration of justice. Tr. 6967. The Fifth Circuit's convoluted hypothetical

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[18] But, the government's Fastow summary, incomplete as it was, disclosed that Fastow did not use the word guarantee and likely, not "promise." Tr. 1611-13, 1675. Dkt.1168, Ex. I, at pp. 3-6. That is exactly why McMahon was "the key."

[19] In the Fifth Circuit's alternative universe, where no witness could testify that McMahon had made an illegal buyback guarantee (for fear of devastating cross-examination), Brown would have been entitled to an acquittal. Without McMahon's alleged guarantee, the "Trinkle call," was meaningless, Tr. 1142-43, and the government was stripped of its only means to impute "guilty knowledge" to Brown. *Cf*. App.198a-200a.

demonstrates unequivocally that the suppressed evidence "puts the whole case in [ ] a different light." *See Kyles*, 514 U.S. at 435.

1. The McMahon evidence would have altered the entire trial

Had Brown's counsel known before trial that McMahon repeatedly told the government that he had not made any guarantee, but instead that he and Fastow – the only two purported guarantors – offered to engage in only a "best-efforts" agreement to remarket the barges (exactly as Brown told the grand jury), then Brown's counsel could have prepared and conducted the entire case differently. Brown would have been empowered with the knowledge that such evidence existed – itself a dramatic revelation even six years later. Brown's counsel could have included in his opening statement that there would be evidence that neither McMahon nor Fastow made a guarantee, and he could have featured evidence from McMahon that only a "best-efforts" representation was made (evidence appearing only in the mutually-corroborating raw notes from multiple agents' interviews of McMahon and Fastow). Brown could have pointedly cross-examined Glisan and Kopper.[20]

[20] Defense counsel could have also used the statements to make an immunity request for McMahon who, despite frequent threats, was never indicted for *making* the supposed guarantee that served as the basis for Brown's perjury and obstruction convictions. Counsel could have also used it as direct evidence

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The Fifth Circuit also ignored the fact that Brown's counsel could have used the McMahon notes to impeach other government witnesses and continue to "put the whole case in [ ] a different light." *Kyles*, 514 U.S. at 435. Notably, FBI Agent Raju Bhatia was permitted (improperly) to "vouch" for the entire prosecution, while implying reliance on knowledge and evidence not available to the defendant or the jury: "Based on my investigation, my conducting interviews with numerous people, the review of all the documents, the evidence, going over all the transcripts of the people that are here in this trial that [Enron "promising" a buyback] is exactly what I believe to have happened in this case." Tr. 3289-90. Agent Bhatia testified improperly and without fear of impeachment because the government concealed the crucial, contradictory evidence that Agent Bhatia and the prosecutors knew existed. This *Brady* evidence would have enabled Brown to conduct a compelling and incisive cross-examination of a witness who, unimpeached, was devastating to the defense.[21]

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supporting Brown's belief in the truth of his grand-jury testimony and to raise a defense of government misconduct.

[21] Additionally, McMahon's statements could have impeached (1) Tina Trinkle, whose only role was to testify to an internal Merrill call in which McMahon's alleged guarantee was discussed and supposedly rendered Brown a coconspirator, *see supra* note 19, and (2) government witness Timothy Henseler, the federal agent who, unbeknownst to Brown, took notes of interviews with McMahon. Tr. 2914-48, 2989-3073.

2. The Zrike evidence would have altered the entire trial

The Fifth Circuit's analysis again contravened this Court's requirements when it acknowledged that Zrike's testimony before the Grand Jury and the SEC "could have helped Brown" by explaining the absence of a written best-efforts agreement, but then dismissed the suppressed evidence as not material. App.25a-26a. According to the Fifth Circuit, the suppressed evidence would have been only of "marginal" benefit to Brown, because Zrike testified for the defense and the prosecution successfully "neutralized" her testimony by showing that she and the other lawyers had been kept "out of the loop." *Id.* at 26a.

The Fifth Circuit's recognition that the evidence "could have helped Brown" and rebutted the government's argument is, again, the definition of materiality. The true nature of Zrike's participation in the approval and negotiation process alone could have served to rebut the government's claims. The exculpatory evidence that the government withheld demonstrated that Zrike was central to the process. She was not out of the loop; she completed it. Zrike's suppressed testimony indicated that she knew of the best-efforts agreement and tried to document it well after the government claims Merrill had received a secret illegal guarantee. Zrike further undermines the import of the "Trinkle call." Brown's defense team was entitled to have all of Zrike's testimony before trial, so that it could plan its approach to this key

witness (and to others), rather than fly blind, examining a witness who was under constant threat of indictment.[22]

Had Brown received all of Zrike's grand jury and SEC testimony before trial, he would have known that she was an unequivocal supporting witness whose favorable sworn testimony was already preserved. This would have enabled Brown to present a much stronger defense, including taking an aggressive tack in his examination of Zrike. Most likely, it would have led Brown to take the stand himself (as he had already done, voluntarily and without subpoena, three times previously).

The government's impeachment of Zrike was possible only because Brown's counsel did not have the suppressed materials to prepare for her testimony and rehabilitation. Because of the suppression, Brown was unable to ask Zrike about her knowledge of the best-efforts agreement, her attempts to document it, her role in the ongoing negotiations, or her testimony that it was Enron's counsel who rejected best-efforts language and any other provision that might be construed to retain risk to Enron in those later negotiations. Zrike's testimony would have corroborated directly Brown's statements and supported

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[22] *See Leka v. Portuondo*, 257 F.3d 89, 103 (2d Cir. 2001) ("without substantive disclosure by the prosecution, the supposed failure by the defense to petition for leave to seek out [a witness] cannot fairly be seen as a default or a neglect, or even as an election . . . to call a witness cold, [ ] would be suicidal.").

their shared, genuine belief that there was no guarantee, but instead that Enron had committed only to use its best efforts to remarket the barges. *See*, *e.g.*, Dkt.1168, Ex. Y at 88-89, 123-24, 192, 196-207.

III. *BRADY* POLICY WARRANTS A CLEAR RULE THAT EVIDENCE BE DEEMED MATERIAL WHEN THE GOVERNMENT IMPAIRS THE ADVERSARY PROCESS OR CAPITALIZES ON ITS OWN SUPPRESSION, A TEST ADOPTED BY AT LEAST SIX CIRCUITS

The prosecutors' "summaries" – fewer than two full pages summarizing hundreds of pages of statements of Zrike and McMahon – failed via significant omissions to disclose exculpatory evidence, and they were affirmatively misleading. *Cf*. App.183a-187a. Such conduct alone warrants reversal. *See United States v. Service Deli*, 151 F.3d 938, 942-44 (9th Cir. 1998) (reversing conviction when the prosecution's summary of undisclosed evidence was misleading). *See also United States v. Stevens*, No. 1:08-cr-00231-EGS (D.D.C. April 7, 2009) (government's "use of [*Brady*] summaries is an opportunity for mischief and mistake").

The prosecutors' "incomplete response" effectively and wrongfully represented to the defense "that the evidence does not exist" and caused the defense "to make pretrial and trial decisions on th[at] basis." *Bagley,* 473 U.S. at 682-83 (opinion of Blackmun, J.). "[T]he more specifically the defense requests certain

evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption." *Id*.

Compounding their deception, Brown's prosecutors repeatedly elicited hearsay testimony at trial, making arguments that were squarely contradicted by the first-hand evidence they suppressed. App.187a-190a. Even if the prosecutors did not personally believe the exculpatory evidence, they had a duty to disclose it. *Kyles*, 514 U.S. at 439.

Other Circuits have found a due process violation and prosecutorial misconduct where, as in Brown's case, prosecutors' arguments have "deliberately suggested the contrary of the facts known [only] to the government." *United States v. Udechukwu*, 11 F.3d 1101, 1102, 1105-06 (1st Cir. 1993). In *Udechukwu*, the government suppressed favorable evidence that may not necessarily have been sufficient *per se* to establish materiality. However, because the government exploited that suppressed evidence and made it a central issue in the case, the court held that the prosecution's conduct at trial established materiality as a matter of law. That approach is faithful to this Court's requirement that a complete assessment of the entire trial record is required.

Prosecutorial argument that capitalizes on the defendant's ignorance may elevate the suppressed favorable evidence to the level of materiality. *Id*. at 1106. In *Brown*, as in *Udechukwu*, there was "a kind

of double-acting prosecutorial error: a failure to communicate salient information, which, under *Brady* . . . and *Giglio* . . . should be disclosed to the defense, and a deliberate insinuation that the truth is to the contrary."[23] *Id.*

Under equivalent circumstances, Brown would have received a new trial in the First, Second, Fourth, Sixth, Ninth, and Tenth Circuits, which have held that evidence is material as a matter of law when the government takes advantage of its suppression by attempting to prove what the suppressed evidence negates or undermines. For example, in *Monroe*

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[23] *See United States v. Triumph Capital Group*, 544 F.3d 149, 161-65 (2d Cir. 2008) (providing new trial for *Brady* violations where suppressed evidence, going "to the core of its[ ] case," included facts "entirely at odds with the government's theory of the case at trial"); *United States v. Gil*, 297 F.3d 93, 103-04 (2d Cir. 2002) (ordering a new trial where suppressed evidence "b[ore] importantly on the central issue at trial," and the prosecutor attacked the defendant's credibility for testifying about facts which were supported by evidence the government improperly withheld); *Tassin v. Cain*, 517 F.3d 770, 779, 781 (5th Cir. 2008) (finding "a Fourteenth Amendment violation under the clear precedent of *Giglio*, *Napue*, and *Brady*," where government repeatedly "capitalized on [ ] testimony" that was undermined or refuted by evidence it withheld); *accord Robinson v. Mills*, 592 F.3d 730, 738 (6th Cir. 2010) (holding evidence material under *Brady* because it undermined the government's star witness who alone contradicted the defendant's theory of the case); *Nuckols v. Gibson*, 233 F.3d 1261, 1266-67 (10th Cir. 2000) ("Because impeachment of the witness who held the key to successful prosecution was denied to the defense, we have no doubt Petitioner suffered prejudice as a consequence."). Even the Fifth Circuit followed this rule as recently as *LaCaze v. Warden*, 645 F.3d 728, 737-39 (5th Cir. 2011).

v. Angelone, 323 F.3d 286 (4th Cir. 2003), the court found a *Brady* violation undeniable and a new trial mandated where prosecutors "stressed" and "insisted" on facts during closing argument that were "significantly undermined" by suppressed evidence. *Id*. at 314-17 & n.61. Under such circumstances, "it is impossible to say that [defendant] received a fair trial." *Id*. at 317.

Here, the government not only suppressed favorable evidence, but also carefully crafted false and misleading summaries that led defendants to believe that no exculpatory evidence emerged from the government's investigation. Prosecutors "impair[ed] the adversary process." *Bagley*, 473 U.S. at 682 (plurality opinion). Brown had no way to learn what Zrike remembered. The government's summary did not mention Brown or the best-efforts agreement. App.185a-186a. This reasonably led Brown to believe there was no such evidence. Similarly, the prosecutors' summary of McMahon reported that "he didn't recall" making a guarantee, giving Brown no clue that in truth McMahon declared repeatedly and definitively that he "recalled": "No – never guaranteed"; and neither he nor Fastow agreed to anything more than to "use best efforts to help them sell assets." App.213a-227a.

The Court should establish a bright-line rule, which flows naturally from *Giglio v. United States*, in which this Court made clear that "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary

demands of justice.'" 405 U.S. 150, 153 (1972) (citation omitted). The prosecutors' own *yellow-highlighting* in *Brown* demonstrates that they knew of exculpatory evidence squarely contradicting their position, and they suppressed it anyway. Then, at trial, the same prosecutors repeatedly and unfairly capitalized on the lack of contrary evidence that resulted from their own unconstitutional and unethical tactics. A bright-line rule, establishing that exculpatory evidence is material *per se* when the government either crafts incomplete or misleading summaries, or capitalizes on its own suppression, is necessary to deter future violations and to hold the government accountable.

CONCLUSION

As reflected in the recent oral argument before this Court in *Smith v. Cain*, No. 10-8145 (Nov. 8, 2011), our legal system is infected with recurring prosecutorial misconduct and *Brady* infractions. These constitutional infirmities have been exposed more often in high-profile litigation, and sadly, only after considerable damage has been done to the defendant.[24] In this case, the government suppressed

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[24] *See*, *e.g.*, Order, *In re Special Proceedings*, No. 1:09-mc-00198-EGS (D.D.C. Nov. 21, 2011) (Summary of report of misconduct in prosecution of the late Senator Ted Stevens: federal prosecutors were engaging in "systematic concealment of exculpatory evidence" and "significant, widespread, and at times intentional misconduct").

exculpatory evidence that the prosecutors themselves had *yellow-highlighted* as *Brady* evidence, but nevertheless concealed. The prosecutors then repeatedly capitalized on their suppression at trial. Such conduct is inexplicable, inexcusable, unconstitutional, and dangerous. This Court's intervention is essential to conform the practice of prosecutors generally and foreclose replication of the Fifth Circuit's perilous approach.

This litigation provides an excellent vehicle for this Court to establish a *de novo* standard of review for *Brady* violations and mandate clear rules that compel respect for *Brady* and *Kyles.* In addition, this Court may refine expectations for the Department of Justice that will aid it in reacquiring the status it held when it heeded this Court's admonition that the government's interest in criminal matters "is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). Only then can the public repose confidence in the attorneys who are entrusted with the power of the sovereign and are privileged to represent the United States of America.

For these reasons, this petition for *writ of certiorari* should be granted, Brown's convictions reversed, and a new trial ordered.

December 19, 2011

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10-20621

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES A. BROWN,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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(Filed Aug. 12, 2011)

Before SMITH, SOUTHWICK, and GRAVES, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

James Brown challenges his convictions on the ground that the government violated his right to due process by withholding materially favorable evidence that it possessed pre-trial. *See Brady v. Maryland,* 373 U.S. 83 (1963). Because the district court did not clearly err in holding that the evidence was not material, we affirm.

I.

This appeal arises from an earlier trial relating to the Enron scandal. *See United States v. Brown* (*Brown I*), 459 F.3d 509, 513 (5th Cir. 2006). At years' [sic] end 1999, Merrill Lynch purchased an equity interest in three barge-mounted power generators off the Nigerian coast from Enron Corporation ("Enron") for $28 million, with Merrill Lynch paying Enron $7 million and Enron loaning Merrill Lynch the balance. Enron booked a roughly $12 million profit on the transaction. The government contended that the sale was a sham whose sole purpose was to allow Enron artificially to enhance its fourth-quarter earnings to meet forecasts. According to the government, the transaction was not a true sale, because Enron did not actually sell a stake in the barges but instead secretly promised that a company run by Andrew Fastow, Enron's CFO, would buy back the stake in the barges from Merrill Lynch within six months for a guaranteed 15% return plus a $250,000 "advisory fee." In other words, the government alleged Enron just loaned out the stake in the barges to Merrill Lynch, risk-free and with a guaranteed return, but made it seem like a sale so that it could book a pretend profit.

Brown was a managing director at Merrill Lynch and the head of its Strategic Asset and Lease Finance group at the time of the transaction. He testified to a grand jury that, to his knowledge, Enron had never promised that it would buy back Merrill Lynch's

equity in the barges within six months of the purported sale.

The government indicted Brown, charging him with, as relevant here, perjury and obstruction of justice, alleging that Enron executives orally guaranteed to repurchase Merrill Lynch's equity stake in the barges, and Brown knowingly lied to the grand jury about his understanding of the transaction.[1] Specifically, the indictment quoted the following testimony and alleged that the underlined portions were false:

> Q. Do you have any understanding of why Enron would believe it was obligated to Merrill to get them out of the deal on or before June 30th?
>
> . . . .
>
> A. It's inconsistent with my understanding of what the transaction was.

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[1] Brown, along with five co-defendants, was also charged in the same indictment with conspiracy and wire fraud. The jury found him guilty on those counts, but we reversed because the government had relied on an improper "honest services" theory of fraud. *Brown I,* 459 F.3d at 513. We later held that the government could retry Brown on the conspiracy and wire fraud counts without violating his right against double jeopardy, *United States v. Brown* (*Brown II*), 571 F.3d 492, 499 (5th Cir.), *cert. denied,* 130 S. Ct. 767 (2009), but the government ultimately elected not to pursue those charges, and the district court dismissed them with prejudice. So only Brown's perjury and obstruction of justice charges remain.

. . . .

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

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

Q. So you don't have any understanding as to why there would be a reference to a promise that Merrill would be taken out by sale to another investor by June of 2000?

A. No.

Also relevant is the following testimony elaborating on Brown's understanding of the transaction:

Q. And let me now direct your attention to the to the [sic] paragraph of the Nigerian barge project. Now, do you see where it says in the second-to-last line, "[Merrill Lynch] was supportive based on Enron relationship [sic], approximately $40 million in annual revenues, and assurances from Enron management that we will be taken out of our $7 million investment within the next three to six months." Does that accord with your understanding of the transaction?

A. No. I thought we had received comfort from Enron that we would be taken out of the transaction within six months or would

> get that comfort. If assurance is synonymous with guarantee, 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.

We summarize the detailed evidence presented at trial relating to the perjury and obstruction-of-justice charges: On December 22, 1999, Merrill Lynch employee Tina Trinkle participated in a conference call (the "Trinkle call") that included Brown. Trinkle testified that, during the call, "[s]omebody at Enron" promised Merrill Lynch that the Nigerian barges would be bought back, and a Merrill Lynch executive (possibly Brown himself; Trinkle was not sure) rejected putting that guarantee in writing, because it would not allow "the right accounting treatment." Merrill Lynch employees asserted during the call that someone at Enron – they did not say who – had given them "his word" and "his strongest verbal assurances" of a buyback. No lawyers participated in the call.

Trinkle said Brown "was very negative on the deal, and he felt that it had a lot of risks."[2] For example, Trinkle said Brown was concerned about the "political risk" involved in the transaction (because the barges were in Nigeria). Brown's notes also indicate that he was concerned about the "reputational

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[2] Similarly, Bill Fuhs, a vice-president working under Brown, testified that "I think [Brown] thought it was a very risky transaction. I don't think he liked the transaction."

risk" of "aid[ing]/abet[ting] Enron income stmt. manipulation," and he communicated those concerns to Bill Fuhs, a vice-president working under him.

Katherine Zrike, chief counsel for Merrill Lynch's investment banking division, said Bob Furst, a managing director at Merrill Lynch and the investment banker responsible for the Enron account, told her, before the Trinkle call, that "the only agreement between Enron and Merrill Lynch was that Enron would help Merrill Lynch re-market the barges," that is, do its best to find a third party to purchase them from Merrill Lynch. Indeed, a memorandum dated the day before the Trinkle call and sent from Furst to Brown said, "Enron is viewing this transaction as a bridge to permanent equity and *they believe* our hold will be for less than six months." (Emphasis added.)

After the Trinkle call, that same day, Zrike convened a meeting of Merrill Lynch's Debt Markets Commitment Committee ("DMCC"), in which Brown participated, at which "everybody was agreeing" that there could not be a buyback of Merrill Lynch's equity interest in the barges, because that would not permit Enron legally to account for the transfer of the barges to Merrill Lynch as a sale. Furst stated at the meeting that the " 'real agreement with Enron is only to re-market.' " The DMCC did not approve the transaction but instead opted to have Dan Bayly, head of investment banking at Merrill Lynch, and his boss, Tom Davis, review it for approval or rejection.

Shortly thereafter, Zrike, Bayly, and others (but not Brown) met with Davis in Davis' conference room, where the deal was explained to Davis. Zrike said they "talked about the fact that this needed to be a true sale and, therefore, all risks of loss and all risks associated with owning the barge [sic] would pass to Merrill Lynch for the time that it owned the barges." Zrike mentioned the risks of dealing with a property located in Nigeria, and there was a discussion about the fact that there had been no due diligence on the barges. Davis ultimately approved the deal, although he was "not happy" about it.

Brown went on vacation the day after the Trinkle call and DMCC meeting.[3] That day, Fastow conducted a conference call with Merrill Lynch that did not include Brown or Merrill Lynch's chief counsel, Zrike. No one who participated in the call testified about its contents, but Eric Boyt, an in-house accountant at Enron, testified that Daniel Boyle, an Enron finance executive who participated in the call, told him right after the call that Fastow had guaranteed a buyback with 15% return in six months if a buyer could not be found. Ben Glisan and Michael Kopper, both high-ranking Enron finance executives, also testified that

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[3] Brown says he received only one call relating to the barges while on vacation, and it concerned only where to domicile the special purpose entity that would be created to hold Merrill Lynch's interest in the barges. But he also says he did not return from vacation until January 2 or 3, even though his signature is on the final engagement letter that was faxed on December 29.

Fastow and Enron Treasurer Jeff McMahon later told them that they had "promised" Merrill Lynch that they would make sure it was out of the Nigerian barge transaction within six months.

There are also contemporaneous emails from Glisan and James Hughes, another Enron executive, saying, respectively, that, "[t]o be clear, Enron is obligated to get Merrill Lynch out of the deal [by] June 30" and that if "no one will take the Merrill Lynch position, then Enron will inherit it." Finally, there is an unsigned, undated internal Merrill Lynch document from sometime before December 31, 1999, that says that Enron "assured" Merrill Lynch that it "will be taken out of our investment within six months."

The engagement letter itself, which was signed by Brown, makes no mention of a buyback guarantee or a remarketing agreement.[4] An earlier draft of the letter, written by an associate in Brown's department and sent to Fuhs on December 23, 1999 (while Brown was away), says, however, that Merrill Lynch's stake in the barges "will be subsequently sold to third party investors or purchased by Enron or an affiliate" and that Merrill Lynch would receive a 15% annualized return on its investment. Enron executive Boyle struck that language before the final draft.

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[4] The engagement letter states that Enron is to pay Merrill Lynch a $250,000 "advisory" fee. Brown testified to the grand jury that Merrill Lynch did not actually provide any advisory services to Enron.

Sean Long, head of the Enron group that oversaw the Nigerian barge project in Africa, testified that no one at Merrill Lynch "contact[ed] [him] at all with respect to the barges" between January and June 2000; that is, Merrill Lynch did not follow-up on the barges after it bought them, which indicates that it knew they would be bought back. Long also testified that Boyle had told him "that a senior person at Enron gave assurances to a senior person at Merrill Lynch that they would not get hurt by the transaction."

In June 2000, six months after Merrill Lynch obtained its interest in the barges, LJM2[5] – a partnership that, according to Kopper, was "set up by . . . Fastow, to raise private equity for deals that were to be done with Enron" – purchased Merrill Lynch's equity interest in the barges at a 15% annualized return. Fastow was LJM2's general partner. Kopper testified that "Enron would use LJM as essentially an off-ramp on deals that they needed to use to make earnings for any given quarter." Enron would "warehouse" assets in LJM2 for six months to "misstate" that it had sold them. Kopper referred to "this Nigerian barge deal" as a transaction involving such a misstatement, and

> we knew that we [i.e. LJM2] would only be holding this asset no longer than through

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[5] In the record and in this opinion, LJM2 is sometimes referred to as LJM.

> year-end and that Enron would get – take us out of that deal. And it wasn't documented; it was just between Andy and senior management of Enron that he [Andy, as general partner of LJM2] would be taken out."

Furthermore, an Enron document, the "Benefits to Enron Summary," dated June 29, 2000, states that "Enron sold barges to Merrill Lynch (ML) in December of 1999, *promising* that Merrill would be taken out by sale to another investor by June, 2000." (Emphasis added).

A couple of emails more directly implicate Brown. After LJM2's purchase of the interest in the barges, Fuhs had an email exchange with Brown in which Fuhs said, "Enjoy the barges on the other side of this trade and good luck." Fuhs was referring to the fact that Brown had an investment in LJM2, which now had a stake in the barges. Brown responded, "thanks bill . . . wanna buy a barge?" to which Fuhs replied, "only if I can have a *guaranty* [sic] of make-whole at par + return in case of civil unrest/war." (Emphasis added).

More significantly, Brown sent an email in March 2001 about an unrelated transaction, saying he would "support an unsecured deal provided we had total verbal assurances from [the company's CEO or CFO]," explaining that "[w]e had a similar precedent with Enron last year, and we had Fastow get on the phone with Bayly and lawyers *and promise to pay us back*

no matter what. Deal was approved and all went well." (Emphasis added).[6]

In short, there is considerable evidence that Enron executives orally promised Merrill Lynch that it or a third party would buy back the barges within six months. An email sent by Brown plainly shows his awareness of that promise. But one can perhaps question, as Brown's attorney did at closing argument and during Brown's original appeal, whether Enron executives really made a "promise" as one might understand it in the commercial context – namely, a binding commitment – or whether it merely meant giving one's not-always-reliable word, what Brown referred to in his grand jury testimony as "strong comfort."[7]

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[6] Also relevant is that, in June 1999, shortly before LJM2 purchased the barges from Merrill Lynch, Merrill Lynch executives drafted a letter addressed to Enron demanding repayment with 15% interest for the barges, arguably implying that Enron had promised repayment within six months. The letter was never sent, because LJM2 bought the barges before it could be sent out, but Brown was listed in the letter's "cc" field.

[7] Brown's attorney argued that Brown "was struggling with the meaning of the term 'promise' as used in a commercial context. Not the way we would use it day to day, like, 'I promised you let's go to the movies.' He tried to get across, in his mind, 'promise' suggests an obligation. And that's not his understanding. . . ."

II.

The jury convicted Brown of perjury and obstruction of justice. A divided panel affirmed, with Judge DeMoss dissenting on the ground that the evidence was insufficient for a reasonable jury to find Brown had lied, because Fastow's "promise" was not a legally enforceable commitment and thus was not a true promise.[8]

III.

Brown now challenges his convictions on the ground that the government violated his right to due process by withholding materially favorable evidence that it possessed pre-trial. Brown focuses on three allegedly new pieces of evidence: (1) The FBI's notes of its interview with Fastow, (2) Senate investigators' notes of their interview with McMahon,

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[8] *See Brown I,* 459 F.3d at 525-31 ("Brown further argues that his testimony was not actually false, as he never denied knowledge of some 'understanding' or 'comfort' between Enron and Merrill Lynch as to the buyback; rather, he merely denied knowledge of a 'promise' of such a side-deal. This distinction and the spin placed on selective and hyper-technical word choice provides no refuge from the jury's verdict."); *id.* at 535-37 (DeMoss, J., concurring in part and dissenting in part) ("The questions posed by the Grand Jury related only to an enforceable take-out, not to an oral 'promise to pay us back no matter what.' . . . I conclude, therefore, that no reasonable jury could conclude that Brown's testimony before the Grand Jury was false.").

and (3) transcripts of Zrike's pretrial testimony before the grand jury and the SEC.

The government disclosed pre-trial two letters that it says fairly summarized the exculpatory aspects of the Fastow and McMahon notes and the Zrike testimony. The government also showed the McMahon notes and the Zrike testimony to the district court *in camera* before Brown's trial, and the court did not find it necessary for the government to produce anything more than the summary letters. The government concedes that it did not submit the Fastow notes to the district court for *in camera* review.

Brown argues that there are significant differences between the Fastow and McMahon raw notes and the Zrike transcript, on the one hand, and the government letters purportedly summarizing them, on the other hand. The district court decided that the government did not violate its *Brady* obligation, holding that the government did not suppress favorable evidence and that, even if it did, it was not material.

IV.

To establish a *Brady* violation, the defendant must prove that (1) the prosecution suppressed evidence, (2) it was favorable to the defendant, and (3) it

was material.[9] The good or bad faith of the prosecution in suppressing evidence is irrelevant. *Kyles v. Whitley,* 514 U.S. 419, 432 (1995) (citing *Brady,* 373 U.S. at 87). But evidence is not suppressed "'if the defendant knows or should know of the essential facts that would enable him to take advantage of it.'" *Skilling,* 554 F.3d at 575 (quoting *United States v. Runyan,* 290 F.3d 223, 246 (5th Cir. 2002)). To have been suppressed, the evidence must not have been discoverable through the defendant's due diligence.[10]

Evidence is material if there is "'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *United States v. Bagley,* 473 U.S. 667, 682 (1985) (citing *Strickland v. Washington,* 466 U.S. 668, 694 (1984)). In other words, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles,* 514 U.S. at 434. A "reasonable probability" exists when the government's suppression of evidence "'undermines confidence in

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[9] *United States v. Skilling,* 554 F.3d 529, 574 (2009) (citing *Mahler v. Kaylo,* 537 F.3d 494, 499-500 (5th Cir. 2008)), *vacated in part on other grounds,* 130 S. Ct. 2896 (2010).

[10] *See Kutzner v. Cockrell,* 303 F.3d 333, 336 (5th Cir. 2002) ("To establish a *Brady v. Maryland* claim, [the defendant] must prove that the prosecution suppressed favorable, material evidence that was not discoverable through due diligence.").

the outcome of the trial.'" *Id.* (quoting *Bagley,* 473 U.S. at 678). To prove a reasonable probability of a different result, the "likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter,* 131 S. Ct. 770, 792 (2011) (citing *Washington,* 466 U.S. at 693). A "reasonable probability" is less than "'more likely than not,'" but the difference "is slight and matters 'only in the rarest case.'" *Id.* (quoting *Washington,* 466 U.S. at 693, 697).[11]

There is no difference between exculpatory and impeachment evidence for purposes of *Brady. Kyles,* 514 U.S. at 433 (citing *Bagley,* 473 U.S. 667). The suppressed evidence need not be admissible to be material under *Brady;* but it must, somehow, create a reasonable probability that the result of the proceeding would be different.[12] We assess the materiality of the suppressed evidence cumulatively, not item by

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[11] *Harrington* is an ineffective-assistance-of-counsel case, not a *Brady* case, but, under *Bagley,* the same "reasonable probability" standard that applies in ineffective-assistance-of-counsel cases applies in *Brady* cases as well. *See Bagley,* 473 U.S. at 682 (borrowing the *Washington* "reasonable probability" standard for use in *Brady* cases).

[12] *See Felder v. Johnson,* 180 F.3d 206, 212 (5th Cir. 1999) ("'Inadmissible evidence may be material under *Brady.*' Thus, we ask only the general question whether the disclosure of the evidence would have created a reasonable probability that the result of the proceeding would have been different." (quoting *Spence v. Johnson,* 80 F.3d 989, 1005 n.14 (5th Cir. 1996))).

item.[13] Once a *Brady* violation has been shown, there is no need for further harmless-error review, *id.* at 435, and a new trial is the prescribed remedy, not a matter of discretion.[14]

A.

We generally review whether the government violated *Brady de novo, Skilling,* 554 F.3d at 578, although even when reviewing a *Brady* claim *de novo,* "we must proceed with deference to the factual findings underlying the district court's decision," *United States v. Sipe,* 388 F.3d 471, 479 (5th Cir. 2004). But we have an exception to our general rule of *de novo* review: Where, as is partially the case here, "a district court has reviewed potential *Brady* material *in camera* and ruled that the material was not discoverable, we review [that] decision only for clear error."[15] The district court's finding is clearly erroneous if, on the entire evidence, we are left with a "definite and firm conviction" that a mistake has been

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[13] *Skilling,* 554 F.3d at 590; *see Kyles,* 514 U.S. at 436 (requiring that the materiality of "suppressed evidence [be] considered collectively, not item-by-item").

[14] *United States v. Oruche,* 484 F.3d 590, 595 (D.C. Cir. 2007); *see Kyles,* 514 U.S. at 435-36 (explaining that a conviction must be set aside if it is not harmless and that the *Brady* standard already incorporates a form of harmless-error review).

[15] *Skilling,* 554 F.3d at 578 (citing *United States v. Holley,* 23 F.3d 902, 914 (5th Cir. 1994).) [sic]

committed. *United States v. U.S. Gypsum Co.,* 333 U.S. 364, 395 (1948).

Thus, with respect to suppression and favorability – the first two prongs of the *Brady* test – we apply two different standards of review: Because the Fastow notes were never seen by the district court before trial, we review whether they are discoverable *de novo* (with deference to the district court's underlying factual findings). But because the court did review the McMahon notes and Zrike testimony pretrial, we review its decision as to those items for clear error. And because we conclude that the withheld portions of the Fastow notes are not favorable to Brown, all favorable evidence was reviewed by the court *in camera* pre-trial. We therefore review materiality for clear error as well.[16]

B.

The first potential *Brady* item is the FBI's notes from its interview with Fastow, which were never disclosed to Brown, although the government did disclose a letter summarizing the notes. The issue is whether any evidence favorable to Brown in the

[16] We have never addressed what standard of review applies in the case of a "mixed" *Brady* question, that is, where some withheld, favorable evidence was reviewed by the district court *in camera* pre-trial, but some was not. We need not address that question here, however, because all of the withheld, favorable evidence was reviewed pre-trial *in camera.*

Fastow notes was suppressed, in light of the government's disclosure letter.

Brown argues that the FBI's raw notes, unlike the government's disclosure letter, referenced a "best efforts" agreement, said that Fastow "never used the word promise," and contained assorted other, similar statements, such as "summary not consistent w/ [Fastow]'s memory b/c not word 'promise.'" The district court held that no favorable information from the notes was suppressed, because the disclosure letter did reveal that Fastow said that "Enron was the marketing agent, but could not make anyone buy at a specified time, price or return" and that "Fastow deliberately avoided the word 'guarantee' and knew that he could not give a verbal or written guarantee on the deal without jeopardizing the accounting treatment Enron needed."

We agree with the district court. Saying that Enron "could not make anyone buy" or that Fastow "deliberately avoided the word 'guarantee,'" knowing that he "could not give a verbal or written guarantee," conveys essentially the same information as "never used the word promise" or "obligation to use 'best efforts.'" Moreover, any potential exculpatory value of the passages from the Fastow notes that were not disclosed to the defense is eliminated when we read them in context rather than looking just to the portions of the sentences that Brown cherry-picks.

The notes say, to give only a few examples, (1) "It was [Enron's] obligation to use 'best efforts' to find

3rd party takeout + *went on to say there would be 3rd party b/c AF is manager of third party,*" (emphasis added); (2) "LJM was 3rd party + was already found;" (3) "[Fastow] told [Merrill Lynch] that [Enron] would get [Merrill Lynch] out, would get [illegible] or LJM to buy out;" and (4) "Come June 2000, if [Enron] did not have a buyer then LJM would step in to buy out." Thus, the sentences that Brown cites from the Fastow notes do not say that the agreement as a whole was a "best efforts" agreement, *pace* Brown's testimony; they say only that *Enron* would use its "best efforts" to find a buyer but that Fastow guaranteed that LJM2, which he controlled, would be that buyer if no one else was found. Indeed, Fastow admitted that, "[i]f call was transcribed – it should have blown the accounting."

That is how this court interpreted the same statements in Fastow's notes in *Skilling*[17] in rejecting an essentially identical *Brady* claim.[18] The relevant

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[17] *See Skilling,* 554 F.3d at 589 (interpreting these precise passages to say that "it was not Enron itself that was formally bound to buy the interest from Merrill Lynch; LJM would do so if Enron's 'best efforts' did not result in another buyer").

[18] *See id.* (denying Skilling's *Brady* claim that the government concealed the "promise" and "best efforts" statements because the government's disclosure documents in that case "did not indicate that Enron was obligated," only that "Enron would not repurchase the barges, because LJM would instead"). *Skilling* is directly on point, because the defense in that case argued the same alleged deficiencies in the government's pretrial disclosure as here. Moreover, that this is a perjury case and

(Continued on following page)

passages, read in full, thus corroborate the government's position, not Brown's, by showing that Fastow *did* promise a buyback by LJM2. Thus, the government's disclosure letter accurately stated that "Fastow did not say Enron would buy back the barges, but represented instead that a third party would," and no favorable evidence was suppressed.

Second, Brown highlights a portion of the notes that says,

> w/Subordinates
>
> (1) Probably used a shorthand word like promise or guarantee as
>
> (2) Internally at Enron. AF, JM + BG would tell Enron people that there was a guarantee so to light a fire under Int'l people-so it should be in paperwork.
>
> (3) On phone call, didn't say EN would buy back, – Rep of 3rd Party. Explicit. Internally said Enron would buy back. Unit less motivated if knew of LJM. "Enron will take necessary steps to make sure you are out of this by June 30." → Reasonable for person on other end to think Enron.

The district court noted that those statements were "arguably . . . suppressed" but decided they were not

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Skilling was a fraud case does not alter the analysis, because the defense argument is the same: Fastow did not promise to buy back the barges.

material. The information indicating that Fastow used different terminology with his employees than he did with Merrill Lynch was omitted from the government's disclosure letter, however, and was not otherwise available to Brown. So it was suppressed.

But it was not favorable to Brown. Read in context, Fastow's statements say only that Fastow was hiding *LJM*'s role in the barges transaction from his subordinates, not that there was no promise. Fastow's promise to Merrill Lynch, as reflected in the notes, was that LJM would buy back the interest in the barges if a third-party buyer could not be found. *Skilling,* 554 F.3d at 589. Indeed, immediately preceding the passage that Brown cites, Fastow explained, "By referencing [that he was LJM's] General Partner [in the call with Merrill Lynch], was in effect giving the guarantee. . . . [I]f LJM not buyer then [Enron] will take necessary steps to make sure [Merrill Lynch] not owner."[19]

Fastow then goes on to say, in the passage Brown cites, that he told subordinates that Enron would buy back the interest in the barges, because if he told them about LJM, they would lose motivation to find a third-party buyer. That is the only possible explanation for his statement, "Internally said Enron would

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[19] *See id.* at 590 ("Immediately preceding these notes, Fastow discussed the guarantee with Merrill Lynch extensively, repeatedly noting that he had made a guarantee in everything but name. . . .")

buy back. *Unit less motivated if knew of LJM.*" (Emphasis added.) That Fastow told his subordinates that Enron would buy back so that they did not know LJM would do so supports, rather than undermines, the government's argument that Fastow made a promise that LJM would buy. Indeed, we so held in *Skilling,* explicitly rejecting the notion that this portion of the notes implied that Fastow admitted to lying to subordinates that there was a promise.[20]

Brown's argument thus boils down to the proposition that we should consider the passages he cites to be exculpatory because he could have put some misleading spin on them to the jury. But because the only fair reading of those passages is an inculpatory one, the government is correct that no favorable evidence was suppressed.

C.

Brown claims the government withheld exculpatory portions of (1) the Senate Permanent Subcommittee on Investigations's notes from its interview with McMahon and (2) Zrike's grand jury and SEC testimony. Favorable information was plainly suppressed from McMahon's notes, and we will assume *arguendo* that favorable information from Zrike's testimony was suppressed as well. Nevertheless, the

[20] *See id.* (holding, with respect to this identical passage, that it "does not contradict Fastow's assertions that he made an implicit guarantee to Merrill Lynch").

district court did not clearly err in holding that the suppressed information was not cumulatively material.[21]

The McMahon notes contain numerous passages that unequivocally state that it was McMahon's understanding that there was only a "best efforts" agreement and no "promise," whereas the government's disclosure letter says only that McMahon "does not recall" a guaranteed buyback. The district court thus clearly erred in holding that the government's disclosure letter fully disclosed the contents of the notes: "No" is not the same thing as "I do not recall." But despite the exculpatory nature of the suppressed portions of the McMahon notes, Brown could have made only very little use of them.

The parties stipulated that McMahon was unavailable as a witness because he would invoke his Fifth Amendment privileges if called to testify, so access to the McMahon notes would not have aided Brown in that sense. At most, Brown could have used McMahon's statements from the Senate subcommittee notes to impeach Glisan's and Kopper's testimony that McMahon told them there was a buyback

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[21] Because we do not consider the materiality of any non-suppressed information, *id.* at 591, we consider only the cumulative materiality of the suppressed portions of the McMahon notes and Zrike testimony and not the materiality of the Fastow notes.

"promise."[22] But McMahon's statements to Glisan and Kopper were merely cumulative evidence: Glisan and Kopper also gave unimpeached testimony that Fastow told them he promised Merrill Lynch that he would buy the barges back; Trinkle, Boyt, and Long all testified to the same effect; and multiple Enron and Merrill Lynch documents, including Brown's email, said there was a promise.

The "impeached testimony of a witness whose account is 'strongly corroborated by additional evidence supporting a guilty verdict . . . generally is not found to be material,'" *Rocha v. Thaler,* 619 F.3d 387, 396 (5th Cir. 2010) (quoting *Sipe,* 388 F.3d at 478), let alone on clear-error review and when the witness is an out-of-court declarant. Even if the net result of disclosing the McMahon notes to Brown would have been that the government would not have asked Glisan or Kopper to testify at all about what McMahon told them, that would have had essentially no impact on the government's case. Yet, it would have prevented Brown from making any use of the McMahon notes at trial, because they were otherwise inadmissible hearsay.[23] Thus, although the McMahon

[22] *See* FED. R. EVID. 806 (permitting a party to impeach a hearsay declarant's credibility by any means that would be allowed if the declarant testified as a witness, and stating that impeachment through the use of inconsistent statements is "not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain").

[23] Although evidence need not be admissible at trial to be material under *Brady,* it must somehow create a reasonable

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notes are favorable evidence, disclosing them to Brown pre-trial would not have created a reasonable probability of a different outcome, even in conjunction with the suppressed Zrike testimony.

Turning to Zrike's testimony to the grand jury and SEC, Brown points to her statements that Merrill Lynch wanted to add a best-efforts clause but was "not successful in negotiating that [in] with Vinson & Elkins [Enron's outside counsel]." Zrike explained that Merrill Lynch was "trying to be creative to protect [itself], but they [the Enron legal team] kept coming back to the fact that it really had to be a true passage of risk. . . . " She did not find it "nefarious [or] problematic" that Enron "would not put in writing an obligation to buy [the barges] back, to indemnify us[–]all those things were consistent with the business deal."

Those statements could have helped Brown by giving the defense an argument to counter the prosecution's position that the absence of a written "best efforts" agreement was evidence that there was no "best efforts" agreement at all. Brown could have pointed to Zrike's testimony to say that the reason the "best efforts" agreement was not in writing was that Enron's attorneys wanted a "true passage of risk." But that would have been of little marginal benefit to Brown, because Zrike already took the

probability of a different trial outcome. *See Felder,* 180 F.3d at 212.

stand as a witness and gave testimony explaining that she believed the agreement was nothing more than a "best-efforts" agreement, and the prosecution successfully neutralized her testimony by arguing that she was unaware of Fastow's oral promise because Merrill Lynch's investment bankers kept her and the other lawyers out of the loop. Nothing in her allegedly suppressed testimony would have weakened the prosecution's successful argument on that point.

In sum, the favorable evidence that Brown points to is not, even cumulatively, sufficient to give us a "definite and firm conviction" that it establishes a substantial probability of a different outcome. There was considerable evidence of Brown's guilt. Trinkle testified that there was a promise during the conference call she listened in on; Glisan and Kopper testified about Fastow's statements to them that he promised to rebuy; Boyt testified that Boyle told him, immediately after the Fastow call, that Fastow promised a buyback during the call; Long testified that there was a promise as well; Merrill Lynch conducted no due diligence, consistent with a buyback promise; a number of contemporaneous emails and documents referred to a promise; there was *in fact* a buyback, at 15% return, exactly six months after Merrill Lynch bought the barges, just as some internal documents said would happen; Fuhs jokingly emailed Brown that he would re-buy the barges only if Brown gave him a buyback guarantee; and in an email Brown himself said Enron had made a promise to buy back.

Brown points to the divided panel in *Brown I* to argue that the evidence against him was relatively weak. It is true that the panel was divided on Brown's guilt, but that division was over whether a legally unenforceable oral promise could establish Brown's guilt, not whether there was an oral promise at all.[24] The alleged *Brady* evidence in this appeal addresses only the latter issue – whether there truly was an oral promise to buy back or whether, instead, it was just a promise to use best efforts. It thus does not call the majority's holding in *Brown I* into question, and we have no authority to relitigate the issue that divided that panel. In short, the district court did not commit reversible error in holding that the *Brady* items, taken together, did not create a reasonable probability of a different outcome.

AFFIRMED.

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[24] *See Brown I,* 459 F.3d at 535-37 (DeMoss, J [sic], concurring in part and dissenting in part) ("The questions posed by the Grand Jury related only to an enforceable take-out, not to an oral 'promise to pay us back no matter what.' ").

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

UNITED STATES OF AMERICA	§	
	§	C.R. NO. H-03-363
v.	§	
JAMES A. BROWN	§	

MEMORANDUM & ORDER

(Filed Aug. 23, 2010)

Pending are Defendant James A. Brown's Motion for New Trial (Document No. 1004); Defendant James A. Brown's Supplemental Memorandum in Support of Motion for New Trial (Document No. 1020); Defendant James A. Brown's Supplemental Brief in Support of Motion for New Trial on Counts IV and V (Document No. 1160); Defendant James A. Brown's Supplemental Memorandum in Support of His Motion for New Trial (Document No. 1217); Defendant James A. Brown's Motion to Dismiss Indictment for Egregious Prosecutorial Misconduct, *Brady* Violations, and Double Jeopardy (Document No. 1168); and Defendant James A. Brown's List of Authorities Ordering Dismissal of Indictment for Prosecutorial Misconduct (Document No. 1231). After having made an exhaustive study of the motions, responses, and replies, together with the exhibits, and having carefully considered the oral arguments and the applicable law, the Court finds for the reasons that follow that no evidentiary hearing is necessary and that the motions should be DENIED.

I. Background

In November 2004, Defendant Brown was convicted by a jury of charges of conspiracy, wire fraud, perjury, and obstruction of justice.[1] Although the Fifth Circuit reversed Brown's wire fraud and conspiracy convictions because of the flawed honest services theory, it affirmed his "conviction and sentences . . . on [the] charges of perjury and obstruction of justice." *United States v. Brown* ("*Brown I*"), 459 F.3d 509, 531 (5th Cir. 2006). Brown now seeks a new trial on these convictions of perjury and obstruction of justice that the Fifth Circuit affirmed in 2006, and dismissal of the conspiracy and wire fraud counts of the Indictment.

The perjury and obstruction charges arose from Brown's 2002 testimony to the grand jury investigating the Enron Nigerian barge transaction, wherein he testified that Enron's belief that it was obligated to get Merrill Lynch out of the barge deal by June 30th was "inconsistent with my understanding of what the transaction was," that he had no information as to the promise that Merrill Lynch would be taken out by sale to another investor by June 2000, and that he had no understanding as to why a Merrill Lynch document would refer to a promise that Merrill Lynch would be taken out by a sale to another investor by June of 2000. *See Brown I,* 459 F.3d at 527.

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[1] Document No. 628.

II. Motions for New Trial

Brown asserts that newly discovered evidence, allegedly unknown during the first trial due to government suppression or non-disclosure, proves that Enron did not make such a promise or obligate itself, and therefore Brown's testimony to the grand jury was literally true.[2] This, of course, was the central issue in Brown's five weeks long [sic] trial in which voluminous evidence was received. The Court of Appeals well summarized the evidence in affirming Brown's convictions on perjury and obstruction. *See Brown I,* 459 F.3d at 513-16, 525-31. Brown presents no new evidence that his grand jury testimony truthfully disclosed his actual belief of the nature of the transaction, or of his lack of any understanding as to *why* Enron felt obligated to take Merrill Lynch out of the deal by June 30th and as to *why* Merrill Lynch's document would refer to a promise of such; rather, the asserted "new evidence" supports a hypothesis that the nature of the transaction was such that Brown's characterization of it turns out to be literally true.

Brown's assertions of *Brady* violations and of newly discovered evidence are all linked to two Enron employees involved in the barge transaction, and five of Brown's co-employees at Merrill Lynch, plus Merrill Lynch's outside counsel who Brown himself retained to work on the barge transaction. The Enron

[2] *See, e.g.,* Document No. 1004 at 5; Document No. 1020 at 1 & n.1; Document No. 1061 at 2-3, 6.

employees were (1) its former Treasurer [sic, CFO], Andrew Fastow, who in January 2004 (eight months before Brown's trial) pled guilty to two counts charging conspiracy to commit wire fraud and conspiracy to commit wire and securities fraud, and became a cooperating government witness; and (2) its former Treasurer Jeffrey McMahon, who was never indicted in the multiple Enron-related criminal cases. The Merrill Lynch employees and counsel were (1) Katherine Zrike, Chief Counsel for Merrill Lynch's investment banking division, who testified at Brown's trial during presentation of the defense case; (2) Gary Dolan, another in-house Merrill Lynch attorney whom Brown knew and consulted while working on the barge transaction; (3) Schuyler Tilney, former head of the Merrill Lynch banking office in Houston; (4) Kevin Cox and (5) Paul Wood, two Merrill Lynch employees in the credit department; and (6) Alan Hoffman, an attorney with a New York law firm that was Merrill Lynch's outside retained counsel on aspects of the barge deal.

A. Legal Standard

Generally, to obtain a new trial based on newly-discovered evidence, a defendant must demonstrate that: (1) the evidence was discovered after trial; (2) the failure to discover the evidence was not due to defendant's lack of effort; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the new trial would probably produce a new result. *United States v. Runyan,* 290 F.3d 223,

246-47 (5th Cir. 2002). "Motions on grounds of newly discovered evidence 'are not favored by the courts and are viewed with great caution.'" *United States v. Vergara,* 714 F.2d 21, 22 (5th Cir. 1983) (quoting 3 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 557, at 315 (1982)).

"[W]hen a motion for new trial based on newly-discovered evidence raises a *Brady* claim," a court *instead* applies "the three-prong Brady test to determine whether a new trial is appropriate." *United States v. Runyan,* 290 F.3d 223, 247 (5th Cir. 2002). Under *Brady v. Maryland,* 83 S. Ct. 1194 (1963) and its progeny, the government may not withhold evidence that is favorable to a criminal defendant.[3] To establish a *Brady* violation, a defendant must show that (1) evidence was suppressed; (2) the suppressed evidence was favorable to the defense; and (3) the

[3] Brown has made a multitude of *Brady* requests over the course of several years, culminating in last month's Emergency Motion to Compel the Production of *Brady* Material (Document No. 1222), which the government has moved to strike (Document No. 1225). Brown's most recent requests echo past filings, with sweeping requests such as for "[a]ll raw interview notes of any government agent or attorney, draft 302s, including copies containing any highlighting by the [Enron Task Force], and any other evidence in the government's possession (and not previously disclosed) from Andrew Fastow." Document No. 1222 at 4. *Brady,* however, "does not permit a defense fishing expedition whenever it is conceivable that evidence beneficial to defendants may be discovered." *United States v. Scott,* 555 F.2d 522, 528 (5th Cir. 1977). This having been said, the government still must comply with its *actual Brady* obligations and this Court requires complete compliance with that duty.

suppressed evidence was material to either guilt or punishment. *Runyan,* 290 F.3d at 247; *see also United States v. Skilling,* 554 F.3d 529, 574 (5th Cir. 2009), *vacated in part on other grounds,* 130 S. Ct. 2896 (2010). Evidence is not "suppressed" when a defendant "knows or should know of the essential facts that would enable him to take advantage of it." *Skilling,* 554 F.3d at 575 (quoting *Runyan,* 290 F.3d at 246). Indeed, a defendant must "establish that his or her failure to discover the evidence was not the result of a lack of due diligence." *Id.* at 574; *see also United States v. Sipe,* 388 F.3d 471, 478 (5th Cir. 2004) ("[T]he State bears no responsibility to direct the defense toward potentially exculpatory evidence that is either known to the defendant or that could be discovered through the exercise of reasonable diligence.").

Suppressed evidence is material under Brady when there is a "reasonable probability" that the outcome of the trial would have been different had the evidence been disclosed to the defendant; a defendant establishes such a probability upon a showing that the government's suppression of the evidence "undermines confidence in the outcome of the trial." *Runyan,* 290 F.3d at 247 (discussing *Kyles v. Whitley,* 115 S. Ct. 1555, 1566 (1995)). In assessing materiality, the court weighs the cumulative effect of all suppressed evidence relative to the disclosed evidence. *Skilling,* 554 F.3d at 579-80; *Sipe,* 388 F.3d at 478. "[W]here suppressed evidence is merely cumulative, no Brady violation occurs." *Skilling,* 554 F.3d at 580.

Moreover, the materiality of any non-suppressed information is irrelevant to this analysis. *Skilling,* 554 F.3d at 591.

B. Discussion

1. Evidentiary Hearing

Brown requested an evidentiary hearing on his request for new trial, and the Court heard oral arguments on that subject on June 24, 2010. Although an evidentiary hearing on a motion for new trial may be available, one is not required, and it is within a court's discretion whether to conduct such a hearing. *Runyan,* 290 F.3d at 248 (citing *United States v. Blackburn,* 9 F.3d 353, 358 (5th Cir. 1993)).

Having now had opportunity carefully to review Brown's multiple, prolix briefing on his motion for new trial, together with the evidentiary support submitted,[4] and having also heard oral arguments on the motion, the Court finds no showing that an evidentiary hearing would add substantively to the record or materially assist the Court in ruling on the motion. Brown's request for an evidentiary hearing on the motion is therefore DENIED.

[4] Brown has filed more than 150 pages of briefing on this motion alone, plus hundreds of pages of exhibits. By comparison, the government's 100 pages of briefing, most of which also doubles up to answer Brown's separate Motion to Dismiss for Prosecutorial Misconduct, seems rather laudable.

2. Asserted *Brady* Violations and Newly Discovered Evidence

As noted above, the alleged *Brady* violations and claimed new evidence relate primarily to eight individuals. Each is discussed in turn, followed by an analysis of the cumulative materiality of any suppressed evidence.

i. Andrew Fastow

The largest portion of Brown's briefing and supporting evidence is focused on the raw notes of investigating agents, and testimony and depositions of former Enron CFO Andrew Fastow. Each is discussed in turn.

a. Fastow Raw Notes

Both before and after Fastow entered his guilty plea in January 2004, the FBI conducted extensive interviews of him regarding numerous Enron-related financial transactions, including the Nigerian barge deal with Merrill Lynch, resulting in almost 420 pages of handwritten notes (the "Fastow Raw Notes"). *See Skilling,* 554 F.3d at 577. Agents prepared two summary FBI Form 302s[5] – one in December 2003 and another in January 2005. Fastow later testified

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[5] An FD-302 form, commonly called a 302, typically contains memoranda of interviews conducted by FBI agents. *See United States v. Gaston,* 608 F.2d 607, 610 (5th Cir. 1979).

as a government witness in the 2006 criminal trial of former Enron president Jeffrey K. Skilling. Then, in late 2006 and after Fastow had been sentenced, he testified by deposition in the *Newby* Enron shareholder litigation.[6] *See In re Enron Corp. Securities, Derivative & ERISA Lit.,* No. MDL-1446, Civil Action No. H-01-3624 (S.D. Tex. filed Oct. 22, 2001). Brown asserts that Fastow's testimony and the F.B.I.'s raw notes of Fastow interviews demonstrate that the barge transaction involved no promise or guarantee by Enron that the barges would be taken off of Merrill Lynch's hands.

During the pendency of Jeffrey Skilling's appeal, the Fifth Circuit ordered the government to produce the raw notes taken by federal agents in their interviews of Andrew Fastow. *See* Document No. 0051235478, *United States v. Skilling,* No. 06-20885 (5th Cir.), filed November 1, 2007. The Court of Appeals ordered this production to enable Skilling, if he could do so, to support his argument on appeal that the raw notes of Fastow's interviews constituted Brady [sic] material. The Fifth Circuit ultimately determined, on plain error review, that the government's non-production of the raw notes to Skilling before his trial was *not* a *Brady* violation. *Skilling,* 554 F.3d at 591. Brown, in the present motion, extracts 18 pages from these voluminous raw notes in which references are

[6] *See Skilling,* 554 F.3d at 578-79 (testimony); *see also* Document No. 1160, ex. C (*Newby* deposition).

attributed to Fastow about the barge transaction and, like *Skilling,* he also contends that they constitute *Brady* material. The Court has carefully examined all of these raw notes – including the excerpted pieces, phrases, and out-of-context passages relied upon by Brown – and finds that they are substantially consistent with the disclosure letter summarizing Fastow's recollections that the government provided to Brown and his co-defendants in advance of Brown's trial.

First, Brown quotes an excerpt from the raw notes in which Fastow, in the context of being asked about the 6/29/00 Benefits to Enron Summary, says "it was [Enron's] obligation to [use its] 'best efforts' to find 3rd party takeout," but Brown *omits* the rest of the sentence which reads, "& went on to say there would be 3rd party [because] [Fastow] is manager of 3rd party."[7] Fastow added, "LJM was 3rd party and [it] was already found."[8] Brown also quotes a raw note that reads, Enron "best efforts to get [Merrill Lynch]

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[7] Document No. 1160, ex. A at 000263 [hereinafter "Fastow Raw Notes"].

[8] *Id.* LJM was a pseudo third-party entity created to help Enron "improperly hedge its investments." *Skilling,* 554 F.3d at 538. Fastow was its general partner. *Id.* Around the time of the Nigerian barge deal, LJM "apparently was running out of capital, so Fastow raised nearly $400 million in capital and formed LJM2, another third party entity that could conduct deals with Enron." *Id.* at 539 n.6. This Court, like the Fifth Circuit in *Skilling,* and as was frequently done throughout the Fastow Raw Notes, will refer to LJM and LJM2 simply as "LJM." *See id.*

out,"[9] but *omits* that this excerpt is in the context of notes on the 12/23/99 telephone conference, the topic of which Fastow said was "assurance [to Merrill Lynch] they would be out & rate of return as well," . . . "primary issue was assurance of take out."[10] Fastow in this same interview adds:

> Intent for anyone on call to come away with understanding that [Enron] would take necessary steps to make sure [Merrill Lynch] won't own barges on 6/30/00
>
> > (a) and buyer will probably be LJM (Didn't use word LJM)
> >
> > (b) "Necessary steps" – was saying, as CFO Enron, that Enron will have continuing attention to the barges
> >
> > (c) Intent to guarantee they won't hold barges in 6 mos
> >
> > (d) By referencing General Partner was in effect giving the guarantee. . . .[11]

Brown also points to statements that Fastow "never used the word promise"[12] and could not "give a verbal or written guarantee"[13] because Enron "could not buy back [the barge equity interest] [because] it would

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[9] Fastow Raw Notes at 000348.

[10] *Id.* at 000347.

[11] *Id.* at 000348.

[12] *Id.* at 00084A.

[13] *Id.* at 000262.

[have to] reverse the earnings."[14] However, the raw notes also state that he was "being clever by using euphemisms to get them to believe he was using the word promise"[15] – in other words, he did not need to use the *word* promise to *convey* a promise. Furthermore, though Brown points to the raw notes statement that there was "every intention that Enron would find a [third-party] buyer" for Merrill Lynch's equity interest,[16] the notes also state that "[Fastow] didn't see risk [because] either [Enron] found 3rd party or buy-back,"[17] and that Fastow was:

> [H]ighly, highly confident there will be 3rd Party buyer in 6 mos. I'm confident [because] I am GP of LJM [and] LJM is chiefly interested in the Barges. Talked about 6 mos. period come June 2000, if [Enron] did not have a buyer then LJM would step in to Buy out. Nobody [cut off] have any doubt that LJM would buy out.[18]

Further, Brown asserts that the raw notes statement that "Fastow objected to the word 'obligation' in Glisan email" contradicts the disclosure in the government's June 2004 discovery letter that states "Fastow was not bothered by Glisan's use of the word 'obligated' to describe Fastow's representation of

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[14] *Id.* at 000178.

[15] *Id.* at 000084A.

[16] *Id.* at 000084A.

[17] *Id.* at 000033.

[18] *Id.* at 000176.

Enron's agreement to get Merrill out of the barge deal."[19] Glisan's 5/11/00 email read, "To be clear, Enron is obligated to get Merrill out of the deal on or before June 30."[20] The raw note was made when Fastow examined that email. The note, which appears internally contradictory, reads:

> 1) Did not see Email [before] today. Object to word obligated. not bothered that it is [Enron] w/obligation.[21]

The Fifth Circuit considered a similar argument in *Skilling* regarding the alleged difference between this Fastow raw note and summary 302s provided to Skilling in that trial, where (unlike Brown's trial) Fastow did testify. The Court wrote:

> The 302s, however, effectively disclosed the information in these statements. Skilling knew of the content of the interview notes

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[19] Document No. 1160, ex. B at 5 [hereinafter "June 2004 Disclosure Letter"].

[20] *See Skilling,* 554 F.3d at 589-90.

[21] Fastow Raw Notes at 000264. This is one of the problems with raw notes: the meaning of what an interrogator jots down can often be understood only by the interrogator. Here, for example, while Brown advances one interpretation of what should be inferred, other possibilities also exist. Thus, the first phrase, "Object to word obligated," could have been a question, or a topic of inquiry, or an initial mistaken entry of what Fastow said, – with the second statement, "not bothered that it is [Enron] with obligation," being Fastow's answer or clarification. Various possibilities exist. For this reason, one ordinarily should not place undue reliance on a fragmentary raw note lifted out of context and at seeming variance with other raw notes on that topic.

> concerning the Glisan email based upon Fastow's repeated statements in the 302s that Enron would not repurchase the barges, because LJM would instead. That is, the 302s did not indicate that Enron was obligated, which is consistent with the information in the interview notes. Thus, Skilling already had the information necessary to challenge Fastow's statement that the email "reflected" the guarantee.

Skilling, 554 F.3d at 589-90. As stated, Fastow did not testify at Brown's trial, and 302s of Fastow's interviews were not provided to Brown before his trial. Instead, the government in advance of trial delivered to Brown disclosure letters dated June 1, 2004, and July 30, 2004. The June 2004 Disclosure Letter contains substantially the same information as those portions of the 302s relied upon by the Fifth Circuit in rejecting Skilling's comparable argument.[22] The June 2004 Disclosure Letter given to Brown before trial states:

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[22] The Fifth Circuit also concluded that there was no *Brady* violation in *Skilling* while reviewing for clear error. 554 F.3d at 591. Furthermore, the 302s discuss the "Benefits to Enron" document specifically, whereas the June 2004 Disclosure Letter is written in more generic terms. While recognizing that the Fifth Circuit's analysis is thus not strictly controlling, this Court, after conducting an independent comparison of the notes and the June 2004 Disclosure Letter, finds the Fifth Circuit's analysis of the Fastow Raw Notes regarding the Nigerian barge transaction to be accurate and instructive in this analysis. Indeed, as noted, the summary disclosure provided in this case is substantially similar to the 302s examined in *Skilling*.

In Fastow's discussion with Merrill, Fastow alluded to his position as general partner of LJM, and his ability to use LJM to take Merrill out of the Barge deal, if necessary. Fastow spoke with Rebecca McDonald, the head of APACHI, regarding LJM's buyout of Merrill. She said that APACHI had a buyer lined up to buy the Barges but the buyer was not yet ready. Fastow may have told McDonald that Enron had to get Merrill out of the Barge deal.

Merrill believed that Merrill would be taken out of the Barge deal because Fastow gave Merrill verbal assurances that Merrill would be taken out in six months. Fastow does not recall using the word "promise" in his telephone call to Merrill, but he cannot say that with certainty. Fastow thought that he was being clever during the telephone call with Merrill by using euphemisms in order to convey to Merrill a promise to take Merrill out of the barges. Fastow stated to Merrill that Fastow had an extremely high level of confidence that Merrill would not lose money in the Barge deal. Fastow talked about how he was the General Partner of LJM, and that LJM was interested in buying an interest in the Barges, but not at the end of the last quarter of 1999.

. . .

Fastow did not say Enron would buy back the barges, but represented instead that a third party would. Fastow did say that

> Enron will take the necessary steps to make sure Merrill is out of the deal by June 30, 2000. It was reasonable for anyone listening to the call to think that it was Enron that was going to buy them out.
>
> . . .
>
> Enron was the marketing agent, but could not make anyone buy at a specified time, price or return.[23]

Like the summary 302s in *Skilling,* the government's June 2004 Disclosure Letter gave Brown "all the information necessary" to prepare his defense with respect to Fastow's description of what transpired.[24] *See Skilling,* 554 F.3d at 589. Brown has thus failed to show suppression of any complained – of [sic] information in the Fastow Raw Notes regarding the nature of the transaction and Fastow's conduct in his call with Merrill Lynch representatives. That Fastow did not actually testify at Brown's trial offers Brown no recourse because the government expressly offered

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[23] June 2004 Disclosure Letter at 3-5.

[24] Brown asserts that the June 2004 Disclosure Letter's omission of any reference to a "best efforts" agreement renders it materially different from the 302s because "best efforts" is a term of art. Document No. 1201 at 2. This does not materially differ from the disclosed information that "Enron was the marketing agent, but could not make anyone buy at a specified time, price or return."

to require Fastow to testify if Brown or any of his co-defendants desired his testimony.[25]

Brown further asserts that the raw notes show "evidence that was never disclosed" – that Fastow "confirmed" that the draft documents relating to the transaction went through multiple iterations, and likely were reviewed by Arthur Andersen to confirm the transaction's legality.[26] Brown's suggestion that there was suppression of evidence that the draft documents went through multiple iterations has no merit. Testimony and evidence admitted at Brown's trial showed that Enron and Merrill Lynch exchanged at least three versions of the engagement letter setting forth the terms of the deal.[27] Katherine Zrike, Merrill Lynch's most senior in-house counsel on the deal and a defense witness, also testified about the roles of lawyers and accountants in drafting the deal documents.[28] Moreover, the Disclosure Letter summarized Fastow's response to a reference to Arthur

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[25] Document No. 248 at 3; Trial Tr. at 2653. Indeed, in view of this fact, it would be difficult for Brown to prove a Brady [sic] violation for *any* discrepancy between the raw notes and the government disclosure, as he must establish that his "failure to discover the evidence was not the result of a lack of due diligence." *Skilling,* 554 F.3d at 574; *see also United States v. Sipe,* 388 F.3d 471, 478 (5th Cir. 2004).

[26] Document No. 1160 at 6-7.

[27] Gov't Exhibits 507, 515, 518.

[28] *See, e.g.,* Trial Tr. at 4110, 4132-34.

Andersen in the Summary of the Transaction document:

> In Fastow's view, this passage suggests that Enron discussed the barge deal with Andersen and Anderson [sic] told Enron not to change the transaction because there would be a problem.[29]

On the other hand, if Brown relies on these statements to show that Fastow corroborated the evidence already presented at trial, the statements are merely cumulative, and therefore lack materiality. *See Skilling,* 554 F.3d at 591.

Finally, Brown also asserts that the Fastow Raw Notes disclose that Fastow misrepresented the nature of the transaction within Enron, thereby undermining the testimony of any Enron employee – such as Ben Glisan and Michael Kopper, subordinates to Fastow – as to the nature of the transaction.[30] Specifically, Brown argues:

> Fastow had deliberately misled his "'subordinates' by 'tell[ing] Enron people' this was a 'guarantee' to 'motivate' and 'light a fire' within Enron to remarket the barges to a third-party."[31]

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[29] June 2004 Disclosure Letter at 5-6.

[30] Document No. 1160 at 8.

[31] Document No. 1160 at 9 (citing Fastow Raw Notes at 000349).

In context, the Fastow Raw Notes state:

> W/Subordinates
>
> 1) Probably used a shorthand word like promise or guarantee[.]
>
> 2) Internally at Enron. AF, JM + BG would tell Enron people there was a guarantee so to light a fire under Int'l people – so it should be in paperwork
>
> 3) On phone call, didn't say [Enron] would buy back, Rep of 3rd Party. Explicit.
>
> Internally said Enron would buy back. Unit less motivated if knew of LJM.
>
> "Enron will take necessary steps to make sure you are out of this by June 00" → Reasonable for person on other end to think Enron.[32]

Brown has failed to show the materiality of this information. Fastow internally referred to a "promise" or "guarantee" as *shorthand* to keep the International Division's focus on the need to get Merrill Lynch off the hook by the end of six months. Again, this is consistent with the government's June 2004 disclosure of Fastow's representations to Merrill Lynch on the phone call – that Enron would ensure Merrill Lynch would be taken out of the deal because, if all else failed, Fastow could use his position as general

[32] Fastow Raw Notes at 000349.

partner of LJM to take Merrill Lynch out of the barge deal.

The Fifth Circuit addressed a very similar argument in *Skilling,* with respect to these same raw notes:

> This statement does not contradict Fastow's assertions that he made an implicit guarantee to Merrill Lynch.
>
> Immediately preceding these notes, Fastow discussed the guarantee with Merrill Lynch extensively, repeatedly noting that he had made a guarantee in everything but name and was avoiding the word to protect the accounting treatment. Thus, he was not necessarily lying when using words like "promise" or "guarantee" with his subordinates.
>
> Further, these notes do not support Skilling's argument that Glisan and Loehr based their testimony only upon Fastow's lies. First, the notes report Fastow as saying that "BG," presumably Ben Glisan, was party to the plan to "tell Enron people that this was a guarantee." As Skilling bases his argument that Fastow "lied" to Glisan upon this statement, it is difficult to understand how it indicates that Fastow lied to Glisan about something which they were then both supposed to lie about to "Enron people." That is, it is unlikely that Glisan was confused about the nature of the deal as a whole if he was also lying to the "Enron people." Second, Loehr worked at both Enron and LJM, and

> he offered explicit testimony about the intricacies of the Enron/LJM interactions, so it is unreasonable to conclude that he was tricked by Fastow's alleged lie. Therefore, it is unlikely that Skilling could have used this statement to impeach either corroborating witness.

Skilling, 554 F.3d at 590. As the government points out, Kopper, like Loehr, was an employee of both Enron and LJM; in fact, Fastow sold LJM to Kopper in 2001.[33] Thus, it is even less likely than with respect to Loehr that Kopper was unaware of the nature of the transaction.

In sum, the only pieces of information from Fastow that arguably were suppressed are: (1) Fastow's corroboration of evidence that the deal went through multiple drafts and (2) Fastow's assertion that he told "Enron people there was a guarantee so to light a fire under" them. That each fails to meet the materiality test has been discussed above; the Court will nonetheless consider these statements along with any other suppressed information in a combined materiality analysis below. *See Skilling,* 554 F.3d at 579-80; *Sipe,* 388 F.3d at 478.

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[33] Trial Tr. at 1291.

b. Fastow's Testimony and Deposition

Brown also contends that Fastow's subsequent testimony in *Skilling* and his deposition in *Newby* merit a new trial. This contention must rest solely on an assertion of "newly discovered evidence," as the government could not have suppressed Fastow's *Newby* and *Skilling* statements prior to Brown's trial; they were given *after* Brown's trial. *See* 2 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 256, at 141 (4th ed. 2009) ("[E]xculpatory evidence must exist at the time of the trial to qualify as Brady material."). The Court will therefore apply the five-part newly discovered evidence test. *See United States v. Runyan,* 290 F.3d 223, 246-47 (5th Cir. 2002).

Fastow's central involvement in the barge deal was well known to Brown and to his co-defendants. Presumably desiring to save Fastow's debut as a government witness until the much higher profile Lay/Skilling trial, the government elected not to call him as a witness in Brown's trial. Significantly, however, the government offered to require Fastow to testify if Brown or any of his co-defendants desired his testimony. It informed the Court and Defendants on June 3, 2004: "While Fastow is entitled to assert the Fifth Amendment if called by any third party, including the defense, the government will, if asked, require Fastow to testify in this trial pursuant to his cooperation agreement [in Fastow's plea agreement] with the government if the defense believes his testimony

could assist them in any way."[34] Neither Brown nor any of his co-defendants took the government up on its offer. Indeed, the Court even reminded Defendants at trial that "the Government . . . told you that Mr. Fastow would be glad to testify – may not be glad to – but they would certainly see to it that he testifies, if you wish him to testify."[35]

This alone renders Fastow's subsequent testimonial statements an insufficient basis for new trial due to Brown's lack of effort to procure Fastow's available testimony, or perhaps more precisely, his considered decision not to call Fastow. *See United States v. Lowder,* 148 F.3d 548, 551 (5th Cir. 1998) (defendant not entitled to new trial where he had "not met his burden of demonstrating that the failure to

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[34] Document No. 248 at 3.

[35] Trial Tr. at 2653. The Court was favorably impressed at the time that Brown and his five co-defendants were represented in trial by some of America's preeminent criminal defense attorneys. Given the government's fair disclosures of the substance of Fastow's statements to the FBI, the separate decisions not to call Fastow made by six separate sets of top defense lawyers were not at all surprising. Their wisdom was borne out when Fastow later testified at the *Lay/Skilling* trial and in the *Newby* deposition. It is inconceivable that even a neophyte defense trial lawyer would call a witness with the harmful testimony Fastow was expected to give simply to "impeach" him with raw notes that the deal documents went through several iterations and Fastow told his subordinates – in order to "light a fire under them" to get a buyer for Merrill Lynch's barge interest by June 30, 2000 – that Enron had made a promise or guarantee to Merrill Lynch to do so.

procure [a witness's] testimony at trial was not the result of his own lack of diligence").

In addition, Fastow's testimony in *Skilling* and deposition in *Newby* are consistent with the raw notes, which, as discussed above, are consistent with the government's June 2004 Disclosure Letter. Thus, Fastow's post-trial testimonial statements in all likelihood would have been even more persuasive in support of the government's case than the testimony of witnesses the government called, and assuredly would probably not have produced a different verdict. Also, due to the substantive similarities between Fastow's subsequent testimony and the disclosure letter given to Brown before trial, Brown's various assertions that he lacked the information necessary to determine whether to call Fastow lack merit.

ii. <u>Jeffrey McMahon</u>

Jeffrey McMahon was Treasurer of Enron when the 1999 year-end Nigerian barge transaction was consummated with Merrill Lynch. At the request of Enron Division APACHI personnel, McMahon contacted Merrill Lynch to request that it contact the APACHI Division regarding the Nigerian barges. Thereafter, McMahon evidently was largely detached from the deal-makers and, during the last two weeks of December, from December 18, 1999 through January 3, 2000, McMahon was on vacation. Thus, McMahon was at his home when he was connected into the December 23, 1999 telephone conference

between Fastow and Merrill Lynch's Daniel Bayly, and others. McMahon was investigated but never indicted. Both the government and Brown and his co-defendants stipulated at trial that McMahon, if called to testify at Brown's trial, would have pled Fifth Amendment immunity, rendering him unavailable to testify.[36]

Brown asserts that two letters written after Brown's trial by counsel for then former Enron Treasurer McMahon – one sent to the Department of Justice on April 25, 2005,[37] for the stated purpose to request that the government not indict McMahon on the Nigerian barge transaction, and the other sent to the SEC on July 28, 2006[38] to advance settlement negotiations – constitute newly discovered evidence that the barge transaction contained no promise or guarantee.[39] Brown also contends that the government

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[36] Trial Tr. at 5260-61.

[37] Document No. 1168, ex. C (emphasis added) [hereinafter "McMahon DOJ Letter"].

[38] Document No. 1020, ex. A [hereinafter "McMahon SEC Letter"].

[39] To the extent Brown asserts that these post-trial letters, as opposed to any pre-trial interview notes, constitute a *Brady* violation meriting a new trial on Counts IV and V, he is incorrect. *See* 2 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 256, at 141 (4th ed. 2009) ("[E]xculpatory evidence must exist at the time of the trial to qualify as Brady material."). Brown, however, points to *Monroe v. Butler,* 690 F. Supp. 521, 525 (E.D. La. 1988), *aff'd,* 883 F.2d 331 (5th Cir. 1988). In *Monroe,* a petitioner convicted of first degree murder in state court alleged a *Brady* violation in his habeas petition to the district court

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suppressed interview notes from the Senate Permanent Subcommittee on Investigations interviews with McMahon. Each contention is addressed in turn.

a. The McMahon Letters

In relevant part, the letters from McMahon's attorneys generally speak to three topics: (1) McMahon's

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based upon the prosecution's non-disclosure of a report of another man's possible confession to the murder. 883 F.2d at 332. Because the state authorities failed to disclose potentially exculpatory evidence to the petitioner during the period allowed for post-conviction relief (i.e., a motion for new trial) under state law, the district court ordered that the petitioner be granted "whatever he was entitled to by way of post-conviction relief during the limitation period provided by Louisiana law for a request for new trial based upon the exculpatory material which the State courts did not have an opportunity to consider. . . ." *Id.* The state court then held an evidentiary hearing to consider the new evidence, whereupon it denied a new trial. *Id.* No new trial was mandated by the *Brady* violation; "the only constitutional problem was the failure of the state court to fully review the newly discovered matter in deciding upon post-trial relief." *Id.* at 333. In other words, the error in *Monroe* happened only after the trial; it therefore did not affect the fairness of the trial itself, and therefore did not directly mandate a new trial. It only affected the fairness of the state court's consideration of whether to grant the petitioner a new trial; therefore, a re-consideration of the motion for new trial was the only thing mandated.

Brown is already getting exactly what *Monroe* stands for: consideration of the McMahon letters in a motion for new trial. *Monroe* does not speak to the standard applied to evaluate that evidence in the motion for new trial *itself,* but because they are alleged to be post-trial newly discovered evidence, they are considered under the five-part "newly discovered evidence" test.

understanding of the overall transaction; (2) his understanding of Fastow's representations to Merrill Lynch during the 9:30 a.m. December 23, 1999 conference call; and (3) his opinion on the veracity of Glisan's and Fastow's Enron-related testimony pertaining to himself.

In both letters, McMahon's attorneys each repeatedly point to their client's lack of involvement in the Nigerian barge transaction beyond its initiation, essentially describing McMahon's minimal involvement and understanding of the transaction in general. For example, "Mr. McMahon did not negotiate the terms and conditions of the transaction with Merrill Lynch. . . . After his initial telephone contact, Mr. McMahon did not have any further involvement with the transaction until December 23, 1999."[40] The letters also emphasize his passive role in the December 23 conference call: McMahon, on vacation at the time, "participated in the conference call from his home" and "did not speak . . . other than to acknowledge he was indeed on the conference call."[41] Any argument that McMahon's description of the transaction should be believed over contradictory evidence would necessarily be undercut by McMahon's asserted lack of involvement.

With respect to the conference call in which McMahon listened at home without speaking (the

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[40] McMahon DOJ Letter at 6.

[41] *Id.* at 8.

second relevant topic of the letters), McMahon's counsel wrote to the Department of Justice:

> Any language used by Mr. Fastow in the 9:30 a.m. conference [call on December 23, 1999] with Merrill Lynch was, of course, directed to his fund's private placement agent and his investors in LJM2. None of this language, by which Mr. Fastow communicated anything with respect to Enron's position regarding the Nigerian barge equity, translated to Mr. McMahon as a commitment for *Enron or any of its affiliated entities* to repurchase Merrill Lynch's interests.
>
> . . .
>
> In sum, any language used prior to or during the conference call, directly or indirectly, was not understood by Mr. McMahon to entail a commitment by *Enron and its affiliated companies* to repurchase Merrill Lynch's interest.[42]

Similarly, the letter to the SEC states:

> [A]t no time during the call did Mr. Fastow ever suggest that *Enron* would "repurchase" the interest from Merrill Lynch or "guarantee" that Merrill Lynch would not incur risk of loss associated with the investment.[43]

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[42] McMahon DOJ Letter at 9 (emphasis added).

[43] McMahon SEC Letter at 6 (emphasis added).

Brown has failed to demonstrate that these statements would probably lead to a new result in a new trial. First, the statements do not necessarily contradict Fastow's version of the December 23 call, as discussed above with respect to the Fastow Raw Notes, and by the Fifth Circuit in *Skilling*:

> [I]t was not Enron itself that was formally bound to buy the interest from Merrill Lynch; LJM would do so if Enron's "best efforts" did not result in another buyer.

Skilling, 554 F.3d at 589. Second, to the extent that the statements are viewed even more broadly as including LJM, McMahon's lawyers' claims in these letters are contradictory to the testimony of numerous government witnesses at trial, including Tina Trinkle, Sean Long, Ben Glisan, and Michael Kopper, not to mention that LJM did in fact take Merrill Lynch out of the barges by the June 30, 2000 deadline. Given McMahon's obvious self-interest in disavowing wrongdoing to avoid indictment, and the substantial evidence presented in the five weeks-long [sic] Brown trial, Brown has shown nothing in these lawyer-letters that would probably produce a new result.[44]

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[44] For the same reason, Brown has failed to show that the government's various statements in opening and closing arguments referencing Enron's promise to Merrill Lynch, made through either Fastow or McMahon, constitute "egregious misconduct." *See* Document No. 1217, ex. A, Chart 2.

Finally, with respect to the third topic of the letters, Brown provides a *partial* quotation of two sentences in McMahon's lawyer's letter to the SEC:

> Finally, Mr. McMahon has reviewed the transcript of Mr. Fastow and former Enron treasurer Ben Glisan's testimony in the Lay-Skilling trial, Mr. Glisan's testimony in the trial of the Nigerian Barge case and the FBI's Form 302 of Mr. Fastow's statements regarding the transaction. Based on that review and his knowledge of what actually occurred, Mr. McMahon has concluded that both men testified falsely.[45]

Without using any ellipses, Brown omits from the last sentence its concluding limiting clause: the letter in fact stated that McMahon "concluded that both men testified falsely *regarding Mr. McMahon's involvement in the transaction.*"[46] Viewed in context, this statement lacks the requisite materiality; it states only that Glisan misrepresented *McMahon's* role. At most, this evidence is "merely . . . impeaching," and there is no plausible basis to conclude that it would probably lead to a new result. *See Runyan,* 290 F.3d at 246-47.[47] Moreover, even considering cumulatively

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[45] Document No. 1020 at 3 (quoting McMahon SEC Letter at 6).

[46] McMahon SEC Letter at 6 (emphasis added).

[47] The Court also finds that the assertions of McMahon's counsel in these letters fail to demonstrate that the government either sponsored or intended to sponsor perjured testimony, despite Brown's suggestion. *See* Document No. 1020 at 3 n.4.

the content of both letters written by McMahon's lawyers to avoid his indictment and to settle with the SEC, Brown has failed to show that a new trial would probably lead to a new result.

b. The McMahon Interview Notes

Brown also asserts a *Brady* violation in that the government allegedly suppressed information from the notes of the Senate Permanent Subcommittee on Investigations' interviews with McMahon.[48] The interview notes, which pre-date Brown's trial, indicate that McMahon had "[n]o recollection of a promise (to re-buy) outside best-efforts promise in the phone call."[49] The notes also state: "Never made rep[resentation] to [Merrill Lynch] that [Enron] would buy them out [illegible] or [ ] @ rate of return."[50] However, the government disclosed the following in its July 30, 2004 disclosure letter, which it provided to Brown and his co-defendants in response to this Court's order[51]:

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[48] Document No. 1217 at 8.

[49] *Id.* (citing *id.,* ex. D at 000544).

[50] *Id.,* ex. D at 000449.

[51] *See* Document No. 290 at 8-9 (Order Dated July 14, 2004). Prior to issuing the July 14, 2004 Order, the Court reviewed *in camera* much of the material that Brown now asserts contains *Brady* information. The Court's *in camera* review included "the testimony and other materials that led the Government to identify to Defendants 22 persons who may have exculpatory testimony." Document No. 228 (Minute Entry for May 27, 2004 Pretrial Conference); Document No. 205, exs. 1 & 2 (listing the

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> McMahon did not recall any definite push to get the [Nigerian Barge Deal] done by year end. Merrill wanted Enron/Fastow's assurance that Enron would use best efforts to syndicate or find a buyer for these assets. It was not unusual for this type of agreement not to be in writing. McMahon does not recall any guaranteed take out at the end of the 6 month remarketing period.[52]

As with the Fastow Raw Notes, that Brown was actually informed of the substance of this information means it was not suppressed. *See Skilling,* 554 F.3d at 575 (evidence is not "suppressed" when a defendant "knows or should know of the essential facts that would enable him to take advantage of it").[53]

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22 persons, which included Jeff McMahon, Katherine Zrike, Gary Dolan, and Schuyler Tilney).

After that review, the Court ordered the government to "provide to Defendants summaries of the exculpatory information that led the Government to identify Kathy Zrike and other witnesses as having exculpatory testimony." Document No. 290 at 9. The Court acknowledged that "[a]lthough this may be more than is required by *Brady* at this juncture, the Court is of the opinion that the requirement is warranted given the extensive investigation that the Government has conducted and the large number of witnesses it has identified who possibly have exculpatory information for these Defendants." *Id.*

[52] Document No. 1168, ex. O at 7 [hereinafter "July 2004 Disclosure Letter"].

[53] As observed above, moreover, the parties stipulated to the fact that McMahon, if called to testify at Brown's trial, would have pled the Fifth Amendment. Trial Tr. at 5260-61. Brown has not shown how having access to the actual interview notes, as

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iii. Katherine Zrike

Katherine Zrike, who was a principal witness for the Merrill Lynch defendants, testified for 1-½ days. A New York lawyer, Zrike had joined Merrill Lynch in 1994, after having practiced for eight years at Shearman & Sterling in New York City and for about a year and a half at Warner Lambert. At the time of the Nigerian barge transaction, Zrike was chief legal counsel for the investment banking division of Merrill Lynch, with 30-35 lawyers in her worldwide group. She was Merrill Lynch's senior in-house lawyer who was consulted and involved in working on the Nigerian barge transaction.

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opposed to a summary of their substance, would have enabled him to take any greater material advantage of the information; for example, he has failed to demonstrate that any of the interview notes would have been admissible at trial, or that they would have provided substantially different material from which to formulate cross-examination of government witnesses.

Brown *has* argued that the non-disclosure of the McMahon interview notes (as well as the Fastow interview notes) constitutes a *Brady* violation because the notes contradict testimony from Ben Glisan, the government's "star witness," and Michael Kopper, who ran "a close second." Document No. 1217 at 10-11. However, as already discussed, Brown had the substantive information from both Fastow's and McMahon's interviews that was necessary to cross-examine Glisan and Kopper. Brown was able to use both disclosures to formulate cross examination, and has shown nothing in either the Fastow Raw Notes or the McMahon interview notes that would have given Brown additional effective ammunition to use in cross examination.

Brown alleges that the government suppressed grand jury testimony of Katherine Zrike,[54] omitting "all Zrike's testimony and statements regarding the best-efforts assurances and her attempts to document it."[55] For example, Zrike stated in her grand jury testimony:

> The other thing that we marked up and we wanted to add was a best efforts clause, what's called a best efforts clause[,] that they would use their best efforts to find a purchaser to conclude the purchase with the – another third-party purchaser besides ourselves and that – realizing that from our perspective as Merrill Lynch lawyers that this was not – this was still a – was not a guarantee, it was not an absolute, but that at least would give us an angle, it would give us a legal angle to get them to focus on that obligation if, in fact, we saw them not paying attention to what was the business deal.[56]

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[54] Brown also, without argument, includes charts of allegedly concealed evidence from Zrike's SEC testimony and FBI 302. *See* Document No. 1217, Charts 3 and 5. After examination of Brown's excerpts of this material, the Court finds no suppression of substantive information. To the extent that minor differences exist between Zrike's SEC testimony and her grand jury and trial testimony, Brown has failed to demonstrate that he by due diligence could not have uncovered the same information from this defense witness during her lengthy testimony at Brown's trial.

[55] Document No. 1217 at 6 (citing Document No. 1168, ex. F at 55, 63-64, 66-70).

[56] Document No. 1168, ex. F at 63.

In her testimony at Brown's trial, Zrike stated multiple times, in answers both to defense counsel and on cross-examination by the government, that her understanding was that Enron made an oral agreement to re-market the barges.[57] For example, when Zrike was asked about Government Exhibit 203, an internal Merrill Lynch document, she affirmed again her understanding of Enron's re-marketing commitment:

> Q. Okay. All right. And this prior sentence before that, "Enron will facilitate our exit from the transaction with third-party investors," was that consistent with what you knew about the re-marketing agreement?
>
> A. Yes, it was.
>
> Q. Okay. And so, when you read, "Enron is confirming this commitment to guarantee the ML take-out within six months," did you also assume that that meant the remarketing agreement?
>
> A. Yes.[58]

In light of Zrike's extensive testimony on what she understood was Enron's oral re-marketing agreement, as well as her testimony on many other topics and details, Brown has shown no suppression of any of Katherine Zrike's knowledge of the transaction.

[57] *See, e.g.,* Trial Tr. at 4069, 4101, 4108-09, 4122-23, 4126, 4230, 4241, 4269-70, 4275, 4277.

[58] Trial Tr. at 4277.

Moreover, the alleged non-disclosure of Zrike's unsuccessful attempts to put in writing that Enron would use its "best efforts" to re-market the barges is no *Brady* violation. The evidence was quite clear that Enron would not agree in writing to *any* obligation to re-market the barges – period – whether by the use of "best efforts" or not.[59]

Finally, Brown has not shown that he or his co-defendants could not have elicited the same testimony from Zrike at trial by the exercise of due diligence. This is not a case in which the defendants had insufficient information to elicit the relevant exculpatory testimony.[60] Defendants knew that Zrike

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[59] Even had this additional testimony been elicited, it would amount to an immaterial difference over the substance of Zrike's testimony already of record regarding her impression of the deal as a re-marketing agreement. Hence, Brown has failed to show materiality.

[60] Brown cites *United States v. Fisher* as an example of where the defense did not have sufficient information even to recognize the particular significance of a potential witness. Document No. 1160 at 18 (citing 106 F.3d 622, 634-35 (5th Cir. 1997), *abrogated on other grounds by Ohler v. United States,* 120 S. Ct. 1851 (2000)). The potential witness's accountant provided "central" testimony on the bank fraud charge on which the defendant was convicted. 106 F.3d at 634. That accountant testified that the potential witness had been aware of a loan that the accountant took out in the potential witness's name. *Id.* After the accountant testified, the government on the last day of trial produced an FBI 302 report of an interview with the potential witness wherein the witness claimed to have had no knowledge of the loan in his name. *Id.* Without this disclosure, the defense had no basis to assume that the potential witness did not know of the loan, and thus did not call the potential witness. *See id.* at

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was Merrill Lynch's senior-most attorney on the barge transaction; they knew her impression of the deal; they called her and had every opportunity to ask her about her participation in drafting the deal documents. Brown, who had consulted with Zrike in putting together the transaction, had no reason to have been oblivious to the obvious expectation that, as Merrill Lynch's lawyer, Zrike would attempt to introduce language into draft deal documents that was favorable to Merrill Lynch. A defendant is expected to exercise at least reasonable diligence in uncovering information. *See Skilling,* 554 F.3d at 574; *see also United States v. Sipe,* 388 F.3d 471, 478 (5th Cir. 2004). That Brown, with the benefit of hindsight, is now dissatisfied with the testimony elicited does not demonstrate a *Brady* violation.

iv. Gary Dolan

Gary Dolan in 1999 was a lawyer in Katherine Zrike's investment banking counsel group. He worked with Zrike and Brown on the year-end Nigerian barge

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634-35. While this testimony would not have directly exculpated the defendant, "it would have severely impeached the testimony of a key government witness." *Id.* at 635. The late disclosure was thus a *Brady* violation.

Here, in contrast, Brown knew and had worked with Zrike, who was head of the investment banking counsel group, and he had consulted her in putting together the barge transaction. She testified as a friendly witness, on call of the Merrill Lynch defendant Bayly. Brown had all of the knowledge necessary and full opportunity to elicit any favorable testimony.

transaction. Brown's co-defendant Robert Furst and the government stipulated that, although Furst subpoenaed Dolan as a defense witness, Dolan would invoke his Fifth Amendment privilege against self-incrimination and was therefore an unavailable witness.[61]

Brown complains that in government disclosures pertaining to Dolan, the government omitted the following sentence from a statement found in the FBI's 302:

> Dolan believed that such an agreement would be improper because such a transaction could be viewed as a "parking" transaction.[62]

This was the last sentence of a paragraph in the 302 that was substantially copied verbatim by the government in its pretrial disclosure to Brown on July 30, 2004:

> As to a draft engagement letter in his files, Dolan made changes to some of the engagement letter terms related to the deal because Dolan did not believe that those were the actual terms. Dolan stated that the original draft of the engagement letter obligated Enron to eventually take [Merrill Lynch] out of the Nigerian Barge transaction. This was

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[61] Trial Tr. at 4924.

[62] Document No. 1217, ex. B-2 at 5.

> contrary to Dolan's understanding of the transaction.[63]

That Dolan, a lawyer, would recognize that a written obligation by Enron eventually to take Merrill Lynch out of the Nigerian barge transaction could be viewed as a "parking transaction" adds nothing material. The disclosure that *was* important, which Brown received, was that Dolan – consistent with what Brown now claims is the truth – said he believed Enron was *not* agreeing eventually to take Merrill Lynch out of the barge deal. Evidence is not "suppressed" when a defendant "knows or should know of the essential facts that would enable him to take advantage of it." *Skilling,* 554 F.3d at 575 (quoting *Runyan,* 290 F.3d at 246).[64]

Brown also asserts that the government failed to inform him that "Dolan explained his notes which reflected his knowledge of the deal, the fees to [Merrill Lynch], and the gain to Enron."[65] As observed above, the government disclosed Dolan's knowledge of the

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[63] July 2004 Disclosure Letter at 5; *cf.* Document No. 1217, ex. B-2 at 5.

[64] The government's disclosure that attorney Dolan made changes to the engagement letter certainly provided Brown with information sufficient to challenge through questioning any testimony or evidence to the contrary, and the government's disclosure of the fact that Dolan made changes to the engagement letter was sufficient to alert Brown as to whose handwriting was on the engagement letter. Brown has failed to demonstrate a suppression of this complained-of evidence relating to Dolan.

[65] Document No. 1217 at 5.

deal; it separately disclosed to Brown the fees to Merrill Lynch and gain to Enron prior to trial.[66] Nonetheless, Brown asserts that Dolan's knowledge of the fees to Merrill Lynch and gain to Enron is vital to contradict the prosecution's opening statement at Brown's trial that there would be no evidence "that any lawyer was asked if it was all right for Enron to count this deal as income."[67] Brown asserts that the "prosecutors knew – but withheld – that Dolan and Zrike had told them that the lawyers were well aware that Enron was going to book a gain from this transaction."[68]

Brown and his co-defendants, however, had the knowledge necessary to put on evidence to combat this argument. Before Brown's trial Defendants were given a copy of a Merrill Lynch submission to the SEC wherein Zrike's understanding of the barge transaction was explained.[69] The SEC submission stated that Zrike[70] concluded that Merrill Lynch was at risk in its ownership of the barges despite Enron's offer to

[66] *See* Document No. 1223 at 5-6; Gov't Exhibits 203, 209, 212.

[67] Trial Tr. at 419.

[68] Document No. 1227 at 2.

[69] *See* Document No. 125, ex. 5 (Merrill SEC letter attached to Defendant Daniel Bayly's Motion to Compel).

[70] Because Brown hinges the importance of Dolan's knowledge of Enron receiving income from the transaction upon his status as an attorney, and lumps Dolan's superior, Zrike, into the argument, Zrike's knowledge is also relevant. Both were Merrill Lynch attorneys working on the transaction.

facilitate finding a third-party buyer, and that Zrike and her colleagues considered Enron's re-marketing offer and all circumstances of the transaction, and concluded it did not negate true sale treatment.[71] In other words, Brown was fully informed that Zrike and her colleagues – which included Dolan – were aware that the transaction would be considered a sale – that is, that Enron would book income on it. Indeed, Zrike even testified at trial that, at the time of the transaction, she thought it "was [an] equity transaction" that "involved the purchase of interest in the barges in the form of equity."[72] In fact, she also testified, in response to defense counsel questioning, that she and Dolan both met with Brown to learn more about the barge transaction.[73]

To the extent that *Dolan*'s knowledge of income booking by Enron was suppressed, such was cumulative of information disclosed to Brown and his codefendants and immaterial in light of the testimony and evidence elicited at trial.

v. Schuyler Tilney

Schuyler Tilney was the head of Merrill Lynch's Houston banking group in late 1999. He was identified as one of those on the December 23, 1999,

[71] *See id.,* ex. 5 at 5-7.

[72] Trial Tr. at 4230. *See also id.* at 4126.

[73] *Id.* at 4055-63.

telephone conference between Fastow and Merrill Lynch's Daniel Bayly. Tilney was not indicted. Tilney's lawyer advised co-Defendant Furst's counsel that if subpoenaed, Tilney would plead the Fifth Amendment,[74] and neither the government nor Brown or any of his co-defendants called Tilney to testify at trial.

Brown asserts that excerpts from the raw notes taken in interviews with Tilney demonstrate suppression. Brown specifically complains of the following alleged omissions (quoted from Brown's Supplemental Memorandum in Support of his Motion for New Trial):

> 1) [The prosecution] withheld that Tilney told the government affirmatively that Fastow *told* Merrill Lynch that Enron "will find a new home" for Merrill's equity interest.[75]
>
> 2) Tilney said that "ML had no legal recourse to Enron" and that "ML [was willing to] place $7 million at risk to build its relationship with Enron."[76]

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[74] Document No. 348, ex. K.

[75] Document No. 1217 at 11 (citing *id.,* ex. F at 000704) (emphasis in original).

[76] *Id.* at 11-12 (citing *id.,* ex. F at 000679).

3) A "'commitment to guaranty' [reflected in the APR] conflict[ed] w[ith]/ his understanding of what would take place under [the] transaction."[77]

4) Fastow's representations *did not include a guarantee – orally or in writing.*[78]

5) There was "no legal obligation for E[nron] to do anything."[79]

The government disclosed to Brown in its pretrial July 2004 Disclosure Letter the following:

> Tilney thought Fastow said on the call that they could not give Merrill assurances in writing because otherwise it would not have been a true sale. Tilney indicated that he believed Merrill was at risk in the [Nigerian barge deal] at the end of 1999. If Enron were unable to find a home for the barges, Merrill would own the barges. Enron did not represent that if the Marubeni deal fell through and Enron was unable to secure another buyer then they would make it up to Merrill in some other way. Merrill had been informed by Enron that Arthur Andersen had blessed the transaction and its true sale

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[77] *Id.* at 12 (citing *id.,* ex. F at 000706).

[78] *Id.* (citing *id.,* ex. F at 000680) (emphasis in original).

[79] *Id.* (citing *id.,* ex. F. at 000727). Brown also includes several other quotes from Tilney's raw notes, without further argument, in an attached chart. *See* Document No. 1217, Chart 9. They add nothing material to the excerpts that are the subject of Brown's arguments.

> characteristic. Tilney stated that he believed the [Nigerian barge deal] was proper.[80]

Again, Brown has failed to point to any non-disclosed interview notes that do not convey the same substantive information as found in the Court-ordered July 2004 Disclosure Letter. Indeed, the latter disclosure identifies Tilney as holding views consistent with what Brown is now urging, namely, that there was no promise by Enron to take Merrill Lynch out of the barge transaction and that it was a true sale that put Merrill Lynch at risk. Also, as with McMahon's interview notes, Brown has failed to show how he would have been able to use the raw notes of Tilney's statements any more effectively or differently than his use of Tilney's statements summarized in the government's disclosure.

vi. Alan Hoffman

Alan Hoffman is a New York attorney who, in 1999, was with the law firm of Whitman, Breed, Abbott & Morgan, whose New York office merged with Winston & Strawn in 2000.[81] According to the 302 on Hoffman's interview, Hoffman after joining the firm had worked on Merrill Lynch matters in his practice specialty, which is structured finance. A few

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[80] July 2004 Disclosure Letter at 8.

[81] *See* Trial Tr. at 4132-33. Hoffman's 302s refer to his firm of employment only as Winston & Strawn; for simplicity's sake, the Court will do the same.

days before Christmas 1999, Hoffman received a call from Brown, who retained Hoffman as outside counsel in connection with the Nigerian barge transaction.[82] Brown told Hoffman the deal had to be completed before year-end.[83] Brown instructed Hoffman to focus on three areas: the non-recourse loan, the indemnification agreement, and reviewing the deal to make sure that there were no adverse tax consequences.[84]

Notwithstanding that it was Brown himself who retained Hoffman to represent Merrill Lynch in aspects of the transaction, Brown complains that the government provided to Brown no disclosure relating to Hoffman. In particular, Brown asserts that the 302 of Alan Hoffman's interview contained exculpatory evidence.[85] The arguably relevant statements include: (1) Hoffman's opinion that Brown and Fuhs were very ethical; (2) that Enron had no "obligation to find a buyer of Merrill Lynch's interest," but that "there was an unwritten understanding that Enron would help ML find a purchaser for their interest in the Nigerian Barge"; and (3) that Hoffman and his colleagues at Winston & Strawn examined aspects of potential liability arising from the deal.[86]

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[82] Document No. 1020, ex. G at 1.

[83] *Id.*

[84] *Id.*

[85] *See* Document No. 1020 at 12-13 n.11; *id.,* ex. G at 5; *see also* Document No. 1201 at 5.

[86] *See* Document No. 1201 at 5.

Given Brown's history of dealings with Hoffman, Brown presumably knew better than anyone Hoffman's high opinion of his ethics. This is not a *Brady* violation. The absence of a written obligation to remarket in the transaction's closing documents and the "unwritten understanding" between Enron and Merrill Lynch, as well as the several descriptions of what that agreement was, were fully established by numerous other disclosures as recited *ad nauseum* above; Brown offers no reason why Hoffman's understanding, substantially the same as that expressed by some other witnesses, adds anything material. Thus, Brown has failed to demonstrate materiality with respect to Hoffman's statements that Enron had no obligation other than to help Merrill Lynch find a buyer. Finally, with respect to Brown's third contention as to Hoffman, Winston & Strawn's examination of Merrill Lynch's potential liability pertaining to tax issues, whether Merrill Lynch would be viewed as a utility under U.S. law, and possible Nigerian legal liability, if relevant at all, were all best known by Brown himself, who hired Hoffman and gave him his instructions. Brown has thus failed to show suppression of Hoffman's examination of Merrill Lynch's potential liability.

vii. and viii. Kevin Cox and Paul Wood

Kevin Cox, according to Brown, was head of Merrill Lynch's credit department and involved in the preliminary discussions regarding the Nigerian barge

transaction. Paul Wood, according to Brown, was a Merrill Lynch credit manager.

Cox was a member/participant in Merrill Lynch's Debt Markets Commitment Committee ("DMCC"). That committee considered debt transactions that Merrill Lynch became involved in, whether as an underwriter or as a lender. According to Katherine Zrike's testimony at Brown's trial, Zrike decided that the barge transaction should be considered by a group other than the banking team and she turned to the DMCC. That group met on December 22, 1999, and among those present were Zrike, Kevin Cox, and Brown. After presentation of the barge deal and discussion, Zrike testified at Brown's trial that the DMCC "decided that they did not believe that it was in their jurisdiction to approve an equity purchase and so they did not approve it or disapprove it."[87]

Kevin Cox and Paul Wood each testified to a grand jury after Brown was convicted and sentenced. Brown claims their testimony is "newly discovered evidence" that entitles Brown to a new trial.[88] The testimony to which Brown points, however, is only cumulative of what defendants elicited through the testimony of Zrike. Cox testified that the DMCC

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[87] Trial Tr. 4094.

[88] Document No. 1061 at 30-31. For the same reasons discussed with respect to the McMahon DOJ and SEC letters, the Court reviews the post-trial Cox and Wood statements under the "newly discovered evidence" standard, not as a *Brady* violation. *See supra* p. 23, n.39.

concluded "that the only way for this transaction to meet the client's [Enron's] needs would be if it was an actual sale or a true sale and that in order to have a true sale, Merrill Lynch would have to be at risk and that there wasn't any way that the company [Enron] could do anything to make us whole – or buy it back. . . ."[89]

Paul Wood's grand jury testimony, cited by Brown, is that at Merrill Lynch he heard not that there was no written commitment from Enron, but that it was "a high level person at Enron who, while not committing Enron Corp. on any kind of oral contract, was giving his assurances that he would do what he could to influence things so that there would be, you know, a – that Merrill would be taken out."[90]

The testimony of both is cumulative but, in addition, its substance was amply disclosed to Brown and his co-defendants in the government's July 2004 Disclosure Letter. Among other things, Brown was advised with respect to Kevin Cox as follows:

> At the DMCC meeting, Cox believed the Merrill representatives asked themselves what the [Nigerian barge deal] was and concluded that it was not a loan. There were assurances that Enron would use its best

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[89] Document No. 1061 at 30-31 (citing Document No. 1020, ex. H at 30).

[90] *Id.* at 31 (citing Document No. 1020, ex. F at 73).

> efforts to complete the original sale. Enron did not promise to do anything.[91]

Likewise, the government's disclosure regarding Paul Wood included, among other things, the following:

> During the DMCC meeting, someone on the deal team said that, although Enron could not guarantee that it would take the deal off Merrill's hands, the Merrill team had assurances that Enron would take the deal off of Merrill's hands. This was what Wood meant when he wrote "handshake deal" in a document. The DMCC did not discuss obtaining a guarantee from Enron and turning the deal into a loan.[92]

Brown has not carried his burden to show that his failure to present this evidence was due to anything other than his own lack of effort, one of the five requisite showings for a new trial based on newly discovered evidence. *See United States v. Runyan,* 290 F.3d 223, 246 (5th Cir. 2002). As observed above, the government disclosed to all defendants, pre-trial, the substance of Cox's and Wood's impressions of the deal.

In his Motion to Dismiss for Egregious Prosecutorial Misconduct (Document No. 1168), Brown also points to Wood's grand jury testimony that Wood believed Zrike was on a telephone conference call

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[91] July 2004 Disclosure Letter at 3.

[92] *Id.* at 8.

among Merrill Lynch employees discussing the barge transaction (the "Trinkle call"), although Zrike did not say anything.[93] Wood was on vacation at the time and he was connected to the call from his home. Trinkle testified at Brown's trial that no lawyer was on that call and, moreover, that until the government prosecutor asked her about Zrike, Trinkle "never heard of her," and had "no idea" if Zrike worked on the Nigerian barge transaction.[94] Zrike herself – a defense witness – testified that she was never on a conference call with Tina Trinkle, and specifically did not participate in a December 1999 "phone call in which the [Merrill Lynch] bankers from Texas were explaining what was going on in the barge deal to Mr. Bayly, with people from the credit division on the phone[.]"[95] Given the significant direct evidence adduced at trial that Zrike was not on this call, Wood's contrary belief – based on his having written her name on a note he made of the call – and his recollection that Zrike said nothing on the call, is not newly discovered evidence that would probably lead to a different result at a new trial.

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[93] Document No. 1168, ex. R at 75. This call, often referred to as the "Trinkle call," is summarized in *Brown I.* 459 F.3d 509, 515 (5th Cir. 2006).

[94] Trial Tr. at 1076, 1077.

[95] Trial Tr. at 4256-57.

3. Cumulative Materiality

Amidst the huge volume of materials and briefing that Brown has unloaded on the Court, and after examining Brown's complaints in context with all of the disclosures actually made to Brown before trial, only a scant few possibilities of "suppressed evidence" can arguably be found. These largely boil down to the Fastow Raw Notes corroboration of multiple iterations of drafts of the deal documents; the Fastow Raw Notes statement that Fastow told "Enron people there was a guarantee so to light a fire under" them; the McMahon interview notes statements that McMahon does not recall Enron making a guarantee; that Zrike unsuccessfully tried to add "best efforts" language in the deal documents[96]; that Dolan specifically knew that Enron would treat the transaction as a sale and book income; and Hoffman's 302 regarding Hoffman's understanding of the deal.

As has been seen, none of these non-disclosures, or any other actually suppressed item of evidence, rises to a level of materiality, that is, none – had the items of evidence been disclosed – in reasonable probability would have led to a different result. Viewing all of these items in the aggregate, and taking into account their cumulative effect in the light of other evidence, the same result is reached. Quite to the

[96] The Court reiterates its conclusion that Brown failed to show due diligence with respect to Zrike's efforts to include the "best efforts" language, but nonetheless includes this in its materiality analysis for the sake of completeness.

contrary of Brown's argument, the additional fragments of evidence cumulatively relied on by Brown do not render "literally true" Brown's grand jury testimony, but would largely be cumulative, or mere nuances, of other evidence that Brown and his codefendants presented and argued at trial. The government's substantial documentary evidence and witness testimony at trial that supported the jury's findings about the barge transaction and the Enron/ Merrill Lynch agreement, which underlie its verdict on Brown's perjury and obstruction convictions, are not a subject of elaboration in this analysis but, as the presiding judge at the Brown trial, this Court considers all of that as well in assessing materiality. The Fifth Circuit in *Brown I,* 459 F.3d at 528, 529, ably summarized evidence supporting the jury's verdict, including an email that Brown authored the year *after* the barge transaction when he was working on another deal. Recalling the barge transaction as having been successful, Brown wrote that Merrill Lynch "had Fastow get on the phone with Bayly and lawyers and promise to pay us back no matter what. Deal was approved and all went well."[97]

In short, there is no reasonable probability that the outcome of Brown's trial would have been different if the government had disclosed to Brown before his trial the several additional items that he claims were wrongfully suppressed. Given the mass

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[97] Gov't Exhibit 240.

of material developed in the government's investigations and the magnitude of the disclosures made, and taking into account the evidence at trial, the cumulative effect of what was not disclosed does not at all undermine confidence in the outcome of the trial. The same conclusion applies to those few items of alleged newly discovered evidence that did not exist at the time of Brown's trial. Brown is not entitled to a new trial.

III. Motion to Dismiss

Brown also seeks dismissal of Counts I through III of the Indictment for egregious prosecutorial misconduct.[98] Brown's many arguments for dismissal may be grouped in two categories: (1) alleged *Brady* violations[99] and (2) allegations that the government unconstitutionally interfered with Brown's access to exculpatory witnesses.[100]

The important distinction between Brown's arguments regarding Counts I through III and his arguments for a new trial on Counts IV and V is that Brown has *already* been awarded a new trial on Counts I through III because of the flawed honest services theory of wire fraud. *See Brown I,* 459 F.3d

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[98] *See* Defendant James A. Brown's Motion to Dismiss Indictment for Egregious Prosecutorial Misconduct, *Brady* Violations and Double Jeopardy (Document No. 1168).

[99] Document No. 1168 at 13-54.

[100] *Id.* at 54-71.

509, 523 (5th Cir. 2006). *Dismissal* of these counts, as opposed to a new trial thereon, requires a showing of conduct "'so outrageous' that it violates the principle of 'fundamental fairness' under the due process clause of the Fifth Amendment." *United States v. Mauskar,* 557 F.3d 219, 231-32 (5th Cir. 2009) (quoting *United States v. Johnson,* 68 F.3d 899, 902 (5th Cir. 1995)); *see also United States v. Hammond,* 598 F.2d 1008, 1014-15 & n.6 (5th Cir. 1979) (granting new trial, although defendant sought dismissal, because defendant had "not proved that the government's involvement in these offenses was so outrageous"). "The standard for proving outrageous governmental conduct is extremely demanding," *United States v. Sandlin,* 589 F.3d 749, 758 (5th Cir. 2009), and "[s]uch a violation will only be found in the 'rarest' of circumstances." *Mauskar,* 557 F.3d at 232 (quoting *Johnson,* 68 F.3d at 902). The Fifth Circuit has "declined to find outrageous conduct where the Government failed to disclose that the defendant's signature on a particular document was forged . . . engaged in entrapment . . . or abducted the defendant from his home country to circumvent extradition proceedings." *Sandlin,* 589 F.3d at 759 (citing *Mauskar,* 557 F.3d at 232-38; *Stokes v. Gann,* 498 F.3d 483, 485 (5th Cir. 2007); *United States v. Chapa-Garza,* 62 F.3d 118, 121 (5th Cir. 1995)). Brown has cited no case ever decided by the Fifth Circuit Court of Appeals in which an

indictment was dismissed for outrageous government conduct.[101]

A. Brady Violations

Brown relies upon much of the same alleged *Brady* violations in support of his Motion to Dismiss as relied upon in his various motions for new trial. He argues that the government suppressed evidence proving: (1) that "neither McMahon nor Fastow ever made a buy-back guarantee"; (2) that "counsel for both Enron and Merrill were fully informed" and made critical decisions, which "deprived Brown of the good faith and reliance on counsel defenses"; (3) that Merrill Lynch counsel "knew there was an oral understanding to re-market the barges and tried to formalize this agreement"; (4) that "a lawful best efforts assurance was the only agreement ever reached"; and (5) that the buyback language from the engagement letter was deleted by Merrill Lynch's counsel Dolan.[102] He again relies primarily on: the Fastow Raw Notes, Fastow's subsequent *Newby* deposition, and his *Skilling* testimony[103]; the McMahon DOJ and SEC

[101] *United States v. Henderson,* which Brown does cite, affirmed dismissal of an indictment without prejudice as a sanction for the government's continued failure to comply with a court order to pay for a state trial transcript found to be necessary to the preparation of an indigent defendant's case, which failure was found to prejudice the defendant. 525 F.2d 247, 249-51 (5th Cir. 1975).

[102] Document No. 1168 at 11-12.

[103] *Id.* at 13-28, 44 & n.53, 46-47.

letters[104]; the grand jury testimony of Kevin Cox and Paul Wood[105]; Katherine Zrike's grand jury and SEC testimony[106]; the FBI 302 of Gary Dolan[107]; and the FBI 302 of Alan Hoffman.[108] As detailed above, these allegations fail to establish *Brady* violations warranting a new trial; they likewise fail to carry the more onerous burden to establish outrageous government conduct meriting dismissal of Counts I through III.

B. Interference with Witnesses

Brown also alleges that the government intentionally interfered with his ability to call exculpatory witnesses.[109] He points to: (1) the non-prosecution agreement between the government and Merrill Lynch[110]; (2) the effect of the government's ongoing investigation, which included indications of "unindicted

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[104] *Id.* at 28-34.

[105] *Id.* at 34-36.

[106] *Id.* at 36-43, 46-47, 49-54.

[107] Document No. 1204 at 14-17.

[108] Document No. 1168 at 17-19.

[109] Brown does not, and indeed may not, seek a new trial as to Counts IV and V based on his claims of witness interference. Because these are not newly discovered evidence claims, Brown was required to seek a new trial based on them within seven days after the Fifth Circuit's October 2006 mandate affirming his convictions. *See* FED. R.CRIM. P. 33(b)(2) (2006). Even were Court to apply the 2009 amendment to Rule 33, extending 33(b)(2)'s time limit to 14 days, Brown's request for a new trial on these grounds would still be barred.

[110] Document No. 1168 at 57-65.

coconspirators,"[111]; [sic] and (3) the effect of the government's request that an Enron Task Force representative be present for any defense counsel interview of Merrill Lynch employees,[112] and its alleged requirement of the presence of a representative in any interview of Andrew Fastow.[113]

1. Legal Standard

"The Sixth Amendment guarantees a criminal defendant the right to present witnesses to establish his defense without fear of retaliation against the witness by the government." *United States v. Skilling,* 554 F.3d 529, 567 (5th Cir. 2009), *vacated in part on other grounds,* 130 S. Ct. 2896 (2010) (quoting *United States* [sic] *Bieganowski,* 313 F.3d 264, 291 (5th Cir. 2002)). Similarly, the "Fifth Amendment protects the defendant from improper governmental interference with his defense." *Id.* (quoting *Bieganowski,* 313 F.3d at 291). Both the government and defense "have an equal right, and should have an equal opportunity, to interview [witnesses]." *United States v. Soape,* 169 F.3d 257, 270 (5th Cir. 1999) (quoting *Gregory v. United States,* 369 F.2d 185, 188 (D.C. Cir. 1966)). A defendant's rights are not violated, however, "when a potential witness freely chooses not to talk [to defense counsel]." *Skilling,* 554

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[111] *Id.* at 66-68.

[112] *Id.* at 65-66.

[113] *Id.* at 69-70.

F.3d at 567 (quoting *In re United States,* 878 F.2d 153, 157 (5th Cir. 1989)). "[T]o demonstrate governmental infringement on these Sixth Amendment rights, 'the defendant must show that the government's conduct interfered substantially with a witness's free and unhampered choice to testify.'" *Id.* (quoting *United States v. Thompson,* 130 F.3d 676, 686 (5th Cir. 1997)).

2. Discussion

A review of Brown's arguments demonstrates that he has failed to carry the "extremely demanding" burden to show conduct so "outrageous" as to characterize these as the "rarest circumstances" meriting dismissal of the Indictment. *See Mauskar,* 557 F.3d at 231-32; *Sandlin,* 589 F.3d at 758.

The non-prosecution agreement between the United States and Merrill Lynch stated that Merrill Lynch may not:

> [T]hrough its attorneys, board of directors, agents, officers or employees make any public statement, in litigation or otherwise, contradicting Merrill Lynch's acceptance of responsibility set forth above.[114]

Merrill Lynch acknowledged the following "responsibility" in the agreement:

> Merrill Lynch acknowledges that the Department has developed evidence during its

[114] Document No. 1168, ex. H at 3.

> investigation that one or more Merrill Lynch employees may have violated federal criminal law. Merrill Lynch accepts responsibility for the conduct of its employees giving rise to any violation in connection with the Year-End 1999 Transactions.[115]

Brown characterizes this as a bar against any Merrill Lynch employee "disputing (legitimately or not) the government's theory of the case."[116] The terms Merrill Lynch agreed to, however, did not foreclose Merrill Lynch's employees, individually, from disputing the government's theory of the case. First, the agreement spoke only to Merrill Lynch's ability to make statements *through* its employees, not its employees' abilities to make statements on their own behalf. Second, Merrill Lynch's promise not to disavow responsibility for its employees' actions has no bearing on the antecedent issue of whether those actions were criminal or not. Merrill Lynch in the agreement accepted responsibility for *actions* "giving rise to any violation," and acknowledged that some of its employees "*may* have violated federal criminal law"; it did not declare that a "violation" necessarily had occurred.

Indeed, Katherine Zrike, still a Merrill Lynch employee at the time of Brown's trial,[117] testified for the defense that her understanding of the transaction

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[115] *Id.,* ex. H at 2.

[116] Document No. 1168 at 59.

[117] *See* Trial Tr. at 4048.

was one containing a re-marketing agreement, as discussed above. Moreover, Merrill Lynch provided to Zrike a "waiver of attorney-client privilege for [her] to provide testimony through the course of this investigation. . . ."[118]

Though Brown quotes extensively from *United States v. Stein* ("*Stein I*"), 435 F. Supp. 2d 330 (S.D.N.Y. 2006) and *United States v. Stein* ("*Stein II*"), 495 F. Supp. 2d 390 (S.D.N.Y. 2007), the case leading to those two decisions is factually inapposite. There, the district court found that the government interfered with the Sixth Amendment rights of several accounting firm employees by pressuring the accounting firm – which was subject to a deferred prosecution agreement – into believing that the government would "hold against it" the payment of the employees' defense costs. *Stein II,* 495 F. Supp. 2d at 394-95; *Stein I,* 435 F. Supp. 2d at 365-68. The court made several findings that the government impermissibly coerced the accounting firm into believing that any payment of its indicted employees' defense costs would "be held against the firm": it first made the threat in a memorandum; government attorneys then "reinforced the threat" by "placing the issue of payment of legal fees high on its agenda for its first meeting" with the firm's counsel; government attorneys further implied "that anything more than compliance with demonstrable legal obligations [regarding

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[118] *Id.* at 4043.

attorneys' fees] could be held against the firm,"; and the attorneys made a "colorful warning that the [United States Attorneys' Office] would look at any discretionary payment of fees by [the firm] 'under a microscope,'" which "drove the point home." *Stein II,* 495 F. Supp. at 394-95. Thus, the court found that the firm's "decision to cut off all payments of legal fees and expenses to anyone who was indicted" and to condition payment of any fees "upon cooperation with the government was the direct consequence of the pressure applied" by the government. *Id.* at 395.

Here, in direct contrast to *Stein,* when Brown was tried it was well known among counsel and the Court that he and his Merrill Lynch co-defendants' attorneys' fees were being paid by Merrill Lynch; in fact, this was remarked as cause for mild envy by counsel representing Brown's Enron co-defendants who had to fund their defenses from their own limited personal resources. Apart from that, however, Brown has made no showing of any "colorful warnings," intentional threats, or similar strong-arm tactics brought to bear upon Merrill Lynch in connection with its non-prosecution agreement that would lead the Court to conclude that Merrill Lynch was pressured to prevent defense access to witnesses. Instead, Brown merely alleges that the government threatened Merrill Lynch and its employees with indictment if they contradicted the government's theory of

the case,[119] a conclusion apparently derived from nothing more than reading the government's list of persons who were named as investigative targets or unindicted co-conspirators.[120]

Brown's allegations of threats to indict Merrill Lynch employees tie into his second contention about what he describes as the "chilling effects" of the government's ongoing investigation. However, the government's ongoing investigation does not support a finding of impermissible government interference. As the Fifth Circuit held in *Skilling* when ruling on a similar argument about the investigative actions of the Enron Task Force, "the government is always entitled to investigate and punish criminal conduct." 554 F.3d at 571. As in *Skilling,* Brown has offered no direct evidence, and none appears of record, that the government conducted its investigation of the Nigerian barge transaction for the purpose of intimidating

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[119] Document No. 1168 at 57.

[120] *Id.* at 60-63. Brown and his co-defendants repeatedly *asked* for the government to identify the known co-conspirators, which led to the government providing their names in advance of trial. *See* Document No. 1160, ex. T (Government's April 22, 2004 letter listing unindicted co-conspirators); Document No. 177 (Order Dated April 21, 2004) ("The Government has agreed to furnish to Defendants the names of known unindicted co-conspirators forty-five (45) days in advance of trial. With this understood, the motions for bills of particulars are otherwise DENIED."); Document No. 126 at 1 (Bayly's request); Document No. 141 at 4 (Boyle's request); Document No. 135 at 3 (Brown's request); Document No. 117 at 37 (Furst's request); Document No. 109 at 1 (Kahanek's request).

witnesses into silence as distinguished from conducting a large-scale investigation and identifying others where probable cause may be found to prosecute, independent of their willingness to testify on behalf of Brown or any other defendant. *See id.*; *cf. Hammond,* 598 F.2d at 1012-13 (substantial interference found where, during recess after direct and cross examination, defense witness was threatened with prosecution in a separate matter if he "continued on"; the witness and another, who had not yet testified, were subpoenaed before the grand jury the next day). Indeed, Katherine Zrike, who testified at length for Defendants, was never indicted.

Brown's third claim of interference is that the government at one point *requested* that Merrill Lynch's counsel permit a government attorney also to be present if a defense counsel interviewed a Merrill Lynch employee. This provoked a dispute that led Bayly to file a motion to dismiss the indictment. In response, the government clarified:

> [T]hat this was a request only and that the decision whether to permit Merrill employees to be interviewed by the defense and whether to permit the government's attendance was a decision that resided in the sole discretion of Merrill Lynch and, ultimately, the employee herself.[121]

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[121] Document No. 191 at 2 (citing *id.* at 10-11 (Affidavit of David Hennessy, Assistant U.S. Attorney)).

This is not the kind of conduct such as in *Gregory,* where the prosecutor instructed the witness to talk to no one unless the prosecutor were present. *Gregory,* 369 F.2d at 188. It certainly does not rise to a level of outrageous conduct requiring dismissal of the Indictment. Instead, this is more closely akin to *United States v. Nardi,* where the First Circuit held that the government's informal grant of immunity, which left it free to prosecute the witness if he failed to cooperate, was not substantial interference with defense counsel's right to interview that witness absent a showing of coercion, even though the witness apparently refused the interview. *See* 633 F.2d 972, 977 (1st Cir. 1980).

Regardless, the dispute motivated Merrill Lynch – rather than to be stuck in the middle of such requests for interviews by defendants and like requests from the government – to adopt a policy of hiring an independent counsel for any employee with whom any defendant wished to speak.[122] The decision on whether to grant such an interview and on what terms was left entirely to the employee, who had the benefit of advice from his or her own personal counsel.[123] Merrill Lynch's provision of independent counsel to employees undermines any implication that the government's request unduly influenced those

[122] *See* Document No. 191 at 11.

[123] *Id.* at 4-5.

employees by reason of the government's non-prosecution agreement with Merrill Lynch.

Brown also presents the February 25, 2008 affidavit of co-defendant Robert Furst's trial attorney:

> In an attempt to gain access to Fastow before the first Barge trial, I contacted the Enron Task Force and requested that I and other Defense counsel be allowed to interview Fastow. The Task Force informed me and other Defense counsel that I was free to contact Fastow's counsel to request an interview, but that I and other Defense counsel would not be able to interview Fastow unless a Task Force attorney was also present at the interview.[124]

Furst's attorney's affidavit does not state *when* this exchange took place, or with whom. In response, the government points to its letter to defense counsel dated April 5, 2004, more than five months before trial, which contains no such condition:

> Some of you have expressed an interest in interviewing Andrew Fastow. If you wish to interview Mr. Fastow, or any other witness for that matter, you should contact that witness's lawyer. Mr. Fastow is represented by David Gerger.[125]

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[124] Document No. 1168, ex. V at 1-2.

[125] Document No. 1185, ex. 13.

The Court recalls no pretrial dispute between the government and Brown or his co-defendants about any conditions the government imposed on defendants' interviews with Fastow. Moreover, as discussed with respect to Brown's request for a new trial, even if Fastow through his own counsel declined interviews, Brown and his co-defendants received in the government's June 2004 Disclosure Letter the essential substance needed, combined with their own knowledge of the deal, to evaluate whether to call Fastow as a witness.

In sum, the government is not shown to have engaged in "outrageous conduct" such as would justify dismissal of the Indictment on Counts I, II, and III.

IV. Order

Accordingly, Defendant James A. Brown's Motion for New Trial (Document No. 1004), Defendant James A. Brown's Supplemental Memorandum in Support of Motion for New Trial (Document No. 1020), Defendant James A. Brown's Supplemental Brief in Support of Motion for New Trial on Counts IV and V (Document No. 1160), Defendant James A. Brown's Supplemental Memorandum in Support of His Motion for New Trial (Document No. 1217), and Defendant James A. Brown's Motion to Dismiss Indictment for Egregious Prosecutorial Misconduct, *Brady* Violations, and Double Jeopardy (Document No. 1168) are all DENIED.

The Clerk will enter this Order, providing a correct copy to all counsel of record.

SIGNED at Houston, Texas, on this 23rd day of August, 2010.

/s/ Ewing Werlein, Jr.
EWING WERLEIN, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-20038

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

JAMES A BROWN; ROBERT S FURST; DANIEL BAYLY

Defendants-Appellants

Appeal from the United States District Court for the Southern District of Texas

(Filed Jun. 16, 2009)

Before REAVLEY, WIENER, and SOUTHWICK, Circuit Judges.

REAVLEY, Circuit Judge:

The defendants in this interlocutory appeal, all former employees of Merrill Lynch, appear before us for the second time in connection with charges that they conspired to defraud the Enron Corporation and its shareholders by agreeing with Enron employees to "park" assets with Merrill Lynch in order to artificially enhance Enron's 1999 earnings. The assets at issue were power-generating barges located

off the coast of Nigeria that Merrill Lynch allegedly agreed to buy from Enron based on a secret side-deal that Enron would buy the barges back in six months. After a jury convicted the defendants in a general verdict for *inter alia* conspiracy and substantive wire fraud offenses, we reversed those convictions on the legal ground that the circumstances of the transaction were not covered by the honest services theory of wire fraud, which was one of three means of fraud charged in the indictment. *See United States v. Brown (Brown I)*.[1] The Government then sought to re-try the defendants without the honest services theory. The defendants now appeal from the district court's denial of their motion to dismiss the indictment on grounds of double jeopardy. We AFFIRM the district court's judgment.

I.

The underlying facts of the alleged fraudulent transaction between Enron and Merrill Lynch are recounted in great detail in *Brown I*. Briefly stated, Enron's Asia/Pacific/Africa/China (APACHI) energy division was under pressure in 1999 to sell assets in order to meet earnings targets but had been unsuccessful in finding a buyer for the Nigerian barges, and so it turned to Merrill for help. As this court wrote:

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[1] 459 F.3d 509, 517 (5th Cir. 2006).

> Merrill agreed to invest $7 million to purchase equity in the barges so that Enron could record $12 million in earnings and meet its forecasts. The Government contended, however, that the sale was a sham because Enron executives orally promised Merrill a flat fee of $250,000 and a guaranteed 15% annual rate of return over the six-month period of Merrill's investment; Enron executives allegedly promised that Enron or an affiliate would buyback Merrill's interest in the barges if no third party could be found. Such a buyback agreement, the Government contended, rendered Merrill's interest in the barges risk-free, meaning that Enron's accounting of the deal as a sale rather than a lease was false.[2]

Enron approached Merrill in December 1999 and recorded the barge deal at the end of that year after multiple discussions among the defendants and Enron employees. Merrill was apparently willing to participate because of the opportunity to foster good relations with Enron and because Enron management, including C.F.O. Andrew Fastow, purportedly gave verbal assurances that Merrill would be taken out of the deal within six months for a fixed rate of return on the investment. Enron allegedly paid Merrill an "advisory fee" of $250,000 even though Merrill did not provide any advisory services. In late June 2000, Merrill sold the barges through arrangements from

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[2] *Id.* at 513.

Enron to a third company controlled by Fastow for just over $7.5 million, representing the promised six-month rate of return. Merrill thus earned $775,000 as a result of its assistance to Enron, which was able to inflate and misstate its earnings report.[3]

The Government charged the defendants, along with several others, in a Third Superseding Indictment with violating the wire fraud statutes under 18 U.S.C. §§ 1343[4] and 1346[5] by scheming to defraud both Enron and its shareholders. Count one charged a conspiracy while counts two and three alleged substantive offenses.[6] In *Brown I* we identified three

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[3] *See id.* at 514-16.

[4] The statute provides in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1343.

[5] "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346.

[6] Count one alleged in relevant part that the defendants:

> conspired to: (a) knowingly and intentionally devise a scheme and artifice to defraud Enron and its shareholders, including to deprive them of the intangible

(Continued on following page)

objects alleged for the conspiracy: (1) to commit wire fraud by fraudulent deprivation of Enron's money or property (the "money or property charge"); (2) to commit wire fraud by fraudulent deprivation of the intangible right to honest services (the "honest services charge"); and (3) to falsify Enron's books and records (the "books and records charge").[7]

The jury found the defendants guilty in a general verdict, but we reversed. We noted that because the jury was not asked to indicate the basis for its

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> right of honest services of its employees, and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises, and for the purpose of executing such scheme and artifice to transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce writings, signs, signals, pictures and sounds . . . and (b)knowingly [sic] and willfully falsify books, records and accounts of Enron. . . .

Counts two and three alleged that the defendants,

> having devised a scheme and artifice to defraud Enron and its shareholders, including to deprive them of the intangible right of honest services of its employees, and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises, and for the purpose of executing such scheme and artifice to defraud, did transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce writings, signs, signals, pictures and sounds, specifically [as stated in two separate counts, certain interstate transmissions by facsimile and email between Houston and New York].

[7] *Brown I*, 459 F.3d at 516, 518.

verdict, we could affirm only if the Government proved all three theories alleged for criminal liability.[8] The panel majority concluded, however, that the circumstances of the transaction as alleged by the Government did not extend to honest services wire fraud. The panel reasoned that while honest services fraud generally involves bribery, kickbacks, or self-dealing, the defendants' conduct was disassociated from such actions. The panel noted that the Enron employees here breached a fiduciary duty in pursuit of corporate earnings goals, which Enron had tied through incentives to employee compensation.[9] The panel noted in a footnote that Enron's corporate incentive policy, coupled with "senior executive support" for the barge transaction, created an understanding that Enron was a "willing beneficiary[ ] of the scheme" and set the case apart from other honest services fraud cases.[10] We specifically limited our holding to be that the conduct alleged by the Government was not a federal crime under the honest services theory of fraud, and we expressly declined to

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[8] *Id.* at 518 (citing *Yates v. United States*, 354 U.S. 298, 77 S. Ct. 1064 (1957)).

[9] *See id.* at 522 (stating that "where an employer intentionally aligns the interests of the employee with a specified corporate goal, where the employee perceives his pursuit of that goal as mutually benefitting him and his employer, and where the employee's conduct is consistent with that perception of the mutual interest, such conduct is beyond the reach of the honest-services theory of fraud").

[10] *Id.* at 522-23 n.13 (distinguishing *United States v. Gray*, 96 F.3d 769 (5th Cir. 1996)).

address the viability of the money or property charge and the books and records charge remaining in the indictment.[11]

Upon remand, the Government moved to redact the indictment to remove all references to the honest services theory of fraud. The redacted version of the indictment is otherwise identical to the indictment on which the defendants were convicted at the first trial. The defendants moved to dismiss the redacted indictment, raising claims of double jeopardy and arguing in part that *Brown I* necessarily precluded a retrial. The district court denied the motion but certified the double jeopardy claims for interlocutory appeal.[12]

II.

Defendants Bayly and Furst contest on double jeopardy grounds the money or property charge of the redacted indictment. They contend that they may not be retried insofar as the indictment alleges that they schemed to deprive Enron of money or property. They reason that the Government must prove for this charge that they intended to deceive the putative victim but that this court held in *Brown I* that Enron was a willing participant in the scheme. They further contend that although Enron and its shareholders are

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[11] *Id.* at 523.

[12] *See generally Abney v. United States,* 431 U.S. 651, 97 S. Ct. 2034 (1977).

legally distinct, the district court erroneously determined that a fraud could be worked on the corporation given that senior executives, including Fastow, approved the deal and the executives' actions show the corporation was not a victim. Finally, they argue that even if the shareholders could be victims, the redacted indictment fails to allege the deprivation of a legally cognizable money or property interest. They do not contend that retrial on the books and records charge would violate double jeopardy.

In a separate brief, Defendant Brown argues that a retrial is barred by the Double Jeopardy Clause because the original indictment charged as the object of the wire fraud only the deprivation of the intangible right of honest services, a theory that *Brown I* rejected. According to Brown, the redacted indictment fails to allege a valid offense apart from the honest services charge because it fails to allege an identifiable and cognizable object of money or property as the basis for the fraud and fails to allege that any Merrill Lynch employee deprived or took anything away from Enron or its shareholders.

"As traditionally understood, the Double Jeopardy Clause precludes multiple prosecutions and multiple punishments for the same offense." *United States v. Yeager.*[13] When a reviewing court determines that the evidence at the first trial was insufficient and reverses a conviction, a retrial will be barred by

[13] 521 F.3d 367, 371 (5th Cir. 2008).

double jeopardy. *See Burks v. United States*.[14] A reversal on any other ground will not foreclose a second trial. *United States v. Scott*.[15] The Double Jeopardy Clause also incorporates the collateral estoppel doctrine, which means that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*.[16]

The defendants' arguments in this appeal largely implicate this latter aspect of double jeopardy and require us to revisit *Brown I*.[17] Whether a prosecution violates the Double Jeopardy Clause or is precluded by collateral estoppel are issues of law that we review *de novo*.[18]

We are not persuaded that our decision in *Brown I* precludes a retrial. Our opinion there was guided by the general verdict rule, which "requires a verdict to

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[14] 437 U.S. 1, 18, 98 S. Ct. 2141, 2150-51 (1978).

[15] 437 U.S. 82, 90-91, 98 S. Ct. 2187, 2193-94 (1978) ("The successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict . . . poses no bar to further prosecution on the same charge." (internal citation omitted)).

[16] 397 U.S. 436, 443, 90 S. Ct. 1189, 1194 (1970).

[17] Indeed, Bayly and Furst contend in their reply brief that our statement in *Brown I* that Enron was a willing participant in the barge scheme is dispositive of their appeal.

[18] *Yeager*, 521 F.3d at 370-71; *United States v. Delgado*, 256 F.3d 264, 270 (5th Cir. 2001).

be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." *Yates v. United States*.[19] Citing *Yates*, we determined that the defendants' convictions could not be upheld because there was no way to tell on which theory the jury had rested its verdict and the Government failed to prove that the honest services charge extended to the defendants' conduct.[20] But we did not consider any other means of fraud alleged. We could not have been clearer that our reversal was premised narrowly and solely on the failure of the honest services charge, stating: "This opinion should not be read to suggest that no dishonest, fraudulent, wrongful, or criminal act has occurred. We hold only that the alleged conduct is not a federal crime *under the honest-services theory of fraud specifically*."[21] The opinion implicitly, if not explicitly, recognized the possibility that criminal wrongdoing might be proved in a retrial, as we noted that "the Government must turn to other statutes, or even the wire fraud statutes absent the component of honest services, to punish this character of wrongdoing."[22] *Brown I* thus did not on its face preclude a retrial on the money or property charge because the

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[19] 354 U.S. 298, 312, 77 S. Ct. 1064 (1957), *overruled on other grounds by Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141 (1978).

[20] *Brown I*, 459 F.3d at 518, 523.

[21] *Id.* at 523 (emphasis in original).

[22] *Id.* at 522-23.

panel did not rule that the evidence for that charge was insufficient.[23]

Nor are we persuaded by Bayly and Furst that the panel's footnote reference to Enron as a "willing beneficiary" precludes a theory of Enron as a victim for all purposes. First, this contention does not account for the Enron shareholders, who were also alleged in the indictment to be victims apart from the corporation. Second, as part of the honest services discussion in *Brown I*, the "willing beneficiary" language was used to narrow the construction of honest services fraud to exclude the defendant's conduct and to distinguish the case.[24] The decision did not consider other avenues alleged for conviction, and instead noted that we "need not address the viability of the Government's remaining theories of criminal liability (the money-or-property and books-and-records charges)."[25] Enron was thus not excluded by the decision in *Brown I* as a victim for purposes of those charges.[26]

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[23] *See Scott*, 437 U.S. at 90-91, 98 S. Ct. at 2193-94.

[24] *See Brown I*, 459 F.3d at 522-23 & n.13; *see also United States v. Skilling*, 554 F.3d 529, 545 (5th Cir. 2009) ("In essence, *Brown [I]* created an exception for honest-services fraud where an employer not only aligns its interests with the interests of its employees but also sanctions the fraudulent conduct, i.e., where the corporate decisionmakers, who supervised the employees being prosecuted, specifically authorized the activity."), *pet. for cert. filed*, 77 U.S.L.W. 3645 (U.S. May 11, 2009) (No. 08-1394).

[25] *Brown I*, 459 F.3d at 523.

[26] We hold only that *Brown I* does not preclude a retrial for the money or property charge and books and records charge. We

(Continued on following page)

Brown's contention that the original indictment alleged only an honest services wire fraud offense, and that therefore a retrial presents a pure double jeopardy issue, is contrary to a plain reading of *Brown I*, which specifically recognized that the indictment alleged three means for the conspiracy. Brown's real argument is that without reference to honest services, the remaining allegations of the indictment are insufficient to state an offense. For example, he argues that the redacted indictment uses boilerplate language alleging a scheme to obtain money or property but fails to identify a specific object of that scheme. That contention is not a double jeopardy claim, however, and is not properly before us on interlocutory review.[27]

The defendants present additional challenges in the guise of double jeopardy but which similarly

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do not hold that Enron or its shareholders were deceived, but whether they were or not for purposes of the additional fraud allegations is a question of fact best resolved at trial, not by a reviewing court addressing, as we did in *Brown I*, the limited question whether the indictment alleged one specific type of wire fraud offense. As an appellate court, we do not find facts. *See, e.g., Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714, 106 S. Ct. 1527, 1530 (1986).

[27] *See Abney*, 431 U.S. at 663, 97 S. Ct. at 2042 (holding that the sufficiency of the indictment does not come within the rule permitting interlocutory review of a denial of a motion to dismiss); *see also United States v. Arreola-Ramos*, 60 F.3d 188, 191 (5th Cir. 1995) ("The interlocutory appeal that *Abney* permits is, however, limited to double jeopardy claims and does not include other challenges.").

implicate sufficiency issues based on the district court's ruling. The district court held that the participation of Enron executives in the barge deal did not preclude Enron and its shareholders from being victims of the fraud because the corporation and shareholders enjoy a separate identity from corporate officers and directors. It further determined that the right to accurate shareholder information is a legally cognizable intangible property right under the wire fraud statutes. Bayly and Furst contend that Enron's shareholders could not be victims separate from the corporation because the indictment fails to allege the shareholders were deprived of either money or legally cognizable "property." They also contend that shareholders possess no cognizable property right under 18 U.S.C. § 1343 in accurate economic information. Brown similarly argues that the indictment fails to allege a scheme to defraud any victim of that victim's specific money or property, and that honest services are the only intangible right protected under the wire fraud statutes. If the defendants are correct – and we intimate no opinion on the matter – their arguments concern the sufficiency of the offense alleged in the indictment, an issue which we do not address and which must be left for another day.[28]

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[28] *Abney*, 431 U.S. at 663, 97 S. Ct. at 2042.

III.

We conclude that there is no issue of double jeopardy or collateral estoppel that impairs a retrial here. The district court's judgment is AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,	§	Cr. No. H-03-363 (Werlein, J.)
v.	§	
DANIEL BAYLY, DAN O. BOYLE, JAMES A. BROWN, ROBERT S. FURST, and	§	*Violations*: 18 U.S.C. §§ 371 (Conspiracy); 1001(a)(2) (False Statements); 1343, [sic] (Wire Fraud); 1503 (Obstruction of Justice); 1623 (Perjury)
Defendants.	§	

THIRD SUPERSEDING INDICTMENT

(Filed April 5, 2007)

The Grand Jury charges:

* * *

COUNT FOUR
(BROWN: Perjury Before The Enron Grand Jury)

34. The allegations in paragraphs 1 through 15, 17, and 18 are realleged as if fully set forth here.

35. On or about September 25, 2002, in the Southern District of Texas, defendant JAMES A. BROWN, while under oath and testifying in a proceeding before a Grand Jury of the United States, knowingly did make a false material declaration as set forth below.

36. At the time and place stated above, the Enron Grand Jury was conducting an investigation

into potential federal criminal offenses relating to the Nigerian barge transactions. It was material to this investigation that the Enron Grand Jury determine all the terms of the agreements, whether written or oral, between Enron, Merrill Lynch, and LJM2.

37. At the time and place stated above, defendant BROWN, appearing as a witness and testifying under oath at a proceeding before the Enron Grand Jury, knowingly made the following declarations in response to questions with respect to matters material to the Grand Jury's investigation (the portions that have been underlined are false):

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

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

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

(Tr. at 80, lines 6-11.)

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

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

Q: So you don't have any understanding as to why there would be a reference [in the Merrill Lynch

document] to a promise that Merrill would be taken out by a sale to another investor by June of 2000?

A: *No.*

(Tr. at 88, lines 13-23.)

(Title 18, United States Code, Sections 1623 and 3551 *et seq*.)

COUNT FIVE
(BROWN: Obstruction of the Enron Grand Jury Investigation)

38. The allegations of paragraphs 1 through 15, 17, 18, 36 through 37 are realleged as if fully set forth here.

39. On or about September 25, 2002, in the Southern District of Texas, defendant JAMES A, [sic] BROWN did corruptly endeavor to influence, obstruct, and impede the due administration of justice in that BROWN did knowingly and willfully make false and misleading declarations before the Grand Jury with intent to obstruct and impede the Enron Grand Jury investigation.

40. At the time and place stated above, BROWN corruptly endeavored to influence, obstruct, and impede the due administration of justice by giving false and misleading testimony: the declarations which are underscored in Count Four.

(Title 18, United States Code, Sections 1503 and 3551 *et seq.*)

[Pages 16 And 17 Were
Deleted By The Government]

*   *   *

Dated: Houston, Texas
July 22, 2004

A TRUE BILL

/s/ Linda Clifton
FOREPERSON

JOSHUA R. HOCHBERG
Acting U.S. Attorney

ANDREW WEISSMANN
Director, ENRON TASK FORCE

By: /s/ Kathryn H. Ruemmler
Matthew Friedrich
John H. Hemann
Kathryn H. Ruemmler
Assistant United States Attorneys
ENRON TASK FORCE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-20319

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES A. BROWN; DANIEL BAYLY;
ROBERT S. FURST; WILLIAM R. FUHS,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:03-CR-363-2

(Filed Aug. 1, 2006)

Before REAVLEY, JOLLY and DeMOSS, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

This appeal arises from a six-week trial in which the Government charged that Enron and Merrill Lynch employees of [sic] engaged in a conspiracy and scheme to defraud Enron and its shareholders by "parking" an Enron asset – an equity interest in three power-generating barges moored off the coast of Nigeria – with Merrill for six months for the purpose of artificially enhancing Enron's 1999 end-of-year

earnings report. Merrill agreed to invest $7 million to purchase equity in the barges so that Enron could record $12 million in earnings and meet its forecasts. The Government contended, however, that the sale was a sham because Enron executives orally promised Merrill a flat fee of $250,000 and a guaranteed 15% annual rate of return over the six-month period of Merrill's investment; Enron executives allegedly promised that Enron or an affiliate would buyback Merrill's interest in the barges if no third party could be found. Such a buyback agreement, the Government contended, rendered Merrill's interest in the barges risk-free, meaning that Enron's accounting of the deal as a sale rather than a lease was false. The jury agreed and convicted the appellants of conspiracy and wire fraud. Additionally, appellant Brown was convicted of perjury and obstruction of justice. For the reasons stated below, we reverse the conspiracy and wire-fraud convictions of each of the Defendants on the legal ground that the government's theory of fraud relating to the deprivation of honest services – one of three theories of fraud charged in the Indictment – is flawed. We further vacate appellant Fuhs's conviction on the ground that the evidence is insufficient to support his conviction. Finally, we affirm appellant Brown's convictions of perjury and obstruction of justice.

I

The trial below involved six Defendants. Sheila Kahanek, an accountant by training and a Senior

Director in Enron's Asia/Pacific/Africa/China ("APACHI") energy division, was acquitted of all charges against her. Daniel Boyle, an Enron Vice President of Global Finance, was convicted on all counts against him and does not appeal. The following four Merrill Lynch executives (the "Defendants") were convicted on all counts against them and appear before us on appeal: Jim Brown, the head of Merrill's Strategic Asset and Lease Finance Group in New York City; William Fuhs, a Vice President under Brown in the New York office; Daniel Bayly, the head of Merrill's Global Investment Banking division; and Robert Furst, a Merrill executive answering directly to Bayly, responsible for generating business from Enron.

A

The Nigerian barges at the heart of this case were held by Enron's APACHI energy division. At the close of 1999, APACHI was pressured to monetize or sell assets in order to show a gain and meet earnings targets that, in turn, would allow Enron as a whole to meet the company's forecasted earnings for the final quarter of 1999. Various attempts at selling APACHI's primary asset, the barges, to an industry buyer were made in the final months of 1999, but each prospective deal collapsed. In early December 1999, Enron executives discussed the need for an "emergency alternative." When executives were informed that the barges would not be sold by year's end, they responded that a "friend of Enron," Merrill

Lynch, might be able to buy the barges and "help Enron out."

In late December, Enron approached Merrill about buying the barges. Boyle discussed the deal with Furst, Merrill's Enron relationship manager. Furst communicated with others at Merrill, including Bayly, Brown, and Schuyler Tilney, the head of banking in Merrill's Houston office. Furst explained that Enron's then-Treasurer, Jeff McMahon, "asked Merrill to purchase $7 [million] of equity in a special purpose vehicle that will allow Enron to book $10 [million] of earnings. The transaction must close by 12/31/99. Enron is viewing this transaction as a bridge to permanent equity and they believe [Merrill's] hold will be for less than six months. The investment would have a 22.5% return." Furst emphasized the importance of fostering an ongoing business relationship with Enron and that the deal offered Merrill a chance to differentiate itself from other investment banks. When Furst explained the deal to Katherine Zrike, chief counsel for Merrill's Global Investment Banking, Zrike noted her concern due to the year-end nature of the deal, its unique quality, and a lack of due diligence.[1]

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[1] On December 1, 1999, Merrill reissued its policy, warning of problematic end-of-year transactions by clients seeking to show gains or losses prior to the end of the year. "Clients wishing to effect a sale and then reestablish a position must be advised that there can be no prearrangement as to the availability

(Continued on following page)

Furst and Brown communicated by fax regarding the deal, and Brown noted his concerns: "Enron credit/performance risk," a lack of "repurchase oblig. from Enron," and the "reputational risk" of "aid[ing]/abet[ting] Enron income stmt. manipulation." Brown also communicated his concerns to Fuhs, who in turn communicated the risks, including the risk of aiding Enron with "income manipulation," to Tina Trinkle, an analyst. Due to these concerns, the short timeline, and a lack of information about the deal, some Merrill employees, including Trinkle, thought the deal would not go through.

According to the Government, the barge deal proceeded because Enron agreed that either it or an affiliate would repurchase the barges from Merrill if a third-party buyer could not be found and that Enron would pay a fixed rate of return for the duration of Merrill's hold of the interest in the barges. Ben Glisan, a colleague of Boyle's and a Government witness, testified that multiple sources informed him of Enron's oral guarantee that Merrill would be taken out of the transaction within six months for a set return on the investment.

On December 22, Bayly, Brown, Furst and others (excluding Fuhs and any lawyers) participated in a conference call about the deal (the "Trinkle call"). Furst and Tilney explained that Enron needed to sell

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of the financial instrument or the specific purchase price, if and when the client decides to reestablish the position."

the barges by year-end in order to book additional earnings in 1999 and that someone at Enron indicated that Enron would agree to take Merrill out at a fixed rate of return. Bayly asked for a written assurance to support Enron's promise, and someone responded that a writing was not possible because such an assurance would prevent Enron from receiving the accounting treatment it sought with the deal. But either Furst or Tilney responded that Enron had given its strongest verbal assurances that Merrill would not own the barges after June 30. That same day, Brown and Fuhs received an e-mail from Furst's office in Dallas, describing some of the material terms of the deal including that Bayly would confirm Enron's promise with senior Enron management. In a later meeting with Furst that day, Zrike warned that for Enron to show the sale as a profit on its books, Merrill would have to own the barges outright without any buyback agreement. Furst stated that the agreement contemplated only Enron's attempt to remarket the barges. Zrike restated her concerns in afternoon meetings with Bayly on December 22, where the Government alleges Bayly had a duty, under Merrill's policy, to disclose his awareness of Enron's buyback promise to Zrike but failed to do so. At the end of the day on December 22, Furst e-mailed Boyle to announce the conference call between Bayly and Enron management – Andrew Fastow, McMahon, and Boyle – for 9:30 the next morning.

According to Government witness Eric Boyt, an accountant for APACHI, both Fastow and Boyle said

that during the conference call, Fastow promised that Merrill would not own the barges for longer than six months and that if Enron could not facilitate a buyer, it would "guarantee a 15 percent buyback within six months." In this vein, Boyle authored an e-mail explaining the transaction as follows: "[Merrill's] decision to purchase the equity was based solely on personal assurances by Enron senior management to [Merrill] that the transaction would not go beyond June 30, 2000." Although Brown was not on the December 23 conference call, the Government alleges that he understood Fastow's promise on Enron's behalf; this allegation is supported by Brown's later e-mail of March 2001, describing a similar, prospective deal: "I would support an unsecured deal provided we had total verbal assurances from [the company's C.E.O. or C.F.O.]. . . . We had a similar precedent with Enron last year, and we had Fastow get on the phone with Bayly and lawyers and promise to pay us back no matter what. Deal was approved and all went well."

Following this call, the initial draft of the "engagement letter" for the deal, including reference to Enron's oral buyback promise, was circulated. On December 28, Boyle sent out a revised version of the engagement letter, with "strike-through" indicating proposed removal of the language about the annual rate of return and that Merrill's interest would be subsequently sold or repurchased by Enron or an Enron affiliate. Another draft, with the oral promises

redacted entirely, was circulated shortly thereafter and signed by Brown and Fastow.

At the end of 1999, Enron recorded the barge deal and booked from it $12,563,000 in earnings. The Government argues this booking was a false entry because Merrill's investment was never at risk in the light of the guaranteed buyback, advisory fee, and fixed rate of return. These oral but material terms, according to the Government's witnesses, required that the deal be booked as a loan rather than as a sale.

The Government further asserted that the parties' conduct, between the end of 1999 and June 2000, was consistent with Enron's oral promise to buy back the parked barges from Merrill: Enron wired a $250,000 "advisory fee" to a Merrill account at Citibank even though Brown testified that Merrill did not provide advisory services; Merrill did not monitor Enron's attempts to remarket the barges during the interim period; efforts to remarket the barges on APACHI's behalf were motivated by a desire to preclude Enron from having to repurchase them from Merrill; Enron contacted Furst seeking an extension of the deadline; and Merrill drafted for Furst's signature a letter to Enron demanding that Enron purchase the barges by June 30 for $7,510,976.65, a number that was consistent with the terms of the oral guarantee. Before the letter left Merrill, however, Fuhs contacted Furst and told him

that Enron had lined up a buyer, an entity called LJM2.[2] LJM2 served as a temporary warehouse for Enron assets, according to Glisan's testimony, and was not wholly independent from Enron.

Merrill and LJM2 closed the deal for the resale on June 29, 2000, when LJM2 paid Merrill $7,525,000 for its interest in the barges.[3] That figure represented exactly six-months' return at a rate of 15% annually. Including the $250,000 "advisory fee" received at the end of 1999, Merrill made $775,000 on its investment in the barges. At the close of the deal, Fuhs e-mailed Brown and Furst to inform them that the money had been paid to Merrill and referred to the fact that Brown and Furst (along with Bayly) were investors in LJM2 and as such still bore an interest in the barges.

[2] Brown, Bayly, Furst, and other Merrill employees invested in a Merrill partnership which in turn invested in LJM2. Brown invested $32,500 of the $400 million LJM2 fund; Furst and Bayly each invested $130,000.

[3] In turn, the plan was for LJM2 to also flip the interest in the barges after the end of 2000 so that Enron would not have to show that the profits earned in 1999 were "unwound." In return for Enron's use of LJM2's balance sheet in this manner, Enron was to pay LJM2 a flat $350,000 fee and a 15% annual rate of return for the period it held the barges, and ensure that LJM2 would be taken out of the investment by January 15, 2001. An industry buyer, an energy company, ultimately bought the barges during the period LJM2 held the barges; tellingly, this ultimate buyer conducted purchase negotiations with APACHI, not with LJM2 which held the barges in name.

B

The Government charged all six Defendants with one count of conspiracy and two counts of wire fraud. The conspiracy count alleged a conspiracy under 18 U.S.C. § 371 to commit wire fraud in violation of § 1343 (the "money or property" charge) and § 1346 (the "honest services" charge), and to falsify Enron's books and records in violation of 15 U.S.C. § 78m(b)(2), (b)(5) and 78ff, and 17 C.F.R. § 240.13b2-1 (the "books and records" charge). The substantive wire fraud counts were based upon two interstate transmissions between Houston and New York. The Government also charged Brown with perjury before a Grand Jury in violation of 18 U.S.C. §§ 1623 and 3551, and with obstruction of a Grand Jury investigation in violation of 18 U.S.C. §§ 1503 and 3551.

The six Defendants were tried together by jury over six weeks. At the close of the Government's case in chief, each Defendant moved for a judgment of acquittal under Rule 29(a), claiming that the Government's evidence was insufficient to sustain a conviction on any count of the Indictment. The district court reserved ruling on the motions under Rule 29(b). Boyle and the appealing Defendants were convicted of the conspiracy and wire fraud counts; Kahanek was acquitted. Brown was additionally convicted on the perjury and obstruction counts. The Defendants renewed their motions for acquittal, and the court denied the motions in the light of "substantial evidence justifying an inference of guilt with respect to each." Brown was sentenced to 46 months'

imprisonment; Bayly was sentenced to 30 months' imprisonment; and Furst and Fuhs were each sentenced to 37 months' imprisonment.

II

The Defendants raise numerous issues on appeal. The Defendants' broadest attack on their convictions suggests that, even if the Government proved all the allegations in the Indictment, the alleged scheme would not run afoul of the wire fraud statutes – there was no deprivation of Enron's intangible right to the honest services of its employees, and there was no scheme to defraud Enron and its shareholders of money or property. The Defendants also claim that the crime of conspiracy does not apply to the falsification of a corporation's books and records because of explicit statutory language to that effect. 15 U.S.C. § 78m(b)(2), (b)(5) and 78ff. The Defendants raise numerous further claims regarding 1) jury instructions on the theory of the defense, good faith, and the materiality requirement of the books-and-records charge; 2) evidentiary and related rulings, most notably, admission into evidence of an inculpatory e-mail by Brown, allowance of testimony as to Furst's belief that the barge deal included an Enron guarantee, exclusion of an expert witness on accounting standards, failure of the court to order disclosure of allegedly exculpatory evidence in the form of details of Fastow's interview with the FBI, and exclusion of impeachment evidence in the form of contradictory statements by Fastow; 3) the denial of their

individual motions for acquittal and the sufficiency of the evidence supporting their convictions; and 4) the calculation of their sentences. Brown additionally appeals the legal and factual sufficiency of the evidence supporting his convictions for perjury and obstruction of justice, and Fuhs additionally alleges prosecutorial misconduct in the form of a repudiation of a stipulation pertaining only to him.

Because we hold that the honest-services theory of wire fraud does not extend to the circumstances as contended by the Government, we vacate the conspiracy and wire-fraud convictions. We therefore do not reach the remaining issues, with the exception of the denial of the Defendants' motions for acquittal, which we reverse only as to Fuhs, and Brown's appeal of his separate perjury and obstruction convictions, which we affirm.

III

A

We begin with the Defendants' broad attack on the legal sufficiency of the Government's assertion of criminal liability. We review the legal sufficiency of an Indictment *de novo. United States v. Caldwell,* 302 F.3d 399, 407 (5th Cir. 2002).[4]

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[4] The Government notes some confusion as to whether the Defendants' argument challenges the legal sufficiency of the Indictment or the sufficiency of the jury instructions. If the latter,

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The Indictment charged the Defendants with one count of conspiracy and two substantive counts of wire fraud. The conspiracy count alleged a conspiracy to violate two different statutes. The first statute is the wire-fraud statute, 18 U.S.C. § 1343, which reads:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Following the Supreme Court's decision in *McNally v. United States,* 483 U.S. 350 (1987), that § 1343 only protects "money or property" and not an employer's or the public's right to the honest services of employees and public officials, Congress added § 1346, which reads:

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the Defendants' failure to object during the charge conference would render our standard of review one for plain error. However, it is clear the Defendants mount a facial challenge to the Indictment, and the Government accepts the propriety of *de novo* review.

> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

Thus, the conspiracy count recited two objects of the alleged conspiracy to commit wire fraud, namely, the fraudulent deprivation of Enron's intangible right to the honest services of its employees, and the fraudulent deprivation of Enron's money or property. The second criminal statute is 15 U.S.C. § 78ff, which punishes

> [a]ny person who willfully violates any provision of this chapter (other than section 78dd-1 of this title), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder. . . .

Thus, the conspiracy count alleged violation of the requirements set forth in 15 U.S.C. § 78m(b)(2),(5) [sic] and 17 C.F.R. § 240.13b2-1.[5]

Because the jury was not asked to indicate the basis for its verdict, the Government must prove all

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[5] "No person shall directly or indirectly, falsify or cause to be falsified, any book, record or account subject to Section 13(b)(2)(A) of the Securities Exchange Act." 17 C.F.R. § 240.13b2-1.

three theories in order for us to affirm the convictions. *Yates v. United States,* 354 U.S. 298 (1957). The Defendants argue that the Government has proved *none* of the three theories it alleges in the Indictment.

B

Wire fraud is (1) the formation of a scheme or artifice to defraud, and (2) use of the wires in furtherance of the scheme. See *Pereira v. United States,* 347 U.S. 1, 8 (1954); *United States v. Caldwell,* 302 F.3d 399, 406 (5th Cir. 2002). Violation of the wire-fraud statute requires the specific intent to defraud, i.e., a "conscious knowing intent to defraud," *United States v. Reyes,* 239 F.3d 722, 736 (5th Cir. 2001); however, specific intent to defraud need not be charged in the Indictment.

Honest-services wire fraud is wire fraud in which the scheme or artifice to defraud "deprive[s] another of the intangible right of honest services." 18 U.S.C. § 1346. This provision can be understood only in the light of the long history of the mail- and wire-fraud statutes, which were intentionally written broadly to protect the mail and, later, the wires from being used to initiate fraudulent schemes. *See McNally,* 483 U.S. at 356. Over time, the lower courts came to construe the fraud statutes to protect not just money and property but also intangible rights such as the right

to privacy,[6] and the right to honest services of employees and public officials. In *McNally,* however, the Supreme Court excised the protection of intangible rights from the scope of §§ 1341 and 1343, holding that the statutes as written protected only money and property. The Court explained that the 1909 amendment adding "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" was meant to confirm that liability covered not just fraudulent misstatements about existing facts but also fraudulent promises and representations about the future. Congress's use of the disjunctive in specifying "obtaining money or property" as an object of the fraud was not meant to expand the criminal statute beyond the protection of money and property. *Id.* at 358-60. Congress responded by passing § 1346, which reads in its entirety, "A 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. As we and other courts have held, § 1346 was clearly meant specifically to overturn *McNally,* at least with respect to the particular intangible right named in the statute, i.e., the right to honest services. *See United States v. Brumley,* 116 F.3d 728, 733 (5th Cir. 1997) (en banc); *United States v. Rybicki,* 354 F.3d 124, 134, 136-37 (2d Cir. 2003). Thus, the meaning of honest

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[6] *See, e.g., United States v. Condolon,* 600 F.2d 7 (4th Cir. 1979); *United States v. Louderman,* 576 F.2d 1383 (9th Cir. 1978).

services – given that the statute provides no perimeters – is to be found in the pre-*McNally* case law. *Brumley,* 116 F.3d at 733; *Rybicki,* 354 F.3d at 136-37.

We have previously undertaken the task of considering the pre-*McNally* case law. Thus, we have written, "'Honest services' are services owed to an employer under state law," including fiduciary duties defined by the employer-employee relationship. *Caldwell,* 302 F.3d at 409; *Brumley,* 116 F.3d at 734. In order that not every breach of fiduciary duty owed by an employee to an employer constitute an illegal fraud, we have required some detriment to the employer. *United States v. Ballard,* 663 F.2d 534, 540 (5th Cir. 1981). *Ballard,* however, implies that breach of the duty to disclose material information is a sufficient detriment to the employer because the materiality requirement, added to the false disclosure or nondisclosure of information, contemplates that the undisclosed information would have led a reasonable employer to change its business conduct. *Id.* at 541; see also *Rybicki,* 354 F.3d at 145.[7] Here, the Government alleged not only the harm inherent in the failure to disclose material information – that the barge transaction presented no risk to Merrill because of the oral side deal – but also concrete harms to Enron in the form of fees paid to Merrill to effect

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[7] The Government must allege materiality in the Indictment, but failure to do so is not fatal "if the facts alleged in the Indictment warrant an inference of materiality." *Caldwell,* 302 F.3d at 409.

the deal and compensation bonuses paid to Enron employees that depended on the completion of the barge deal.

The Seventh Circuit has additionally held that honest-services fraud requires some personal benefit accruing to the duty-breaching employee. *United States v. Bloom,* 149 F.3d 649 (7th Cir. 1998). Here, those same bonuses would likely constitute such a personal benefit accruing to the Enron employees taking part in the alleged scheme.

Thus, the Government presents a very plausible, even strong, case for a criminal deprivation of honest services, alleging a fiduciary breach – the failure to disclose the full truth about the barge transaction – that resulted in both a personal benefit (increased bonus) to the duty-breaching Enron employees and detriments (but also benefits) to the corporation itself.[8]

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[8] The Government's contention that Enron suffered a detriment is not trouble-free. The breach in question resulted in an increase in Enron's stock price, an immediate benefit Enron specifically sought. The Defendants indeed argue explicitly that their actions benefitted the company for this very reason. Certainly, from a practical and short-term perspective, this is true. The Government claims that the detriment was Enron's spending money (in the form of fees paid to Merrill and bonuses paid to employees) for the "sole purpose of misleading shareholders and the investing public." This theory is not fully convincing absent the implicit claim that this specific deal led to Enron's unraveling, a causal connection for which there is no substantiated support. Nevertheless, we will assume for purposes of this

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Nevertheless, the Defendants put forth an equally plausible argument that the limiting statements we have expressed in our past cases do not demarcate the exact outer-most boundaries of honest services. Instead, those limiting statements represent only minimal distinctions we have had *occasion* to declare, and thus they do not exhaust the constraints that are appropriate to recognize. Thus, for example, we noted in *Brumley* that "the boundaries of 'intangible rights' may be difficult to discern, but that does not mean that it is difficult to determine whether Brumley in particular violated them." *Brumley,* 116 F.3d at 733. If we are not to lapse into defining a common law crime, the outer boundary of this facially vague criminal statute must be determined from the factual circumstances supporting affirmed convictions, not by negative implication from the few constraints mentioned in disparate cases.[9] In essence, the Defendants argue that between the core of cases affirming honest-services fraud convictions and the shell of cases reversing them, there is a gap, a lacuna, a vacuum, a no-man's land, a demilitarized zone, in which this case awkwardly sits alone.

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opinion that the alleged detriment satisfies that element of honest-services fraud.

[9] Put another way, the Defendants argue that the scope of honest-services fraud is defined by the set of cases in which convictions have been upheld, not by the complement of the set of cases in which convictions have been reversed.

Appraising this argument requires a study of the case law to understand what behavior justifies criminal liability. We begin by noting that the Government urges the broadest reading by relying on the barest reiteration of the few constraints we have previously acknowledged, even going so far as to argue that no detriment aside from the fiduciary breach itself is necessary because "it is sufficient for the government to show that the defendants violated a duty imposed by state law. . . . The plain text of Section 1346 . . . does not require any detriment . . . beyond proof that the scheme or artifice to defraud 'deprive[d] another of the intangible right of honest services.'" Given our repeated admonition that "not every breach of fiduciary duty works a criminal fraud," *see Ballard,* 663 F.2d at 540 (quoting *United States v. George,* 477 F.2d 508, 512 (7th Cir. 1973)), we consider such a broad theory of liability with caution.[10]

Turning to the case law, we are guided by the leading opinion on honest-services fraud, the Second Circuit en banc decision in *Rybicki, supra. Rybicki* concluded, and we agree, that cases upholding convictions arguably falling under the honest services

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[10] It is also worth noting that the Government's argument is somewhat circular, relying as it does on the statutory text's use of the term "honest services." As already stated, the statute itself provides not a hint of the definition of the term; instead, it is the case law that establishes the meaning of the vague and amorphous phrase.

rubric can be generally categorized in terms of either bribery and kickbacks or self-dealing. The great weight of cases are clear examples of such behavior.[11] The Second Circuit formulated the following rule based on its analysis:

> [A] scheme or artifice to deprive another of the intangible right to honest services in section 1346, when applied to private actors, means a scheme or artifice . . . to enable an officer or employee of a private entity . . . purporting to act for and in the interests of his or her employer . . . secretly to act in his or her or the defendant's own interests instead. . . .

Rybicki, 354 F.3d at 141-42.[12] Our circuit's analysis has not been much different from *Rybicki*'s, although

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[11] *See Rybicki,* 354 F.3d at 139-44. For bribery/kickback cases, *see United States v. Schwartz,* 785 F.2d 673 (9th Cir. 1986); *United States v. Price,* 788 F.2d 234 (4th Cir. 1986); *United States v. George,* 477 F.2d 508 (7th Cir. 1973); *United States v. Conner,* 752 F.2d 566 (11th Cir. 1985); *United States v. Bryza,* 522 F.2d 414 (7th Cir. 1975); *United States v. Hasenstab,* 575 F.2d 1035 (2d. Cir. 1978); *United States v. Lemire,* 720 F.2d 1327 (D.C. Cir. 1983); *United States v. Bohonus,* 628 F.2d 1167 (9th Cir. 1980); *United States v. Boffa,* 688 F.2d 919 (3d Cir. 1982). For examples of self-dealing cases, *see Ballard; Epstein v. United States,* 174 F.2d 754 (6th Cir. 1949); *United States v. McCracken,* 581 F.2d 719 (8th Cir. 1978); *United States v. Von Barta,* 635 F.2d 999 (2d Cir. 1980).

[12] Note that the Second Circuit dissenters dissented not from the narrowness of the construction but from the decision to uphold the statute at all. They would have struck down honest-services fraud as facially vague, emphasizing that " 'the average

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perhaps we have couched our language more broadly in terms of an understood *divergence,* rather than a secret *conflict,* of interests. Thus, in *Brumley,* although we recognized that bribery and self-dealing are the paradigmatic cases of honest-services fraud, we wrote:

> "honest services fraud" contemplates that in rendering some particular service or services, the defendant was conscious of the fact that his actions were something less than in the best interests of the employer – or that he consciously contemplated or intended such actions. For example, something close to bribery.

Brumley, 116 F.3d at 734.

While it may be argued that the Defendants here were conscious of the fact that their actions were "something less than in the best interests of the employer," at least long term, that argument relies on the presumption, inherent in the Government's insistent argument, that a fiduciary breach is itself a sufficient reflection of interest divergence. But that view encompasses every knowing fiduciary breach, and we meet again our oft-mentioned chariness of making every knowing fiduciary breach a federal crime. What makes this case exceptional is that, in

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citizen . . . must be forewarned and given notice that certain conduct may subject him to federal prosecution.' " 354 F.3d at 159 (Jacobs, Circuit Judge, dissenting) (quoting *Brumley,* 116 F.3d at 745-46 (Jolly and DeMoss, Circuit Judges, dissenting)).

typical bribery and self-dealing cases, there is usually no question that the defendant understood the benefit to him resulting from his misconduct to be at odds with the employer's expectations. This case, in which Enron employees breached a fiduciary duty in pursuit of what they understood to be a corporate goal, presents a situation in which the dishonest conduct is disassociated from bribery or self-dealing and indeed associated with and concomitant to the employer's own immediate interest.

Here, the private and personal benefit, i.e. increased personal bonuses, that allegedly diverged from the corporate interest was itself a promise of the corporation. According to the Government, Enron itself created an incentive structure tying employee compensation to the attainment of corporate earnings targets. In other words, this case presents a situation in which the employer itself created among its employees an understanding of its interest that, however benighted that understanding, was thought to be furthered by a scheme involving a fiduciary breach; in essence, all were driven by the concern that Enron would suffer absent the scheme. Given that the only personal benefit or incentive originated with Enron itself – not from a third party as in the case of bribery or kickbacks, nor from one's own business affairs outside the fiduciary relationship as in the case of self-dealing – Enron's legitimate interests were not so clearly distinguishable from the corporate goals communicated to the Defendants (via their compensation incentives) that the Defendants

should have recognized, based on the nature of our past case law, that the "employee services" taken to achieve those corporate goals constituted a *criminal* breach of duty to Enron. We therefore conclude that the scheme as alleged falls outside the scope of honest-services fraud.

We do not presume that it is in a corporation's legitimate interests ever to misstate earnings – it is not. However, where an employer intentionally aligns the interests of the employee with a specified corporate goal, where the employee perceives his pursuit of that goal as mutually benefitting him and his employer, and where the employee's conduct is consistent with that perception of the mutual interest, such conduct is beyond the reach of the honest-services theory of fraud as it has hitherto been applied.[13] Therefore, the Government must turn to

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[13] The Government cites one precedent that lies outside the bulk of the honest-services case law and addresses a situation arguably similar to the instant case. In *United States v. Gray,* 96 F.3d 769 (5th Cir. 1996), university basketball coaches were convicted of mail and wire fraud for fraudulently establishing the academic eligibility of transfer students recruited to play on the basketball team. The court, relying on *Ballard*'s suggestion that a non-disclosure of material information is itself sufficient harm to the employer, rejected the defendants' argument that their actions furthered the fortunes of the basketball team and of the university and were therefore not within the purview of fraud statutes.

The Government argues, quite plausibly, that *Gray* is similar enough to this case to dispose of the Defendants' challenge, because the principal argument of the Defendants is that they believed their actions would benefit Enron. But *Gray* is

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other statutes, or even the wire fraud statutes absent the component of honest services, to punish this character of wrongdoing.

This opinion should not be read to suggest that no dishonest, fraudulent, wrongful, or criminal act has occurred. We hold only that the alleged conduct is not a federal crime *under the honest-services theory of fraud specifically.* Given our repeated exhortation against expanding federal criminal jurisdiction beyond specific federal statutes to the defining of

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distinguishable both factually and legally. *Gray* is dissimilar to this case in part because the opinion recognizes nothing akin to Enron's corporate incentive policy coupled with senior executive support for the deal (the deal was sanctioned by Fastow, Enron's Chief Financial Officer), which together created an understanding that Enron had a corporate interest in, and was a willing beneficiary of, the scheme. The opinion in *Gray* presents only the coaches' own belief that their scheme benefitted the university; no one or any authority outside the cadre of coaches encouraged, approved, or even knew of the wrongdoing. Moreover, the *Gray* court did not appear to have before it the limiting arguments presented here based on *Rybicki* (decided years after *Gray*). Thus, without attempting to call into question the result in *Gray,* we limit it to its facts, since applying the wire fraud statute here, even if it requires no new explicit statement of law, would expand honest-services fraud to reach all manner of accounting fraud and securities fraud, which have not generally been prosecuted as honest-services fraud and are heavily regulated under other statutes. The Government, in fact, would go even further; it plainly stated at oral argument its position, explicitly based on *Gray,* that the honest-services charge would reach the Defendants' conduct *even absent an oral buyback agreement.* The Government's desire to *build* on *Gray* crystalizes the danger we face of defining an ever-expanding and ever-evolving federal common-law crime.

common-law crimes, we resist the incremental expansion of a statute that is vague and amorphous on its face and depends for its constitutionality on the clarity divined from a jumble of disparate cases. Instead, we apply the rule of lenity and opt for the narrower, reasonable interpretation that here excludes the Defendants' conduct. *See McNally,* 483 U.S. at 360.

In sum, the convictions of each of the Defendants for conspiracy and wire fraud cannot be upheld on the basis of the honest-services theory and must be vacated per *Yates, supra.* We therefore need not address the viability of the Government's remaining theories of criminal liability (the money-or-property and books-and-records charges). Nor need we speak to the procedural errors alleged by the Defendants. Instead, we turn to two remaining issues: the Defendants' motions for acquittal and Brown's conviction for perjury and obstruction of justice.

IV

A

We first consider the District Court's denial of Fuhs's Motion for Judgment of Acquittal, which Fuhs submitted at the close of the Government's case-in-chief. Fuhs contends that the evidence in the Government's case-in-chief is insufficient to support a conviction.

Review for sufficiency where, as here, the motion was renewed at the close of the evidence is *de novo,* meaning that "'we determine whether . . . a rational jury could have found the essential elements of the offense beyond a reasonable doubt.' *United States v. Dean,* 59 F.3d 1479, 1484 (5th Cir. 1995)." *United States v. Alarcon,* 261 F.3d 416, 421 (5th Cir. 2001). As Fuhs notes, because the District Court reserved ruling on the motion, appellate review is limited to the evidence presented in the Government's case-in-chief. *United States v. Rhodes,* 631 F.2d 43, 44-45 (5th Cir. 1980). Thus, we ought not consider the Government's rebuttal evidence alleging that Fuhs lied on the witness stand and that he may have edited, or even authored, a key document – the Appropriation Request (Govt. Exhibit 850.1) – in the prosecution's case against all the Defendants.

The Government's case-in-chief against Fuhs consisted entirely of documents and e-mails, plus excerpts from Fuhs's statements before the SEC from 2002. The Government admits that none of its witnesses testified about Fuhs's knowing participation in the alleged scheme and that Fuhs was absent from the critical calls and meetings that allegedly put the Merrill Defendants on notice of Enron's intention to account improperly for the barge transaction. Thus, the Government relies solely on the documentary evidence to assert Fuhs's knowledge of the oral buy-back promise and his intent to participate in the scheme to conceal that promise for the purpose of effecting a misaccounting of the overall deal.

We find that the documentary evidence fails to sustain the Government's burden of proof beyond a reasonable doubt. Much of the Government's evidence consists of e-mails or memos not written or initiated by Fuhs, not directly addressed to him, and in some cases not even copied to him. They neither recognize a secret oral side deal nor imply that the addressees of the correspondence knew of such a secret deal. While they may support the assertion that Fuhs knew Merrill wanted a buyback agreement to protect its investment, and that it was at one point understood to be part of the deal by Fuhs's subordinate Geoffrey Wilson, the principal documents relied upon by the Government simply do not sustain the inference that Fuhs had knowledge of an oral guarantee that was to be kept out of the written agreement and kept secret in (because it conflicted with) the accounting of the deal.

Fuhs's list of transactional risks was only a transcription of Brown's list to be passed along to analysts and executives. It reveals nothing regarding Fuhs's understanding of Enron's intent to misrepresent the transaction. The list does not reveal the existence of a secret buyback promise or an intent to defraud; in fact, the *absence* of a promise securing Merrill's investment is noted. 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. The Government's claim that "Fuhs would

soon find out, if Brown had not already told him, 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.

The Government, however, asserts that certain other documents, especially a series of revisions of the engagement letter representing the transaction, show Fuhs's knowledge of an intent to further a fraudulent accounting of the deal. The Government's inferences are deficient for two reasons. First, 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. It is an unacceptable stretch to conclude from these documents that Fuhs had knowledge that the transaction ultimately included an oral promise to be kept secret from the lawyers and accountants in order to effect a fraudulent accounting. The fact that Fuhs forwarded to Merrill lawyers a black-lined version of the edited engagement letter in which mention of a buyback was redacted is only damning to Fuhs if one assumes he was aware that the buyback guarantee remained part of the deal. But the documents do not establish, nor does any other evidence establish, that Fuhs knew the buyback obligation survived the redaction such that the absence of references would suggest concealment. The Government cannot simply assume the

linchpin of its case against Fuhs; yet it repeatedly frames documents as inculpatory by presuming that Fuhs knew of the oral promise and concluding that he willfully concealed the promise in furtherance of the deception. Second, whatever understanding these documents do reveal, such understanding is principally that of the primary communicants of the correspondence, namely, Wilson, Furst, and Boyle. The fact that Fuhs is copied on a stream of e-mails documenting the transaction is far from sufficient to support inferences that he knew of the details of an oral side agreement that survived the removal of written references to it.

The Government also produced evidence stemming from six months after the initial transaction, when Merrill was getting rid of its purported equity interest. Fuhs wrote that he had spoken to Boyle and that Enron had lined up a new buyer to purchase Merrill's interest "for the agreed upon amount outlined in the previously forwarded memo." This e-mail fails to prove anything other than that Fuhs became aware of Enron's procurement of a third-party buyer to take Merrill out of its purported equity interest. Even when taken together with the remainder of the evidence against Fuhs, the e-mail demonstrates neither the knowledge of a secret repurchase obligation owed by Enron nor the specific intent to defraud by the concealment of that obligation. Nor does Fuhs's jocose reply, "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?", after Merrill

had sold its stake but Brown was still exposed because of his involvement in LJM2, add much evidence of the requisite knowledge and the specific intent of Fuhs to defraud in the purchase of the barge six months earlier.

As counsel for Fuhs noted at oral argument, if we begin with the assumption that Fuhs is guilty, the documents can be read to support that assumption. But if we begin with the proper presumption that Fuhs is not guilty until proven guilty beyond a reasonable doubt, we must conclude that the evidence is insufficient to prove beyond a reasonable doubt that Fuhs had the knowledge and intent to enter into the fraudulent scheme alleged by the Government.

Ultimately, we do not have to conclude that Fuhs was an innocent in the deal to relieve Enron of the barges. We only conclude that at the close of its case, the Government had failed to support its charges against Fuhs with sufficient evidence of guilty knowledge, as charged in the Indictment, to survive his motion for judgment of acquittal.

B

Regarding the other Defendants' motions for acquittal, we have reviewed the record and are satisfied that the Government's evidence was not so patently deficient that a judgment of acquittal was required as a matter of law.

V

We turn finally to Brown's convictions for perjury and obstruction of justice. These charges stem from testimony Brown gave to the grand jury investigating the barge transaction in the fall of 2002. The Government charged that Brown's testimony concerning the agreement between Enron and Merrill was perjurious and ultimately constituted obstruction of justice. The jury agreed and convicted Brown under 18 U.S.C. § 1623 of one count of perjury, and under 18 U.S.C. § 1503 of one count of obstruction of justice. We affirm these convictions.

A

18 U.S.C. § 1623 defines perjury as "knowingly mak[ing] a false material declaration" to a grand jury. The Government charged Brown with one count of perjury, contending that Brown knew or understood that Enron promised to remove Merrill from the barge deal by June 30, and that Brown perjuriously denied under oath any such knowledge or understanding.[14] The Indictment quotes the following testimony by Brown as constituting perjury (the

[14] Specifically, the Indictment alleges that "[w]hile under oath, Defendant BROWN testified falsely as to a material matter by stating, among other things, that he did not know of any oral promise between Enron and Merrill Lynch relating to the barge transaction."

underlining is in the original and indicates the portions alleged to be false):[15]

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[15] The portion of the testimony from which the excerpts in the Indictment were taken is as follows:

> Q: Do you see where it [e-mail from Boyle, Grand Jury Exhibit 11] says, "To be clear, Ene. (Enron) is obligated to get Merrill out of the deal on or about June 30th?"
>
> A: Yes, sir.
>
> Q: Do you have any understanding of why Enron would believe it was obligated to Merrill to get them out of the deal on or before June 30th?
>
> A: It is inconsistent with my understanding of what the transaction was.
>
> . . . .
>
> Q: . . . And the question to you is do you have any understanding as to whether – how or why – Enron would believe that it was – it understood that it was required . . . to get Merrill Lynch out of the deal by June 30th?
>
> A: I did not understand – you know, my understanding of the transaction was that they were not required to get us out of the transaction, but we made it clear to them that we wanted to be out of it by June 30th.
>
> . . . .
>
> Q: Now, do you see in this E-mail [still discussing Grand Jury exhibit 11] where it says, "And someone should be working on a backstop, as you will not be able to extend Merrill, and I understand that there are accounting ramifications if Enron repurchases"?
>
> Now, do you have any understanding about whether or not Merrill could extend past June 30th?
>
> A: I don't know anything about that.

(Continued on following page)

Q: Okay. And under – if it was a true sale and if Merrill purchases something, there would be no extension needed. I mean Merrill has the asset and until somebody comes along and buys it, they have it; correct?

A: Correct.

. . . .

Q: Now, do you see in this document [LJM-2 document, Grand Jury Exhibit 18] . . . 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."

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

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

Q: So you don't have any understanding as to why there would be a reference to a promise that Merrill would be taken out by sale to another investor by June of 2000?

A: No.

. . . .

Q: [Discussing America's Credit Flash Report for the week ending 12/23/99, Grand Jury Exhibit 9] And let me now direct your attention to the paragraph on the Nigerian barge project.

Now, do you see where it says . . . , "IBK [Merrill] was supportive based on Enron relationship, approximately $40 million in annual revenues, and assurances from Enron management that we will be taken out of our $7 million investment within the next three to six months."

(Continued on following page)

Does that accord with your understanding of the transaction?

A: No. I thought we had received comfort from Enron that we would be taken out of the transaction within six months or would get that comfort.

If assurance is synonymous with guarantee, that is not my understanding.

If assurance is interpreted to be more along the lines of strong comforts or use of best efforts, that is my understanding.

Q: [Discussing the Merrill appropriation request for the Enron/Merrill barge transaction, Grand Jury exhibit 7] . . . Do you see where it says, "Take out," where it says, "project start/finish," and it says, "Needs to close by 12/31/99"? And I'd for now like to focus on the part where it says, "Take out by June 30th, 2000."

A: Yes, sir.

Q: Does that comport with your understanding of the transaction, that the finish of the project was June 30th of 2000 when there would be a take out?

A: You know, "take out" could mean that the anticipated time frame of the investment runs through that period, or in my mind it could, or it could mean some sort of legal take out. So I really – I can't draw a conclusion from just those words.

Q: Do you see where it says "maturity"? . . .

A: Yes.

Q: And its says "less than 6 months"?

A: Yes.

Q: Do you have any understanding why it would say "less than six months" if the terms of the agreement are open-ended?

A: Well, I'd be speculating but I would assume that that would reflect – at least my understanding or

(Continued on following page)

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

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

. . . .

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

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

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

A: *No.*

---

whoever wrote this's understanding, that the anticipated hold period was less than six months.

Q: But if the contract between the parties is an open-ended investment, why does the maturity just say less than six month[s] when the terms of the contract bring Merrill Lynch well beyond six months?

A: I don't know.

Brown makes three primary arguments: first, that he testified truthfully as to his subjective understanding of the barge deal; second, that the questions posed to him before the grand jury were too "vague and ambiguous" to support a perjury conviction; and third, that any misrepresentations by Brown were not material and thus cannot sustain a conviction under 18 U.S.C. § 1623. Each of these arguments is properly characterized as an attack on the sufficiency of the evidence.[16] Consequently, "[w]e ask whether a rational trier of fact could have found that the evidence established the elements of the offense beyond a reasonable doubt." *United States v. Holmes,* 406 F.3d 337, 351 (5th Cir. 2005).

First, Brown argues that the evidence presented is insufficient to support a reasonable juror's finding that his testimony was untruthful. We disagree. Along with other circumstantial evidence of Brown's

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[16] Brown mischaracterizes his challenges as a legal sufficiency challenge, which we would review *de novo.* It is clear, however, that Brown's challenge is to the sufficiency of the evidence. *See, e.g., United States v. Abrams,* 568 F.2d 411, 417 (5th Cir. 1978) (holding that when examining a jury's determination that the defendant "gave false testimony", [sic] "[t]he applicable standard of review is not whether we think the evidence sufficient but whether a reasonable jury could so conclude beyond a reasonable doubt."); *United States v. Bell,* 623 F.2d 1132, 1136 (5th Cir. 1980) ("the prevailing view is that the defendant's understanding of the question is a matter for the jury to decide"); *United States v. Gaudin,* 515 U.S. 506 (1995) (holding that materiality is an element of perjury and thus a question for the consideration of the jury).

knowledge of the details of the transaction, the Government presented the following:

1. Brown was approached in late December 1999 by Furst, who explained that Enron Treasurer Jeff McMahon "asked Merrill to purchase $7 [million] of equity in a special purpose vehicle that would allow Enron to book $10 [million] of earnings", [sic] and that the transaction "must close by 12/31/99". [sic] Furst further 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". [sic]

2. Brown was a part of a conference call on December 22, 1999 (the Trinkle call) in which Brown, Bayly, Furst and others, all Merrill Lynch employees, but excluding lawyers, discussed Enron's need to close the deal to achieve needed revenue goals. Further, it was noted that Enron told Merrill that it would help find a third party buyer and that, if a third party buyer was not secured by June 30, 2000, Enron would repurchase the barges from Merrill. At some point during the call, Bayly asked whether a written assurance of Enron's promise was available, and someone responded that a writing was not possible because such an assurance would prevent Enron from receiving the accounting treatment it was seeking from the deal.

3. Three versions of the engagement letter were circulated among Brown and others, the final draft being executed by Brown on behalf of Merrill. The initial draft of the engagement letter included reference

to Enron's buyback guarantee. On December 28, Boyle sent out a second draft of the letter with "strike-through" indicating the proposed removal of all references to the buyback guarantee. The final executed version of the engagement letter contained no reference to the buyback guarantee.

4. Finally, Brown's own e-mail in March 2001, more than a year prior to his grand jury testimony, plainly stated that "we had Fastow get on the phone with Bayly and lawyers and promise to pay us back *no matter what.*"[17] (Emphasis added.)

Based on this proof, a reasonable jury could have found that the evidence was sufficient to conclude that Brown's answers were untruthful. Brown further argues that his testimony was not actually false, as he never denied knowledge of some "understanding" or "comfort" between Enron and Merrill as to the buyback; rather, he merely denied knowledge of a

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[17] Brown, who was not a party to the "Fastow call," argues that the e-mail is inadmissible hearsay and that it is unreliable and fails to provide evidence that his grand jury testimony was false. However, the e-mail is admissible as non-hearsay under Federal Rule of Evidence 801(c) to reveal Brown's state of mind, i.e., his belief that the side deal had been entered into and confirmed by Fastow. Additionally, although Brown argues that any knowledge he had of the call was based on hearsay, the e-mail is admissible against him under Rule 801(d)(2)(A) as an admission by a party opponent. Despite Brown's contentions to the contrary, a reasonable jury could consider such an admission reliable and reject Brown's proffered explanation that the e-mail was an exaggeration of "the strength of the promise [made by Fastow]. . . ."

"promise" of such a side-deal. This distinction and the spin placed on selective and hyper-technical word choice provides no refuge from the jury's verdict. "[I]f after conviction the defendant offers 'a contrived hypertechnical or lame interpretation of his answer' . . . the jury's decision must be left undisturbed." *Bell,* 623 F.2d at 1136 (quoting *United States v. Clifford,* 426 F.Supp. 696, 704 (E.D.N.Y. 1976) (citations omitted)). Based on this proof, a reasonable jury could have found that the evidence was sufficient to conclude that Brown knew that oral agreements had been made and that Brown's answers before the grand jury were untruthful.

Second, Brown argues that the grand jury questions were "fundamentally ambiguous". [sic] Our review of this testimony convinces us that the questions posed adequately conform with the principle that "[p]recise questioning is imperative as a predicate for the offense of perjury," *Bronston v. United States,* 409 U.S. 352, 358 (1973). There is no indication that Brown struggled to understand or actually misunderstood the meaning of the questions. Brown's answers were carefully responsive to the questions posed. Brown's caution in his word choice, using words like "comfort" and "best efforts," rather than "assurance," "promise," or "guarantee," indicates he was keenly aware of the thrust of the prosecutor's questions.

Finally, Brown's third argument challenging the materiality of his answers is two-fold: First, he contends that any knowing misrepresentations that he may have made were not material to the grand jury

investigation; second, he argues that the refusal of the District Court to admit the entirety of his grand jury testimony was error, because consideration of that evidence would have prevented the jury from believing his testimony to be material. Materiality under § 1623 requires only that the defendant's statements "[had] a 'natural tendency to influence, or [were] capable of influencing, the decision of the decisionmaking body to which it is addressed.'" *United States v. Gaudin,* 515 U.S. 506, 509 (1995) (quoting *Kungys v. United States,* 485 U.S. 759, 770 (1988)); *see also Abrams,* 568 F.2d at 421 (same). The Government does not have to demonstrate that the grand jury was *actually* hindered in any way by the falsehood. *See Abrams,* 568 F.2d at 421 ("Actual impediment of the investigation is not required. . . . Grand jurors are capable of judging credibility and they are free to disbelieve a witness and persevere in an investigation without immunizing a perjurer."). The central issue before the grand jury at the time of Brown's testimony was whether there was an oral buyback guarantee between Enron and Merrill and if there was such an agreement, who was culpable. Any testimony by Brown relating to the existence of the agreement, or his knowledge or understanding about that agreement, was necessarily material to the inquiry of the grand jury.[18] Brown's argument to the contrary is meritless.

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[18] The materiality requirement of § 1623 has been satisfied in cases where the false testimony was "relevant to any subsidiary

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Brown's second argument as to materiality is that the District Court erroneously excluded his entire grand jury testimony. This evidentiary ruling is reviewed for an abuse of discretion. *United States v. Walker,* 410 F.3d 754, 757 (5th Cir. 2005) (citing *United States v. Phillips,* 219 F.3d 404, 409 (5th Cir. 2000)). Brown contends that it was impossible for the trial jury to determine if his statements were perjurious without seeing the context in which they were given. The District Court reviewed Brown's proffered testimony and declined to admit it, finding that "the questions . . . and answers" contained therein "are not genuinely in question," and concluding that the testimony was not relevant and would lead to jury confusion. We have reviewed the record, including the proffered testimony, and find no abuse of discretion by the District Court.

For the reasons given, we find no reason to upset the jury verdict and accordingly, affirm Brown's conviction for perjury before a grand jury.

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issue or [wa]s capable of supplying a link to the main issue under consideration." *United States v. Griffin,* 589 F.2d 200, 207 (5th Cir. 1979) (noting that "[t]he testimony need not be directed to the primary subject under investigation"). Consequently, it appears that even if Brown's falsehood was relevant only as to his participation in the buyback agreement (and was not, as Brown argues, material to the existence of the buyback itself) the materiality requirement of § 1623 is still satisfied.

B

Brown next argues that even if the perjury conviction must be sustained, there is no basis for the verdict on obstruction of justice. Obstruction of justice is defined in 18 U.S.C. § 1503(a) as "corruptly . . . endeavor[ing] to influence, obstruct, or impede . . . the due administration of justice". [sic] 18 U.S.C. § 1503(a) (1996). This clause "clearly forbids *all* corrupt endeavors to obstruct or impede the due administration of justice." *United States v. Williams,* 874 F.2d 968, 977 (5th Cir. 1989) (emphasis in the original). Brown contends, however, that where false testimony alone is the basis for the offense, "it still must be shown to have the effect of impeding justice." Brown essentially argues that perjury and obstruction are separable and distinct offenses; consequently, the mere fact that one perjures himself does not mean that he has obstructed justice.[19] Thus, the obstruction conviction must be reversed because "[t]he government introduced no evidence . . . [to] establish that Brown's testimony had any effect (actual, natural, or probable) on the Grand Jury proceeding."

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[19] We acknowledge this argument is well reasoned and persuasive. However, under the precedent of this circuit, as discussed *infra,* false testimony as to one's *knowledge* relating to the subject of a grand jury inquiry does in fact establish obstruction; not because the perjury *ipso facto* establishes obstruction, but because the perjurious testimony has the effect of "closing off entirely the avenue[ ] of inquiry being pursued." *Williams,* 874 F.2d at 981.

Brown's argument is reasoned and appealing. Nevertheless, our precedent makes clear that material false testimony regarding one's knowledge of the subject matter of a grand jury investigation has an effect beyond its falsity; it also impedes the investigation of the grand jury. In both *United States v. Griffin,* 598 [sic] F.2d 200 (5th Cir. 1979), and *Williams,* the defendants testified falsely to a grand jury by giving "evasive answer[s]" and "denials of knowledge" relating to the subject of the grand jury inquiry. In both cases, the defendants, like Brown, argued that their § 1503 convictions must be reversed as the Government had not presented independent evidence that these falsehoods actually impeded the grand jury. Writing for this Court, respectively, both Judges Wisdom and Garwood rejected those contentions, finding that "the denials of knowledge had the effect of closing off entirely the avenues of inquiry being pursued, namely, *what appellants knew about the subject under investigation.*" *Williams,* 874 F.2d at 981 (emphasis added); *see also Griffin,* 598 [sic] F.2d at 204. As explicated by Judge Wisdom, "[b]y falsely denying knowledge of events and individuals when questioned about them, [the defendant] hindered the grand jury's attempts to gather evidence [of the alleged scheme] as effectively as if he refused to answer the question at all." *Griffin,* 598 [sic] F.2d at 204. Consequently, the "testimony had the effect of impeding justice."[20] *Id.*

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[20] Because the testimony in *Griffin* and *Williams* did in fact impede the grand jury, both cases declined to determine whether

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Brown attempts to distinguish his case, arguing that he testified of his own free will, that he answered every question, and that he never directly denied knowledge of the Fastow conversation. Consequently, he cannot be found to have obstructed the grand jury. Brown's argument, however, presupposes that his "voluntary" and "complete" testimony was true – a presupposition rejected by the jury's conviction of perjury. Given our precedent, we see no principled reason that justifies different treatment of Brown's untruthful testimony and denials of knowledge; as much as the defendants in *Griffin* and *Williams,* Brown "closed off entirely the avenue being pursued," namely, his knowledge or understanding of what actually occurred. We are bound by the precedent of this Circuit, and under that precedent, no other proof of impediment is required to demonstrate obstruction under § 1503. *Williams,* 874 F.2d 968; *Griffin,* 598 [sic] F.2d 200.[21]

Given the evidence presented by the government that Brown's testimony was false, and the jury's apparent acceptance of that evidence, Brown's perjurious testimony had the effect of "closing off entirely

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perjury before a grand jury "*ipso facto* constitutes a violation of section 1503," *see Griffin,* 598 [sic] F.2d at 204; *Williams* 874 F.2d at 980.

[21] Brown repeatedly cites *In re Michael,* 326 U.S. 224 (1945), for the proposition that an obstruction conviction based on perjury alone cannot stand. However, *Griffin* squarely rejected that argument. 985 [sic] F.2d at 205-06. *See also Williams,* 874 F.2d at 979.

the avenue[ ] of inquiry being pursued." *Williams,* 874 F.2d at 981. Consequently, Brown's testimony was corruptly attempting to influence the administration of justice in violation of § 1503. As such, we affirm Brown's conviction for obstruction of justice.

VI

We sum up as follows: The convictions of each of the Defendants for conspiracy and wire fraud are VACATED; the District Court's denial of Fuhs's motion for judgment of acquittal is REVERSED and his convictions are VACATED; and the conviction and sentences of Brown on charges of perjury and obstruction of justice are AFFIRMED.

REVERSED in part; VACATED in part; and AFFIRMED in part.

REAVLEY, Circuit Judge, concurring in part and dissenting in part:

I concur in the dismissal of charges against Fuhs because of the insufficiency of the evidence at the stage of the end of the government's case-in-chief. And I concur in affirming Brown's convictions for perjury and obstruction of justice. I would, however, affirm the judgment against Brown, Bayly and Furst for conspiracy and wire fraud.

The government's theory of wire fraud relating to the deprivation of honest services is warranted by 18

U.S.C. § 1346 because it applies to the behavior in this case. While the majority recognizes that the government provides a "very plausible, even strong case for a criminal deprivation of honest services," it goes on to hold that the scheme as alleged in the indictment falls outside the scope of honest services fraud, and unnecessarily sets up a new "demilitarized zone" for the honest services fraud theory. ("[W]here an employer intentionally aligns the interests of the employee with a specified corporate goal, where the employee perceives his pursuit of that goal as mutually benefitting him and his employer, and where the employee's conduct is consistent with that perception of mutual interest, such conduct is beyond the reach of the honest-services theory of fraud as it has hitherto been applied.").

Both our pre- and post-*McNally* case law supports the honest services fraud theory alleged in the indictment and proven at trial. To prove a violation of the honest services branch of the federal fraud statutes, the government must prove that a defendant deprived his employer of services under state law. *United States v. Caldwell,* 302 F.3d 399, 409 (5th Cir. 2002); *United States v. Brumley,* 116 F.3d 728, 734 (5th Cir. 1997) (en banc) (the employee "must act or fail to act contrary to the requirements of his job under state law"). In *United States v. Ballard,* 663 F.2d 534, 353 [sic] (5th Cir. 1981), this court held

> that a breach of fiduciary duty of honesty or loyalty involving a violation of the duty to disclose could only result in criminal mail

> fraud where the information withheld from the employer was material and that, where the employer was in the private sector, information should be deemed material if the employee had reason to believe the information would lead a reasonable employer to change its business conduct.

See also United States v. Gray, 96 F.3d 769, 774-75 (5th Cir. 1996) (same); *United States v. Fagan,* 821 F.2d 1002, 1009 (5th Cir. 1987) (same). This court has held that "a breach of fiduciary duty can constitute illegal fraud . . . only when there is some detriment to the employer." *Ballard,* 663 F.2d at 540. The court went on to find that the detriment can be a deprivation of an employee's faithful and honest services if a violation of the employee's duty to disclose material information is involved. *Id.* Thus, this court has focused its inquiry on the duty to disclose and materiality.[1]

The indictment alleges that "[a]s Enron employees, Fastow, Glisan, [and] Boyle . . . each owed a duty to Enron and its shareholders to provide the company

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[1] I note that the Second Circuit in *United States v. Rybicki,* 354 F.3d 124, 145-46 (2d Cir. 2003), a case involving a kickback scheme, followed the lead of this court and adopted the materiality test in lieu of the reasonably foreseeable harm test. The court found that private sector honest services cases fall into two general categories: bribery or kickbacks and self-dealing [sic]. *Id.* at 139. While certainly these type of cases fit comfortably into the plain meaning of § 1346, honest services fraud is not limited to those categories, and any implication otherwise is unjustified.

with their honest services." Count One then alleges that the defendants conspired to devise a scheme or artifice to defraud Enron and its shareholders "of the intangible right of honest services of its employees" and that they used "materially false and fraudulent pretenses, representations, and promises" in the process. Counts Two and Three reiterate those allegations for the substantive wire fraud offenses.

The evidence at trial proved that Fastow, Glisan, Boyle, and McMahon, and other Enron personnel temporarily "parked" the barges with Merrill Lynch so that Enron could meet its earnings. The defendants never disputed that Fastow, Glisan, Boyle, and McMahon were senior Enron executives and managers that owed a fiduciary obligations under state law to Enron and its shareholders. These fiduciary obligations included the duty of loyalty, fair dealing, and candor. The Enron executives and managers breached their fiduciary duties by "cooking" Enron's books and engaging in the fraudulent "sale" of the barges to Merrill Lynch, withholding this information from Enron and its shareholders, and causing Enron to pay nearly $1.5 million to Merrill Lynch and LJM2 to hold the barges, along with paying compensation bonuses to APACHI executives that depended on the completion of the barge transaction.

In sum, the government proved that the defendants' scheme involved withholding material information from Enron and its shareholders and caused a detriment to Enron and its shareholders. Given that our pre- and post-*McNally* case law supports the

honest services fraud theory alleged in the indictment and proven at trial, this should end the matter.

To distinguish this case from previous cases, the majority relies on two important propositions: (1) that the barge transaction was intended to serve a corporate purpose/goal, ("This case, in which Enron employees breached a fiduciary duty in pursuit of what they understood to be a corporate goal, presents a situation in which the dishonest conduct is disassociated from bribery or self-dealing and indeed associated with and concomitant to the employer's own immediate interest."); and (2) that there could [sic] no honest services violation because certain Enron executives knew all of the specifics of the barge deal and sanctioned the transaction, ("Enron's corporate incentive policy coupled with senior executive support for the deal (the deal was sanctioned by Fastow, Enron's Chief Financial Officer), which together created an understanding that Enron has corporate interest in, and was a willing beneficiary of, the scheme."). I object to both justifications for the conspiracy.

First, the barge transaction did not serve the purpose of Enron's shareholders, and it cost Enron nearly $1.5 million, plus compensation to APACHI executives, that it should not have had to pay. Most important, falsifying Enron's books does not serve a legitimate corporate purpose, even if it temporarily made Enron's finances appear more attractive to the investing public in the short term. Second, it is no defense that the defendants' co-conspirators included high-ranking executives at Enron. The fact that those

co-conspirators were aware of defendants' conduct does not excuse defendants' actions. But most important, Enron *executives* are not Enron itself and, in any event, they owed a fiduciary duty to Enron *and* its shareholders.[2]

I conclude that the behavior of the defendants falls squarely within the meaning of a "scheme or artifice to deprive another of the intangible right to honest services," measuring it against our pre- and post-*McNally* case law. I therefore respectfully dissent.

DeMOSS, Circuit Judge, concurring in part and dissenting in part:

I join without reservation Judge Jolly's opinion with respect to the honest services theory of the Indictment and the issue of insufficiency of the evidence as to Fuhs. However, I write separately to explain two additional points with respect to the honest services charge and to dissent with respect to Brown's convictions for perjury and obstruction of justice.

[2] For these two reasons, I find the majority's attempt to distinguish and limit *United States v. Gray,* 96 F.3d 769 (5th Cir. 1996), to be unpersuasive.

I.

With respect to § 1346 and the honest services theory, I would reach the Defendants' constitutional challenge and also point out the multiple and troubling problems with the Government's theory of applying § 1346 to these facts, even though the majority opinion disposes of the Defendants' appeal.

In our *Brumley* dissent, Judge Jolly and I did our best to point out the ambiguities in the text of § 1346 that gave us grave reservations about the statute's application. While we did not there call into question the statute's constitutionality as applied, 116 F.3d at 736 (Jolly and DeMoss, JJ., dissenting), I have since then twice had occasion to address § 1346. *See United States v. Griffin,* 324 F.3d 330, 356 (5th Cir. 2003); *United States v. Evans,* 148 F.3d 477 (5th Cir. 1998). The Defendants have raised here a constitutional challenge to § 1346, and in my view the panel should now address that issue. Years of review of the application of § 1346 to varied facts persuade me that the constitutionality of § 1346 may well be in serious doubt. A federal criminal statute must define the crime "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson,* 461 U.S. 352, 357 (1983). Section 1346's text is undeniably vague and ambiguous and is subject to wide variation in application by the lower courts. Rather than address the larger constitutional problem with this statute, which would provide clarity to Congress,

prosecutors, and the lower courts, the circuit courts have instead only clouded the meaning of § 1346 by repeatedly resolving the ambiguities of the statute's text via judicially created definitions and limitations. Our Court and our sister circuits end up doing precisely what most would say we lack the constitutional power to do, that is, define what constitutes criminal conduct on an *ex post facto* and *ad hoc* basis. In this regard, I add my voice to the dissenters in *Rybicki.* 354 F.3d at 163-65 (Jacobs, J., dissenting). Congress should repair this statute that, in my opinion, fails to provide the requisite "minimal guidelines to govern law enforcement." *Id.* at 358 [sic].

Additionally, the application of § 1346 to the facts presented in this case is particularly problematic for several reasons, the combination of which poses an even greater harm to future business relationships and transactions than would any one of the problems alone. The Government's extension of the already ambiguous reach of § 1346 by way of an indictment for conspiracy to commit honest services fraud is especially troublesome. While § 1346's text offers little guidance on the scope of the crime's application, *see Brumley,* 116 F.3d at 741-42, 746 (Jolly and DeMoss, JJ., dissenting), at a minimum the word "services" has been in the past the basis for the statute's pre-*McNally* application to the employer/employee relationship. *See id.* at 734 (Higginbotham, J., majority opinion). To the extent that pre-*McNally* case law required a relationship that generated a duty of honest services, such a relationship does not exist in this

case between the Defendants, who are employees of Merrill, and Enron or its shareholders, who are the purported victims of the alleged fraud. The limitation of criminal activity to relationships giving rise to a duty of honest services is ignored when any person who negotiates with an employee of another corporation is potentially entangled by the combination of § 1346 with our very broad understanding of conspiracy.

I also believe that a serious problem arises with respect to the Government's theory of harm in this case. It is absolutely undisputed that Merrill paid $7 million to Enron as a result of the closing of the transaction contemplated by the Engagement Letter of December 29, 1999 that was the final written agreement of the two parties ("the Engagement Letter"). Even granting the Government that Enron paid back $250,000 as the advisory fee to Merrill, Enron still had $6,750,000 more in its bank account as a result of the Engagement Letter than it had before. The Government's theory of harm would have us ignore the initial gains to Enron and focus solely upon some later loss only tangentially connected to the particular investment transaction that forms the basis of the Indictment.

The cumulative effect of a vague criminal statute, a broad conception of conspiracy, and an unprincipled theory of harm that connects the ultimate demise of Enron to a single transaction is a very real threat, of potentially dramatic proportion, to legitimate and

lawful business relationships and the negotiations necessary to the creation of such relationships.

II.

I dissent from the portion of the majority opinion that affirms the convictions of Brown for perjury and obstruction of justice. I cannot agree with the majority that on this record, particularly the portions quoted in the majority opinion, a reasonable jury could conclude that Brown's allegedly perjurious statements were in fact false. Brown argues that his testimony was true because it represented his subjective understanding of the transaction contemplated by the Engagement Letter. I agree. The majority relies primarily upon four points of evidence to support its assertion of falsity: Furst's explanations to Brown that Enron viewed the deal as a "bridge to permanent equity"; the discussions of the December 22 conference call; working drafts of the Engagement Letter transmitted between Merrill and Enron that were never signed; and Brown's own e-mail of March 2001. These four points, along with other circumstantial evidence, comprise two types of evidence: (1) business negotiations preceding a deal ultimately reduced to a written agreement and (2) an after-the-fact oversimplification and shorthand description of the barge partnership investment by Merrill employees during the discussion and evaluation of a subsequent and entirely unrelated deal. Neither of these types of evidence should be used to support an inference of the falsity of Brown's testimony.

The evidence regarding both working drafts of the Engagement Letter and discussions between employees of Enron and employees of Merrill leading up to the final written agreement are simply the heart and soul of business negotiations and should not indicate the character of the ultimate business transaction. Some negotiations may ultimately be reflected in the final written agreement, but some may not. Here, negotiations are no evidence of the actual nature of the deal because there was no legally enforceable take-out promise in the final written agreement; instead, the parties merely bargained for Enron's best efforts to continue to market Merrill's investment interest in the barge partnership to the mutual benefit of both companies.

Such an agreement does not undermine the nature of the transaction as set forth in the Engagement Letter that was ultimately agreed to and signed by both parties. Employees of Enron and Merrill may well have considered a buy-back agreement, promise, or guarantee during the negotiations leading up to the barge deal; the evidence would certainly permit a reasonable jury to so conclude. But the final written agreement excludes this term. Instead, the parties relied upon their established business relationship and discussions of best efforts and strong comfort that Enron would continue its efforts to find a third-party buyer for Merrill's interest in the barge partnership. The conversations preceding the deal are only negotiations, and the ultimate written agreement speaks for itself. Two material facts corroborate this reading:

(1) Fastow himself averred to the Government that he, in fact, made only assurances of best efforts to Merrill, not promises or guarantees to take Merrill out of the deal; and (2) in conformance with the written agreement, Merrill actually paid $7 million to Enron, consistent with its purchase of an interest in the barge partnership investment, and therefore had absolutely no legally enforceable claim to be taken out of the deal. The Government mischaracterizes the transaction evidenced by the Engagement Letter when it labels the agreement a "sham" and asserts that Merrill was never "at risk" during the transaction. The Engagement Letter expressly states, "No waiver, amendment, or other modification of this Agreement shall be effective unless in writing and signed by the parties to be bound." Likewise, the Engagement Letter also includes the following provision: "This Agreement incorporates the entire understanding of the parties with respect to this engagement of Merrill Lynch by Enron, and supercedes all previous agreements regarding such engagement, should they exist." In light of these provisions, Merrill's $7 million was absolutely at risk. Any oral assurances of a take-out offered to Merrill by any Enron employee would not have been legally binding on Enron.

In my view, both parties acted to maximize mutual benefits in a clear effort to solidify a business relationship. Both parties relied on the good faith of each other in laying a foundation for continued business relationships. Merrill could not have enforced Enron's assurance of its best efforts commitment to

remarket the investment interest that Merrill had agreed to purchase; Merrill could only have refused to deal with Enron in the future if the Engagement Letter had resulted in an unsatisfactory business investment. Such negotiations should not be the fodder for criminal indictments. If there is any criminal wrong arising from the facts in this record, and I have serious doubts on that score, it would be in Enron's employees' reporting of the transaction described in the Engagement Letter, not in the manner in which Merrill's employees negotiated the deal.

Brown's March 2001 e-mail was not a statement under oath; rather, it was a statement made to another Merrill colleague fifteen months after the Engagement Letter transactions that discussed a proposed loan transaction with a potential borrower, a large corporate entity entirely unrelated to Enron (referred to in the e-mail as "CAL"). The talking point in the e-mail was whether Merrill would be a secured or an unsecured lender in the proposed deal. The pertinent part of the e-mail reads,

> If it[']s as grim as It sounds, I would support an unsecured deal provided we had total verbal [a]ssurance from CAL ceo or Cfo, and [S]hulte was strongly vouching for it. We had a similar precedent with Enron last year, and we had Fastow get on the phone with Bayly and lawyers and promise to pay us back no matter what. Deal was approved and all went well. What do you think?

The text of the e-mail reveals that Brown was attempting to use the success of the earlier deal with Enron to persuade a colleague that the deal with CAL would likewise be successful. In the email, Brown did not distinguish the two deals. But the Enron deal and the CAL deal discussed in the e-mail differ in at least one important respect: the Enron deal involved the sale of an equity interest in an Enron partnership to Merrill and the CAL deal involved a loan by Merrill to CAL for funds to be used in building an extension to CAL's facilities. At the time the e-mail was written, Brown may have remembered the Enron deal as some sort of loan by Merrill to Enron; however, the Engagement Letter and the evidence before the jury reveal no such transaction. No legally enforceable promise was ever made to take Merrill out of the Enron deal. Accordingly, no reasonable jury could construe the e-mail as anything but an overly simplified, shorthand description of the barge investment made after the fact in an effort to secure a subsequent, entirely unrelated deal. Under this reading of the e-mail, Brown's testimony before the Grand Jury was not inconsistent with the text of the email because there simply was no promise or guarantee regarding a take-out in the Enron deal. The questions posed by the Grand Jury related only to an enforceable take-out, not to an oral "promise to pay us back no matter what," and Brown's answers to those questions therefore do not conflict with his statements in the e-mail.

Finally, the Government's own evidence supports a conclusion that the only comfort offered to Merrill was that Enron would use its best efforts to sell to a third party. A reasonable jury could not convict Brown of perjury where the Government speaks out of both sides of its mouth with respect to the allegedly perjurious testimony. The Government simultaneously proffers the identical words as both evidence of Brown's guilt of perjury when the words are spoken by Brown and as evidence of the nature of the Enron transaction not being a sale when offered by the Government's own witnesses.

I conclude, therefore, that no reasonable jury could conclude that Brown's testimony before the Grand Jury was false. Accordingly, I must conclude that no reasonable jury could convict Brown of perjury. *See* 18 U.S.C. § 1623. Moreover, the sole basis in the Indictment for the charge against Brown of obstruction of justice, *see* 18 U.S.C. § 1503(a), was Brown's allegedly false statements to the Grand Jury. Accordingly, I would also conclude that no reasonable jury could find Brown guilty of obstruction of justice on this record.

For the foregoing reasons, I would reverse the conviction of Brown on the perjury and obstruction of justice counts.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10-20621

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

JAMES A. BROWN,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITIONS FOR REHEARING
AND REHEARING EN BANC
(Opinion 2011 U.S. App. LEXIS 16634)

(Filed Sep. 19, 2011)

Before SMITH, SOUTHWICK, and GRAVES, Circuit Judges.

PER CURIAM:

The petition for rehearing is DENIED, and no member of this panel or judge in regular active service having requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Jerry E. Smith
United States Circuit Judge

Judges Davis, Benavides, Clement, and Elrod are recused and did not participate in the consideration of the petitions.

United States Constitution: Fifth Amendment

Fifth Amendment – Rights of Persons

[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . .

PERJURY AND OBSTRUCTION

18 U.S.C. 1623. False declarations before grand jury or court

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.

OBSTRUCTION OF JUSTICE

18 U.S.C. 1503. Influencing or injuring officer or juror generally

(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or

injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

DKT 489 Ex. B

UNITED STATES GRAND JURY

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

GJ NO. 02-2

RE: INVESTIGATION OF ENRON

BE IT REMEMBERED that on the 25th day of September, 2002, beginning at 9:48 a.m., in the Federal Building, 515 Rusk, Houston, Texas, the United States Grand Jury convened, at which time the following proceedings were had and testimony adduced as hereinafter set forth.

TESTIMONY OF JAMES ARTHUR BROWN

VOLUME I

* * *

[32] Q. You should understand, as we go forward, a lot of times we have questions which call for any information you have, and it's perfectly fine to tell us, "Well, this I know because I was there and I have firsthand information, as opposed to [33] something else where I'm telling you what I understand the case to be but I can't tell you that it's accurate or not because it's not what I do or it's not something I know from direct knowledge."

A. Right.

Q. But the Grand Jurors are interested in knowing all information you have, regardless of whether you know it from firsthand, what's called legally, non-hearsay evidence versus just any information that you have from any other source.

So you should not be thinking, "Well, because I don't know this positively, really shouldn't say anything." It's just – what you should do is tell us the information you have and if you want to qualify it in terms of your source of information or that you're not sure, just tell us that.

A. Gotcha.

Q. But we want to make sure that we have what's in your head and all information that's in your head on that subject even if [34] you're not positive of it; do you understand that?

* * *

[80] Q. Do you see where it says, "To be clear, Ene. (Enron) is obligated do [sic] get Merrill out of the deal on or about June 30th. We have no ability to roll the structure"?

A. Yes, sir.

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

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

* * *

[88] Q. 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."

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

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

Q. So you don't have any understanding as to why there would be a reference to a promise that Merrill would be taken out by sale to another investor by June of 2000?

A. No.

* * *

[91] Q. Now, do you see where it says in the second-to-last line, "IBK was supportive based on Enron relationship, approximately $40 million in

annual revenues, and assurances from Enron management that we will be taken out of our $7 million investment within the next three to six months."

Does that accord with your understanding of the transaction?

A. No. I thought we had received comfort from Enron that we would be taken out of the transaction within six months or would get that comfort.

[92] If assurance is synonymous with guarantee, 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.

* * *

EXHIBIT O

U.S. Department of Justice

Enron Task Force

1400 New York Avenue
Washington, D.C. 20530

July 30, 2004

BY FACSIMILE

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Re: United States v. Daniel Bayly, et al., Cr. No. H-03-363 (Werlein, J.)

Dear Counsel:

The following summary is provided to you in compliance with the Court's Order of July 14th, 2004.

As you know, in April of 2004, the Enron Task Force provided you with the names of

and Enron was that Enron would help Merrill find a subsequent buyer for its interest in the Nigerian Barge investment. McAndrews stated that Tilney and Furst asked Enron if their accountants approved the NBD and Enron stated that its accountants did approve the transaction.

McAndrews stated that it was common for Merrill to have oral agreements in Private Equity Fund deals.

Jeffrey McMahon

McMahon did not recall any definite push to get the NBD done by year end. Merrill wanted Enron/Fastow's assurance that Enron would use best efforts to syndicate or find a buyer for these assets. It was not unusual for this type of agreement not to be in writing. McMahon does not recall any guaranteed take out at the end of the 6 month remarketing period.

Ace Roman

In June of 2000, Roman believed that a deal had been struck with Merrill and Enron six months earlier that Merrill would be out of the NBD. Roman was not present during any conversations with regard to this deal so he does not know of any explicit promise to take Merrill out of the NBD. Roman does not know if there was a verbal promise to Merrill by Enron to take Merrill out of the deal. Roman was not involved in any discussions about what type of return Merrill would get.

Barry Schnapper

Schnapper understood that there was a commitment from Enron to use its best efforts to take Merrill out of the deal. Schnapper assumed that Arthur Andersen knew about the terms of the NBD. Recently, Boots told Schnapper that she had not heard of any commitment made to Merrill by Enron on the NBD.

Scott Sefton

Sefton did not recall any discussions about promises made to Merrill or LJM to take them out of the NBD at a later date.

John Swabda

Swabda had no recollection of anyone raising the issue of whether Enron would buy the barges back at the DMCC meeting or of a side deal. Swabda did not recall any discussion of a time frame by which Merrill would no longer want to be

Catherine Zrike

Tilney and Furst represented to Zrike that Merrill had a business understanding with Enron that Enron would have to find another buyer of Merrill's interest in the NBD if Marubeni did not come through. Based on the representations that were made to her, Zrike did not feel that there was a commitment by Enron to guarantee Merrill's takeout within 6 months. Zrike believed that there was a business understanding between Enron and Merrill that Enron would remarket the barges. There was no legally binding commitment to do so.

Zrike indicated that she believed Merrill's investment in the NBD was at risk. Furst's perspective was that if the barges could not be sold, Merrill would go out and sell it. Zrike tried to make sure that Davis and Bayly understood that this was a risk and that Merrill could end up owning the barges and could lose its money. Zrike's focus was to ensure that Merrill's management understood that Merrill was the owner of the barges, and could be an owner for longer than it expected because there was no obligation for Enron to buy it back. That was made clear from day one. Zrike said she gave Bayly her views that based on what we know and the information we have this was not illegal. Zrike initially said she gave no legal advice on the NBD.

When asked about Merrill documents indicating that Merrill was internally recording the transaction as debt, Zrike said she had believed that the NBD was recorded in Merrill's books as equity. In connection with documents reflecting Merrill's internal accrual of "interest" daily, at a set rate of return, from the NBD, Zrike indicated that the accrual of interest was not consistent with her understanding of the deal.

Prior to seeing the June 2000 Merrill emails that (a) circulated internally the a draft Merrill demand letter to Enron regarding the NBD (seeking payment of a sum certain by June 30, 2000) and (b) indicated that the demand letter was not sent to Enron because it had been rendered moot when Enron found a buyer for the NBD, Zrike said she understood that the draft Merrill demand letter was not sent to Enron because it was incorrect. Furst or someone may have said around the time that the demand letter was incorrect. She believed Merrill found out that the person who prepared the demand letter had been acting on his own and had not received approval or had it vetted. Zrike believed the demand letter was not a correct representation of the obligations the parties had under the contract.

Zrike was present for discussions with either Tilney or Furst in which it was noted that the NBD added to Enron's earnings but was not being done so that Enron could meet its earnings. Zrike said that we looked at the issues and got satisfactory answers as to whether the NBD was material to Enron.

Zrike recalled a meeting in Davis' office attended by herself, Davis, Bayly, and others. Tilney and Furst joined by phone. The participants in this discussion walked through various risks of owning the NBD. There was a discussion about materiality and the year-end nature of the trade. Zrike said that she was comfortable this was not a made-up transaction. Either Tilney or Furst said that the NBD was not being done to meet earnings expectations. Zrike, when asked about her handwritten notation concerning the NBD to the effect of "relationship loan that looks like equity" initially said it was just her jotting down her internal concerns.

Very truly yours,

ANDREW WEISSMANN
Director, Enron Task Force

By:
Matthew W. Friedrich
John Hemann
Kathryn H. Ruemmler
Enron Task Force

CHART 1: EXCULPATORY EVIDENCE THAT *THE ETF ITSELF HIGHLIGHTED* AS *BRADY* MATERIAL BUT *THEN WITHHELD* FROM THE COURT-ORDERED *BRADY* "SUMMARY" IN 2004–MATERIALS DISCLOSED TO BROWN ON 03-30-10

DOCUMENTS WITH ETF HIGHLIGHTING	**PORTIONS HIGHLIGHTED BY ETF AS *BRADY* BUT DELIBERATELY WITHHELD FROM JULY 30, 2004 "SUMMARY" DISCLOSURES**
FBI 302 of Gary Dolan	DOLAN had a subsequent conversation with BROWN in which BROWN conveyed that he was concerned with the commercial risk ML was taking on the Nigerian Barge transaction. BROWN was worried about the potential environmental risk associated with owning power plants and ML's liability issues. DOLAN stated that the original draft of the engagement letter obligated Enron to eventually take ML out of the Nigerian Barge transaction. This was contrary to DOLAN's understanding of the transaction and DOLAN believed that such an agreement would be improper because such a transaction could be viewed as a "parking" transaction. DOLAN's understanding was that ML purchased an interest in the Nigerian Barges with the expectation that Enron would help ML find a buyer for ML's interest in the Nigerian Barges. DOLAN stated that there was no obligation or commitment that Enron would find a buyer or that Enron purchase ML'S interest if a buyer could not be found.
Raw Notes of Jeff McMahon *The pre-trial summary says what "*Merrill wanted*" only and withholds repeated exculpatory evidence highlighted by the ETF in 2004 that Fastow *agreed* only that Enron would provide best efforts.	**000478**: "Andy agreed E[nron] would help them mkt [market] the equity w/in 6 months after closing. > E[nron] and ML [Merrill Lynch] would work to remarket for the 6 months after." **000494**: "Andy agreed E[nron] would help remarket [the] equity w/in next 6 months–**no further commitment**" **000513**: "Enron would use best efforts to help remarket the equity." **000514**: "A.F. *agreed* that E[nron] would help them remarket in 6 mo[nth]s." **000560**: "Andy said Enron would help remarket in next six months." *Id.* at 000539 - ML had already approved deal internally before "wanting assurances"
Grand Jury Testimony of Kathy Zrike *The government made no disclosure of any negotiation between parties.	ETF withheld that Zrike testified: "The fact that they would not put in writing an obligation to buy it back, to indemnify us,all those things were consistent with the business deal and were not things that I felt were nefarious [or] problematic." Dkt.1168, Ex. F, at p. 75.

CHART 2
CONCEALED EXCULPATORY EVIDENCE DIRECTLY REFUTES PROSECUTORS' STATEMENTS AT TRIAL AND PROVES EGREGIOUS MISCONDUCT

Government Representations at *Brown I.*	ETF Concealed *Brady* Evidence Requiring New Trial
Matthew Friedrich: "If its just 'best efforts,' then it would have been okay." Tr. 4528, 4520. "There is nothing wrong with remarketing. There's nothing wrong with that. They could have gotten sale and a gain treatment on this. If it was a remarketing agreement, there wouldn't have been a problem with that." Tr. 6486.	Andrew Fastow: "It was [Enron's] obligation to use 'best efforts' to find 3rd Party takeout. Fastow went on to detail his sophisticated knowledge of a best efforts agreement: 'Best Efforts' - must do everything possible that a reasonable businessman would do to achieve result..... Best effort would be to find a 3rd Party to accomplish buy out." Dkt.1168, Raw Notes, Ex. C, at Bates #000263.
John Hemann: "McMahon called Merrill Lynch and he cut a deal …. and what was the deal? …. that was the guarantee that Merrill Lynch got from [] McMahon." Tr.402-404. Kathryn Ruemmler: "You know that Enron, through its treasurer [McMahon] and chief financial officer [Fastow], made an oral guarantee to these Merrill Lynch defendants, that they would be taken out of the barge deal by June 30th, 2000, at a guaranteed rate of return." Tr.6144. Hemann: "The purpose of the handshake … was to confirm the deal that had been cut by Mr. McMahon." Tr. 404. *See* Tr. 6527-28 (Friedrich: same). Ruemmler: "And during that conversation [between Glisan and McMahon], Mr. McMahon confirmed to Mr. Glisan that he had, in fact, given an oral guarantee to Merrill Lynch." Tr. 6159. *See* Tr.6157-58 (same). Ruemmler: "So the key, . . . was Jeff McMahon. …. Trinkle told you …. and Glisan told you that Jeff McMahon confirmed to him that he gave that exact guarantee." Tr. 6159-60. *See* Tr. 6218-19 (same). Ruemmler: "It was [Bayly's] job … to get on the phone with Mr. Fastow … and make sure that Mr. Fastow ratified the oral guarantee that Mr. McMahon had already given to Mr. Furst." Tr. 6168.	**Jeffrey McMahon: "Disc[ussion] between Andy [Fastow] & ML [Merrill Lynch]. Agreed E[nron] would use best efforts to help them sell assets." Ex. B, Raw Notes, DOJ-ENRONBARGE #000447.** **"NO - never guaranteed to take out [Merrill Lynch] w/rate of return." *Id.* at 000493.** **"[A]t no time during the call [with Merrill Lynch] did Mr. Fastow ever suggest that Enron would 'repurchase' the interest from Merrill Lynch or 'guarantee' that Merrill Lynch would not incur risk of loss associated with the [Barge equity] investment." Dkt.1168, McMahon Memorandum to the SEC, Ex. D, at pp. 4-6.** 000494: "Andy agreed E[nron] would help remarket [the] equity w/in next 6 months–**no further commitment**" 000513: "Enron would use best efforts to help remarket the equity." 000514: "A.F. *agreed* that E[nron] would help them remarket in 6 mo[nth]s." 000560: "Andy said Enron would help remarket in next six months." *** Yellow highlighting denotes material the ETF highlighted and still withheld. The other material included herein was *Brady* evidence that was also withheld.**

Government Representations at *Brown I*	ETF Concealed *Brady* Evidence Requiring New Trial
Kathryn Ruemmler: "[T]he written agreement between Enron and Merrill Lynch had no re-marketing or best efforts provision. You heard testimony . . . that there was some suggestion, made primarily through Ms. Zrike, . . . that the Merrill Lynch defendants believed that all that Enron had committed to do was to re-market . . . Merrill Lynch's interest in the barges; . . . You can spend as many hours as you would like. You will nowhere in those documents ever find a reference to a re-marketing agreement or a best-efforts provision. It's not there." Tr. 6151-52. **Matthew Friedrich: "The Merrill Lynch Defendants take the uniform approach . . . that all that was going on was just that it was a remarketing agreement. That's all it was. There was no buyback. It's just a remarketing agreement. But ask yourselves this simple question: If it's a remarketing agreement, if that's all it is, why was it not put in writing? . . . If it was a remarketing agreement, there wouldn't have been a problem with that. If that's all it was, why wasn't it put in writing? Tr. 6486.** **Matthew Friedrich: There is a suggestion . . . that what's going on is sort of a good-faith exchange between two parties as they try to negotiate different legal documents that sort of come back and forth, and sometimes language comes in, sometimes it's taken out, that kind of thing. This is not the average business case. This is not a case where people are trying to . . . put language into documents as some sort of good-faithnegotiating process. Tr. 6493-94.**	**Katherine Zrike: "Merrill tried to put the re-marketing agreement in the written agreement but Enron said it was inappropriate and it could not commit to it. The 'best efforts' agreement for selling Merrill's position looked like Enron had to buy back Merrill's interest in the barges. Merrill was putting in real equity with only Enron to re-market its position. Zrike also wanted a 'hold harmless clause for Merrill but Enron rejected that because Merrill had to be at risk.*** Zrike tried to insert a 'best efforts' clause but Enron said that it was too much of an obligation and that they could not have this clause in the agreement." Dkt.1168, FBI 302, Ex. E, at pp. 10-11, 15,.** **"Everyone understood the rules, the accounting rules and the accounting treatment. . . . we [] had to be willing to own it until the thing got sold or–and keep the risk of what that entails on our balance sheet and–making sure that they are comfortable with that." Dkt.1168, Grand Jury Testimony, Ex. F, at p. 55.** **Katherine Zrike: "Merrill – the Merrill Lynch lawyers in my group and myself did ask that we include a provision that – two types of provisions that we thought would be helpful to us. ... The [second] thing that we marked up and we wanted to add was a best efforts clause, ...that they would use their best efforts to find a [third-party] purchaser [for Merrill's equity interest.***[T]he response from the Enron legal team was that – both of those provisions would be a problem....[t]hey kept coming back to the fact that it really had to be a true passage of risk.***[W]e were not successful in negotiating that [in] with Vinson & Elkins." Id. at pp. 63-64, 69.**

Government Representations at *Brown I*	ETF Concealed *Brady* Evidence Requiring New Trial
Matthew Friedrich: "Let's move on to the so-called 'advice of counsel' defense and Kathy Zrike. Kathy Zrike was called as a defense witness. She was completely devastating to the defense. ** This was a case, not about reliance on counsel; this was a case about defiance of counsel." Tr. 6500.** **John Hemann: "And I'm going to say this as clearly as I can: There will not be evidence in this case that any lawyer was asked if it was all right for Enron to count this deal as income." Tr. 419.** **Matthew Friedrich: "The key thing, the key thing in a reliance [on counsel] defense is they have to be in the loop. They have to know what's going on. You have to disclose all the material information to them … The lawyer has to know. They have to make a judgment. They have to render advice. That didn't happen here. The opposite thing happened. They were told you couldn't do it and they did it anyway. And, from that, you can infer bad intent on all their parts." Tr. 6504 (Friedrich).** **Matthew Friedrich: "Mr. Schaeffer said that nothing was hidden from Kathy Zrike, and that's just not true. Things were hidden from her time and time again." Tr. 6503.**	**Katherine Zrike: "Zrike did point out the risks to the DMCC, Davis and Bayly.... Zrike wanted the more experienced group of Merrill employees of the DMCC to review it.... Zrike thought the DMCC would allow the deal to be fully vetted.... [Zrike] wanted the deal looked at in detail. Zrike made the decision to take the deal to the DMCC. ... She told Brown, who was not a member of the DMCC, to attend the DMCC." Dkt.1168, Ex. E, at p. 8.** **"Zrike took the lead in the [DMCC] meeting because it was an equity deal in the DMCC and she had to present the deal to Tom Davis. Zrike and Brown discussed the deal issues [at the DMCC]." "It went to the DMCC because that's where I decided it would be best to be vetted.***I wanted to get [the transaction] reviewed by people who were familiar with transactions like this -- structured deals, complicated ownership interest -- that had some expertise in the area." Dkt.1168, GJ Testimony, Ex. F, at pp. 123, 128.** **"We were making it clear to everybody [at DMCC and at Merrill], .., both Jim Brown and I, that this is an equity investment that we will own and that we have to have all the risks associated with that equity investment in order for them to take it as a sale and to book the gain or loss, whatever it happens to be – it happens to be gain in their case, on their financial statements. So for accounting purposes it had to be a true sale. And there could be no mitigation of that status." Dkt.1168, SEC Testimony, Ex. Y, at p. 192.** **"[T]he response from the Enron legal team was that – both of those provisions would be a problem....[t]hey kept coming back to the fact that it really had to be a true passage of risk.***[W]e were not successful in negotiating that [in] with Vinson & Elkins." *Id*. at 63-64, 69.**

Brown Trial Transcript (10282004)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	*	H-CR-03-363
	*	Houston, Texas
VS.	*	October 28, 2004
	*	
DANIEL BAYLY, JAMES A. BROWN, ROBERT S. FURST, DANIEL O. BOYLE, WILLIAM R. FUHS and SHEILA K. KAHANEK	*	8:30 a.m.
	*	
	*	
	*	
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Volume 22

* * *

[6485] The Merrill defendants take the uniform approach, a fairly uniform approach, that all that was going on was just it was a re-marketing agreement. That's all it was. There's no buyback. It's just a marketing agreement.

But ask yourselves this simple question: If it's a re-marketing agreement, if that's all it is, why was it not put in writing?

Kathy Zrike, all the witnesses who testified, tell you there's nothing wrong with re-marketing. There's nothing wrong with that. They could have gotten a sale and a gain treatment on this. If it was re-marketing agreement, there wouldn't have been a

problem with that. If that's all it was, why wasn't it put in writing?

*   *   *

[6494] This is not the average business case. This is not a case where people are trying to put documents – you know, put language into documents as some sort of good-faith negotiating process. They know that they are taking the language out because, if it remains in, it will blow the accounting for the deal. That's why the language isn't added.

That's the only reason why the language isn't added. It's not a question of somebody can't get something through negotiations, so it's not a part of the deal. You know from the evidence that it was a part of the deal. It just wasn't something that was written down.

*   *   *

Brown Trial Transcript (09212004)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	* *	H-CR-03-363 Houston, Texas
VS.	* *	September 21, 2004
DANIEL BAYLY, JAMES A. BROWN, ROBERT S. FURST, DANIEL O. BOYLE, WILLIAM R. FUHS and SHEILA K. KAHANEK	* * * * *	8:34 a.m.

Volume 2

* * *

[403] But the Merrill Lynch executives were very worried about being stuck with these barges because Merrill Lynch was not in the business of owning interest like this. They were just doing this to help Enron. So the guarantee, that Enron is viewing this transaction as a bridge and will be out of it in six months, that had to be a guarantee. And that was the guarantee that Merrill Lynch got from [404] Geoff McMahon.

* * *

Ladies and gentlemen, the evidence in this case will prove that this guarantee was made and this guarantee would blow the accounting on the deal. And the reason is very simple. We will prove to you

with the evidence in this case that Merrill Lynch was not really buying anything. Merrill Lynch was loaning money to Enron and getting interest on that loan within a certain period of time.

But all that was left – and there was something left here – was the ceremonial handshake between the people at the top of the pyramid, the assurance from senior Enron executives that Mr. Brown's deal approval sheet mentioned, the handshake that had to be undertaken by Mr. Bayly. And that happened on December 23rd, 1999.

And the purpose of the handshake, the evidence will be, was to confirm the deal that had been cut by Mr. McMahon. The meeting happened on the telephone between Mr. Bayly and Andrew Fastow, the CFO of Enron.

*   *   *

Brown Trial Transcript (10272004)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	*	H-CR-03-363
	*	Houston, Texas
VS.	* *	October 27, 2004
DANIEL BAYLY, JAMES A. BROWN, ROBERT S. FURST, DANIEL O. BOYLE, WILLIAM R. FUHS and SHEILA K. KAHANEK	* * * * *	8:33 a.m.

Volume 21

* * *

[6143] Now, the evidence that you've heard over the past six weeks has come to you, as I said before, in bits and pieces. But when you put those bits and pieces together, only one truth emerges, and that is that this Nigerian barge deal was a fraud. The deal between Enron and Merrill Lynch was not a sale of an asset. It was nothing more than an illegal parking deal.

Merrill Lynch never really bought these barges. They agreed to merely park them so that Enron could book the earnings that it so desperately needed. The deal between Enron and Merrill Lynch was a sham, and the sham was accomplished by simple means. The defendants put together written documents to

conceal the true deal. The true deal was oral, was verbally agreed to by the parties. The documented deal was just a mask, a mask that was designed to make the deal look legitimate, a mask that was designed to make the deal look like a sale, a mask designed to fool Enron's auditors and to fool Enron's shareholders and investors.

And, ladies and gentlemen, in this [6144] courtroom, the mask has been pulled off this deal. You now know what Enron shareholders didn't know. You now know what Enron's auditors didn't know. You now know that this deal was a phony sale and it was blatantly wrong. You know that Enron, through its treasurer and through its chief financial officer, made an oral guarantee to these Merrill Lynch defendants, that they would be taken out of the barge deal by June 30th, 2000, at a guaranteed rate of return. That promise, that oral guarantee, made the deal – the real deal a loan. And you can't have a true sale if there is an agreement to take them out or if you guarantee the return that they make on their investment. It's as simple as that, ladies and gentlemen.

* * *

[6147] And keep in mind, ladies and gentlemen, that from the defendants' perspective, the beauty of the fraud is that it's done verbally. Because, if it's verbal and it's not in writing, it's not in the documents, you can always deny it later.

* * *

And what they do, ladies and gentlemen, is that they point to the documents and they say, "This is what the deal was." They use the documents to try to cover up the true deal,

* * *

[6148] And the other thing about the deal being oral, ladies and gentlemen, is that the very essence of it, the way that the whole scheme works, is that it has to be verbal. Because, if you put the real deal in the documents, that defeats the whole purpose of doing the deal in the first place.

As you heard from witness after witness, if the auditors see that the true deal is the takeout and the guaranteed rate of return, then the auditors say, "Huh-uh. No can do. You can't book that as a sale. You can't take earnings off of it." So the deal has to be verbal in order for the scheme to work.

* * *

[6151] Finally, the written agreement between Enron and Merrill Lynch had no re-marketing or best-efforts provision. You heard testimony, ladies and gentlemen, that there was some suggestion made primarily through Ms. Zrike, who testified on behalf of Mr. Bayly, that the Merrill Lynch defendants believed that all that Enron had committed to do was to re-market Enron – excuse me – Merrill Lynch's interest in the barges; in other words, to say "Hey, look, you bought these barges, but we're the ones with no power. So we'll continue to go out there, and we'll

try to sell it for you and try to make a good profit for you."

Ladies and gentlemen, nowhere in the deal documents that you'll see, which are in evidence – you can look through there. You can spend as many hours as you would like. You will nowhere in those documents ever find a reference to a re-marketing agreement or a best-efforts [6152] provision. It's not in there.

Ladies and gentlemen, these basic undisputed facts alone prove that this was not a true sale. It was merely a loan that was disguised as a sale. It was a relationship loan Merrill Lynch made to Enron, and it was dressed up to look like equity.

* * *

[6155] Furst and Tilney, Ms. Trinkle told you, were explaining to Mr. Bayly, their boss, that Enron wanted Merrill Lynch to buy barges at the end of the year so that Enron could book additional earnings. Furst and Tilney, Ms. Trinkle told you, explained to Mr. Bayly that Enron would help Merrill Lynch find a third-party buyer and, if that didn't happen, if Enron was unsuccessful in those efforts, Enron would buy the barges back. That's what the deal was. That understanding never changed between that phone call and June 29th of 2000.

Ms. Trinkle told you that, after Mr. Furst and Mr. Tilney explained this, that either Mr. Cox or Mr. Bayly – she wasn't sure which – asked Mr. Furst and

Mr. Tilney whether Enron could give Merrill Lynch that guarantee in writing. And then Mr. Furst or Mr. Tilney or Mr. Brown – again Ms. Trinkle wasn't exactly sure who said this. She knew that one of them did – said – and this very important, ladies and gentlemen – said, "No. They" – meaning Enron – "can't do that; because if they do, they won't get the right accounting treatment."

Mr. Bayly, in response to that, then said, in an annoyed tone, "Well, then, what are they giving us?"

And Furst or Tilney responded that, [6156] "He" – someone at Enron – "gave me his word. He gave me his strongest verbal assurances. He said, 'We won't own these assets past June 30th.' "

* * *

[6157] Now, let's go back to what Ms. Trinkle heard. She heard Mr. Furst or Mr. Tilney say, "He gave me his word. He gave me his strongest verbal assurances. He told me we won't own these assets past June 30th."

[6158] And who was the "he" he referred to in that call? Well, Ms. Trinkle didn't know. All she heard was "he." But you, ladies and gentlemen, do. You know who "he" was. You know because you heard from Ben Glisan. And Mr. Glisan told you that "he" was Jeff McMahon, the treasurer of Enron.

* * *

And Mr. Glisan told you that he learned from Mr. Schnapper that Enron was selling the barges to Merrill Lynch based upon Jeff McMahon providing an oral guarantee that Merrill Lynch would be taken out of the transaction at six months for a set rate of return.

* * *

[6159] And during that conversation, Mr. McMahon confirmed to Mr. Glisan that he had, in fact, given an oral guarantee to Merrill Lynch. And essentially what he did is he shrugged off Mr. Glisan's concern and he said, "I don't have a problem with handshake deals."

And you learned from Glisan that a handshake deal is one that has to be verbal or it will blow the accounting treatment. And, again, your own common sense tells you that, because otherwise you just put it in the contract. It's got to be a handshake deal or else the whole purpose for doing the deal is defeated.

So the key, who Tina Trinkle heard Mr. Furst or Mr. Tilney discussing in that call, was Jeff McMahon.

* * *

[6160] Yet, Ms. Trinkle and Mr. Glisan totally and completely corroborate each other. Trinkle told you that he – someone at Enron – gave Merrill Lynch its word that Merrill Lynch would not own the barges on June 30th. And Glisan told you that Jeff McMahon confirmed to him that he gave that exact guarantee.

* * *

[6168] It was his job, as you've learned throughout this trial, to get on the phone with Mr. Fastow, the chief financial officer at Enron, and make sure that Mr. Fastow ratified the oral guarantee that Mr. McMahon had already given to Mr. Furst.

* * *

[6202] So what we know is that Ms. Trinkle had a meeting with Mr. Brown the evening of the 21st and then the next morning is the call. Now, all of the things that Ms. Trinkle heard Mr. Brown saying – the reasons that he hated the deal – on the call on December 22nd, when Mr. Bayly enters the picture and Mr. Bayly is running the call and the bankers, Mr. Furst and Mr. Tilney are advocating that the deal get done, Mr. Brown doesn't speak up. He doesn't argue against the deal. He goes along. And at that point, ladies and gentlemen, Mr. Brown is in the conspiracy.

* * *

[6218] Remember again what Mr. Glisan told you, that Andy was the one – Andy Fastow was the one who ratified the comments that had [6219] already been made by Mr. McMahon. This document, again, totally corroborates the testimony that you heard in the case.

* * *

[6222] And just read through that ladies and gentlemen. Note the following things. The engagement letter is addressed to Mr. McMahon, again,

consistent with the evidence that Mr. McMahon is the person who makes the original guarantee. The engagement letter comes after the call between Mr. Fastow and Mr. Bayly.

* * *

[6272] there is only one conclusion that is consistent with all of the evidence in the case, is that there was an oral agreement, an oral side deal, a promise, a guarantee made between Enron and Merrill Lynch that Enron would take Merrill Lynch out of the barges by June 30th at a set rate of return.

* * *

CHART 1
DEFENDANTS' BRADY REQUESTS

Filing/Docket/Date	Brady Requests & Misconduct Allegations	Disposition
Motion by William R. Fuhs for Rule 16 discovery, Dkt. 85, 2/9/04 (joined at Dkt. 86, 89, 90; supplemented at Dkt. 94).	Request for preliminary declaration that SEC and DOJ are one entity for purposes of Rule 16 and *Brady*; Supplement (Dkt. 94) by Brown alleges failures of government to meet Rule 16 discovery obligations (comparison between NBT and EBS discovery).	Denied without prejudice at Dkt. 145 (2/26/04); Supplement denied w/prejudice at Dkt. 145.
Furst Motion for Leave to Issue Subpoenas, Dkt. 88 (and 102), 2/11/04.	Request to get access to all records and documents from accountants and attorneys. Referencing Weissmann statement in response to request that "We are not the SEC. Accordingly, documents that are exclusively in [the SEC's] possession, custody or control are not discoverable from the [ETF]." (p. 5)	Taken under advisement at Dkt. 145; Granted at Dkt 146 (3/1/04); Dkt. 102 denied at Dkt. 146
Furst Motion for Brady Materials, Dkt. 113, 3/1/04.	Enumerating sixteen categories of evidence constituting *Brady* material.	Denied at Dkt. 177 (as to *Brady*) on 4/21/04.
Furst Omnibus Pre-trial Memorandum, Dkt. 117, 3/1/04, Supplemented by Brown, Dkt. 138, 3/1/04.	Detailed request for all *Brady* material, specifically witness statements (302, Grand Jury testimony, SEC statements) all evidence from outside and inside counsel and accountants. "The [ETF] has informed several of these entities and individuals … that they are 'targets' or 'subjects' of the government's investigation. The government's 'chilling' of witnesses helpful to the defense … raises questions about whether the government is impermissibly attempting to 'chill' Defendant's ability to prepare for trial." (pp.31-32)	Denied at Dkt. 177 (as to *Brady*) on 4/21/04.
Bayly Request for *Brady*/*Giglio* Materials, Dkt.125, 3/1/04 (Reply in Support filed as Dkt. 166, 4/5/04)	Comprehensive request for all testimony from exculpatory witnesses (Fastow, Zrike, Hoffman, etc.).Government has not even attempted to meets its *Brady* obligations. Government "has even gone so far as to express a view of its obligations under *Brady* and/or *Giglio* that is inconsistent with the law of this Circuit."	Denied at Dkt. 177 on 4/21/04.
Furst Omnibus Pre-trial Reply Memorandum, Dkt. 158, 4/5/04.	Detailed request for all *Brady* material, specifically Zrike Grand Jury, witness statements (302, Grand Jury testimony, SEC statements) all evidence from outside and inside counsel and accountants. "While the defense may know of a potential exculpatory witness, that does not mean that they are 'available.' Zrike's attorney, for example, has repeatedly notified defense counsel that he will not permit defense counsel to speak with her client and, if called to testify, she will invoke her Fifth Amendment privilege against self incrimination." (p.11) "Invariably, individuals desired as potential witnesses refuse to speak with defense counsel in light of conversations with the [ETF] informing such possible witnesses that they are 'targets' or 'subjects' of the	Denied at Dkt. 177 (as to *Brady*) on 4/21/04.

CHART 1
DEFENDANTS' BRADY REQUESTS

	Government's investigation. The Government's actions have frustrated and, in some cases, thwarted, the defense's ability adequately to prepare for trial." (p.11)"The government cannot have it both ways. It cannot claim that critical elements of this case are 'intent' and 'defendants' understanding' of the [transaction] and, at the same time, 'target' a number of potential defense witnesses, all of whom played a role in evaluating the legal and accounting ramifications of the transaction. Simply put, if the government is not 'chilling' these potential defense witnesses but claims that such witnesses do not wish to incriminate themselves, then the Government should produce interview notes, 302 Reports, SEC and grand jury testimony, and testimony before the Bankruptcy Examiner." (p.12) "Specifically, during the past two months alone, we have ascertained that a number of former [ML] employees, Enron accountants, and in-house counsel directly involved with the [NBT] desire to discuss the transaction with defense counsel and, in fact, have indicated the usefulness, even potentially exculpatory nature, of the information they wish to provide. Upon further inquiry, however, the individuals have decided to forgo speaking with defense counsel, despite the usefulness of the information and desire to assist, because of the aggressive [ETF] tactics of 'targeting' or 'subjecting]' any potential exculpatory witness." (p.12) See also page 15 (Zrike grand jury testimony).	
Bayly's Motion to Dismiss or for an order requiring government to withdraw request to attend witness interviews, Dkt. 180, 4/26/04.	Filed with accompanying declaration of Richard Schaeffer as to government obstruction. (1) References to government's request as "chilling" obligation – pp.4-5 (2) Reference to ML plea agreement ("heavy hammer to wield over ML and its employees" – p.2) which, by its plain terms, makes such requests, in actuality, obligations (3) "government has pointedly refused to state that ML will suffer no consequences if it declines the government's request." – p.2 (4) Charging violations of Fifth and Sixth Amendments and attorney work product doctrine.	Unknown – no evidence in Docket that it was ever ruled on.

CHART 1
DEFENDANTS' BRADY REQUESTS

Furst Motion to Reconsider *Brady*/*Giglio* Ruling, Dkt. 182, 4/27/04. (refiled as Dkt. 219) Reply in support, Dkt. 197, 5/5/04 – all under seal (joined at Dkt. 216, 221)	Renew request for exculpatory information. "The Government's attempts to define the defense strategy and, accordingly, limit its *Brady* obligation, have placed numerous obstacles before defense counsel attempting to prepare properly for an impending trial." (p.6) "Defense counsel has also been hampered by the Government's designation of witnesses as 'targets' or 'subjects.' As we argued earlier, this conduct had 'chilled' and continues to 'chill' such witnesses from testifying or even speaking with defense counsel. Moreover, we believe that the government has designated a number of individuals as 'targets' or 'subjects' simply because these individuals disagreed, and continue to disagree, with the Government's theory of the case. Defense counsel, through its own due diligence, has ascertained that numerous individuals have exculpatory information. Such witnesses, however, will not provide this information to defense counsel for fear of retribution by the Government." (p.6)	Granted in part in sealed Order, Dkt. 223, 5/26/04 (Triggered Brady letter of 6/1/04), but then denied at Dkt.228, 6/1/04.
Emergency Motion and Request for Immediate disclosure and/or hearing on government's *Brady* violations as to Fastow & Other Witnesses, Dkt. 236, 6/3/04. *supplemented by Dkt.237 (6/3/04); joined by all at Dkt.238, 244, 245 (6/3/04)	Request based on 6/2/04 revelatory disclosure of material from edited Fastow 302. "Obviously, the concern at this stage is that the government has not merely 'missed' or 'omitted' *Brady* material concerning Mr. Fastow [which is obstruction of justice]. Indeed, the conduct demonstrated by this belated 'compliance' by the government leads to the inescapable conclusion that similar exculpatory material has not been provided for others as well. How can the defendant-or this Court- take comfort that brady obligations have been fulfilled where the government has so blatantly failed, and chosen to fail, to comply with a player so central to the case as Mr. Fastow." (p.3) "*Brady* is, after all, designed to assist defendants in maintaining their innocence and in preparing to defend against allegations of wrongdoing. In this case, in its conduct as to Rule 16, Jencks, Giglio, and, above all, Brady, the government has twisted its discovery obligations almost beyond recognition and, by doing so, hindered the defendants' right to prepare a defense and to due process." (p.4).	Dkt. 283 (6/25/04) does not rule but states "As previously stated, the Court expects the Govt to furnish Brady material to counsel for the defts in accordance with the law." Dkt. 290, 7/14/04 granting and denying in part. States only that The Court has stated its expectation that the gov't will comply with Brady & Giglio. By 7/30/04 the gov't should provide to the defendants summaries of the exculpatory information that lead to the gov't identifying Kathy Zrike & other witnesses as having exculpatory testimony.
Bayly Motion to Compel Disclosure	Request for all Zrike/*Brady* material.	Denied, Dkt. 290

CHART 1
DEFENDANTS' BRADY REQUESTS

of Zrike, 237, 6/3/04.		
Furst Motion to Adopt and Join Bayly Motion to Compel Disclosure of Fastow materials, Dkt. 244, 6/3/04 – formerly filed as Dkt. 197	Request to Compel Production of all *Brady* material as to Fastow and/or preclude "handshake deal." "Finally, and perhaps most significantly, the latest revelation by the Government related primarily to a single witness, Andrew Fastow, who naturally does not appear on the witness list. Questions remain. What else is out there? What other exculpatory information does the government continue to hold back under the arbitrary designation that it is '*Jencks* or *Giglio*-not *Brady*?' How much information does it intend to keep concealed simply by not calling a witness altogether? How much information do they hope is not available to the jury because it is provided so late [or not at all] that it cannot be incorporated into defensive theories? We fear that the government in this case is perilously close to traveling the path of contrivance and avoidance of it's constitutional obligations pursuant to *Brady* and its progeny so well document in this very courthouse and outlined in *United States v. Rammning*, 915 F.Supp. 854 (S.D.Tex. 1996). (p.3)	Denied, Dkt. 290
Furst's Motion (276) & Amended Motion (282) to Dismiss or to Bar testimony of Glisan and Toone. 6/29/04.	Improper use of Grand Jury to gather evidence.	Denied at Dkt 392, 9/2/04.
MOTION by Daniel Bayly for Disclosure of Grand Jury colloquy and instructions, Dkt. 302, 7/20/04, joined at Dkt.321 (reply at 336, 8/10/04)	Improper use or misconduct before Grand Jury.	Denied at Dkt 397, 9/13/04.
Bayly Request for *Brady*/*Giglio* Materials, Dkt. 305 (refiling of Dkt.125, 3/1/04).	Comprehensive request for all testimony from exculpatory witnesses (Fastow, Zrike, Hoffman, etc.). Government has not even attempted to meets its *Brady* obligations. Government "has even gone so far as to express a view of its obligations under *Brady* and/or *Giglio* that is inconsistent with the law of this Circuit."	Denied at Dkt. 397 on 9/13/04.
Furst Motion in Limine to Introduce Prior Testimony of Unavailable Witness, Dkt. 348,	Request to admit various prior sworn exculpatory statements (withheld) of unavailable witnesses. "These *Brady* witnesses … are unavailable to testify as defense witnesses because the [ETF] has also deemed them 'unindicted co-conspirators,' and the *Brady* witnesses will likely assert their Fifth	Denied at Dkt. 397, 9/13/04. Denied again at trial. Tr. 4863-66

App. 206

CHART 2
GOVERNMENT'S *BRADY* REPRESENTATIONS

Filing/Docket/Date	Government Representation On Existence of *Brady* Material	Resolution
Original Indictment issued 9/16/03 Dkt. 1		
Phone call of 1/27/04, referenced in Defendants' Brady letter of 2/3/04, at 4.	*Brady* obligation does not extend to the production of actual testimony that includes exculpatory information from a grand jury witness.	No underlying grand jury testimony of witnesses identified as possessing exculpatory information was turned over to Defendants until December 2007.
Government Response to Defendants' Motions for Brady Material. Dkt. 154 3/22/04	"The government has ... far exceeded the discovery requirements of applicable law." Dkt. 154, at 78. The government respectfully submits that the discovery afforded to date has been timely and in excess of that required by law." *Id.* at 79.	**Court denied all *Brady* Motions** at Dkt. 177, 4/21/04.
Government letter naming individuals who "arguably" possess exculpatory information 4/5/04. Ex. P.	"For the record, our position is that you are already aware of the identity, and potentially exculpatory nature, of all these witnesses, but we provide them to you out of an abundance of caution." Ex. Y, at 3. Naming Kelly Boots, Eric Boyt, Gary Carlin, Kevin Cox, Mike DeBellis, Mark Devito, Bowen Diehl, Gary Dolan, Gerald Haugh, James Hughes, Mark McAndrews, Jeff McMahon, Ace Roman, Barry Schnapper, Scott Sefton, Schuyler Tilney, Kira Toone-Mertens, Paul Wood, Joseph Valenti, Kathy Zrike	No underlying grand jury testimony of witnesses, identified as possessing exculpatory information was turned over to Defendants until December 2007. Redacted FBI 302s of Kelly Boots were turned over on eve of trial, as Boots was listed as a government witness.
Government letter with list of "unindicted co-conspirators" in Barge transaction 4/22/04. Ex. V.	Naming: Eduardo Andrade, Eric Boyt, Richard Causey, Kevin Cox, Mike DeBellis, Mark Devito, Gary Dolan, Rodney Faldyn, Andrew Fastow, John Garrett, Steve Hirsch, Alan Hoffman, James Hughes, Ben Glisan. Michael Kopper, Sean Long, Mark McAndrews, Rebecca McDonald, Jeff McMahon, Alan Quaintance, Ace Roman, Barry Schnapper, Cassandra Schultz, Jeffrey Skilling, Keith Sparks, Schuyler Tilney, Paul Wood, Joseph Valenti, Kathy Zrike.	No underlying grand jury testimony of witnesses, identified as possessing exculpatory information was turned over to Defendants until December 2007. Only Fastow evidence turned over prior to

CHART 2
GOVERNMENT'S *BRADY* REPRESENTATIONS

		Barge trial was 4-page "summary" of his 1,000+ hours of interviews with government agents.
Transcript 4/15/04, pre-trial conf. Dkt. 175	Friedrich: "This is a situation in which this person, Ms. Zrike, participated with the defendants in the offense itself. That alone would be sufficient to remove the Grand Jury transcript from the rubric of *Brady*." Dkt. 175, at 16. "What is -- the reason that the information is being sought, your Honor, we submit, is for a non Brady purpose; and that is not something that the Court should be sympathetic to." *Id*. at 19. "We've provided a list of names of potentially exculpatory individuals. Our belief is many of these individuals are in the same category as Ms. Zrike. Most of them -- the majority of the people in that -- on that list are current or former employees of Merrill Lynch. Many of them will be designated as unindicted co-conspirators, as well. And, again, the issue is: Does the defense have access to the gist of the information that these people could provide." *Id*. at 20-21. "We see this as the same situation, your Honor, where the defense lawyers already know to a substantial extent what the nature of the exculpatory information is that these witnesses would offer. We provided them a list. We've invited them to go and talk to these witnesses." *Id*. at 21. "But we think that the -- we provided the Court with what we believe that -- is clear authority that providing those names is sufficient for *Brady* purposes." *Id*. at 22. "These names are not unfamiliar to the defense, your Honor. We believe they are very familiar with these witnesses, they are very familiar with what they might say, and they want the information from the Government not for *Brady* purposes, but to be able to prep these people. And that, we think, is a non *Brady* purpose to which the Court should not be sympathetic." *Id*. at 23.	No underlying grand jury testimony of witnesses, identified as possessing exculpatory information was turned over to Defendants until December 2007.
Government Response to Furst's Motion for Reconsideration of Brady Motion 5/704, Dkt. 189	"Furst does nothing to rebut the authority cited by the government establishing that (1) *Brady* is satisfied where the government provides a list of potentially exculpatory witnesses; and (2) information know to the defense is not *Brady*." Dkt. 189, at 2.	**Court denied all *Brady* Motions** at Dkt. 228, 6/1/04.
Transcript 5/27/004 pre-trial conf. Dkt. 234	"I think that in our consolidated response, your Honor, what we tried to do is inform the Court of a procedure which we followed in this Court which complied with	Court ordered *in camera* review of some government

CHART 2
GOVERNMENT'S *BRADY* REPRESENTATIONS

	Brady. And that procedure is providing the defense with a list of potentially exculpatory witnesses complies with *Brady*." Dkt. 234, at 23-24.	material – which production to the Court was government selected, and the Court never ordered any of that material turned over to the Defendants. Dkt. 285, at 34-35.
Government "Brady" letter, 6/1/04. Ex. K.	"This letter also provides you Jencks Act material for some witnesses the government expects to call in this case, and with information pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), *United States v. Agurs*, 427 U.S. 97 (1976) and *United States v. Bagley*, 473 U.S. 667 (1985)." Ex. C, at 2. Highly-redacted summaries of information from Kira Toone-Meertens, Michael Kopper, Ben Glisan, Andy Fastow, and Ramon Rodriguez.	No underlying grand jury testimony of witnesses,identified as possessing exculpatory information was turned over to Defendants until December 2007.
Government Response to Defense Brady Motions 6/3/04 Dkt. 248	"Information regarding Fastow is not only not *Brady*, because of its substance and disclosure ... but also because the defendants [a]re aware of Fastow's identity and his role as a coconspirator." Dkt. 248, at 2. "Ironically, Fastow's mere assertion (that his testimony would incriminate him) would belie the suggestion that his testimony is exculpatory in this case." *Id.* at 3.	No further production of Fastow evidence (even summaries of summaries of interviews) was produced by the government until September 2007.
Transcript 6/25/04 pre-trial conf. Dkt. 285	"We provided a list of names. And the defendants still continue to play this cat and mouse game of not telling the Court who they've talked to, not telling the Court who they've interviewed, not telling the Court what interviews they have gotten pursuant to joint defense agreements, all because, you know, as we said before, this is standing *Brady* on its head. What many of these folks that we have turned over testimony from to the Court are people that the defendants may intend to call. What they desperately fear is that the government has a record from these folks of what they said and for that reason they want to get that testimony. As we've previously argued to the Court, that's not the purpose of *Brady*. There's well established authority that -- which expressly adopts and approves of the procedures that we've gone through in letting them know the names of those people so they can choose to interview, if they wish. What they are doing now is saying, we don't have to do any of that, just give us the stuff, which is plainly against the law." Dkt. 285, at 36-37. "And it complies with *Brady* by making the names of	**Court finds that government has met its *Brady* obligations**. Dkt. 282, at 92-93. July 14, 2004 Court orders government to provide summaries.

CHART 2
GOVERNMENT'S *BRADY* REPRESENTATIONS

	witnesses available. That is a process that complies with *Brady*, period." *Id*. at 44.	
Government "Brady" letter, July 30, 2004. Ex. Q.	"The following summary is provided to you in compliance with the Court's Order of July 14th, 2004.... As you know, in April of 2004, the Enron Task Force provided you with the names of certain witnesses who possessed exculpatory and even arguably exculpatory information, many of whom you have already interviewed or had access to their information, and all of whom you can subpoena to testify at tria1. [FN: "*Brady* requires no more."] As the Court noted, this summary may provide you with even more than is required to be disclosed pursuant to Brady. The information that follows is not a substantially verbatim recitation of the witnesses' statements. While the information contained below may be similar to information contained within FBI form 302s, notes, and grand jury transcripts, it is intended only as a summary of information. We note that many of the witness names provided to you in April 2004 were listed out of an abundance of caution. Indeed, some of the witnesses believed there was no agreement by Enron to take out Merrill Lynch ("Merrill") from the Nigerian barge deal (the "NBD") or a set rate of return simply because they were not present for inculpatory conversations. Other witnesses are unindicted conspirators who denied knowledge that could render them guilty. . . . The summary, for instance, does not include the instances in which the witnesses below later recanted exculpatory information or admitted lying to the government about their knowledge of the deal. Finally, we have not set forth all of the information that would impeach any statements below or statements by the witnesses themselves that are inconsistent with the information set forth below." Ex. F, at 1-2.	Newly produced evidence shows: Summaries, now known to be substantially false or incomplete of information possessed by Bradley Bynum, Kevin Cox, Bowen Diehl, Vince DiMassimo, Gary Dolan, Alan Hoffman, Mark McAndrews, Jeff McMahon, Ace Roman, Joseph Valenti, Paul Wood, Kathy Zrike
8/1/04 through 9/07.	Not a single *Brady* production. In the interim, Defendants are convicted, sentenced, and sent to prison. The Fifth Circuit reviews cases on appeal and reverses 12 out of 14 convictions, for fatally flawed indictment. One Defendant is acquitted after spending 8 months in prison.	
Brief of Appellee United States, *U.S. v. Brown*, No. 05-20319 (5th Cir.) 12/12/05.	Brief for United States: "**The prosecution met its obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963), by providing a letter that informed the defendants precisely what Fastow told FBI agents about what he said during the December 23 conference call**. The prosecution was not required to disclose the FBI Form 302 memorializing Fastow's interview with the	Fifth Circuit did not reach any *Brady* issues on appeal.

CHART 2
GOVERNMENT'S *BRADY* REPRESENTATIONS

	agents, because the letter already provided the relevant information. In any event, as the letter reflects, nothing in the Form 302 can plausibly be deemed exculpatory under *Brady*, because Fastow's statements only underscore that he provided an oral guarantee that "Enron or an affiliate" would buy Merrill's interest in the barges even if no industry purchaser could be found. Fastow FBI Letter, Furst RE8 at 3-5. Because the defendants have not made a "plausible showing" that the Form 302 contains "material" exculpatory evidence, the district court properly declined to conduct an *in camera* inspection of the form." *Id*. at 58.	
Transcript 4/4/07 pre-trial conf. Dkt. 939	AUSA Spencer "commit[ed] to the Court that [he would] personally [] go back over the discovery that was made, as well as any documents the government has received in the interim from the time the discovery was produced in the first trial until today; and [that the prosecution] will make subsequent supplemental production." Dkt. 939, at 15. Indeed, the government agreed to turn over this production by August 1, 2007, if not earlier. *Id*. at 10, 11, 15-20.	AUSA Spencer makes limited production of highly-redacted Fastow 302s in September 2007. No Court disposition on this or any other Brady matter as of 3/20/08.
Government's Opposition to Brown's Request for Production of Brady Materials 10/1/07 Dkt. 986	"Defendant's requests are moot and beyond the scope of *Brady*, *Giglio*, and Rule 16 of the Federal Rules of Criminal Procedure." Dkt. 986, at 1. Based on the record of production, the **Government asserts that "it has fulfilled its obligations under Brady.**" *Id*. at 2. "**The government is not aware of any documents that have been created since the first trial that would constitute Brady materials." *Id*.** The government also asserts that "it does not agree that the Fastow 302[s] constitute[] Brady materials." *Id*. at 7. In another utterly unfathomable claim, the government asserts that "it is curious that none of the Defendants in the first trial . . . used the summary of [Fastow's] statements to impeach other witnesses." *Id*. at 9.	No ruling as of 3/20/08. Defendants tried repeatedly to use the Fastow summary at trial to impeach witnesses. The government vehemently objected. District Court did not allow use of evidence.
Government's Opp. to Bayly and First's Request for Production of Brady Materials 10/12/07 Dkt. 1001	"Based upon this record of production, **the government believes it has fulfilled its obligations under Brady**." Dkt. 1001, at 2. "The Defendants repeatedly speculate that the requested materials contain *Brady*. Using speculative phrases such as 'likely to contain' and 'it is highly unlikely that,' the Defendants presume to know the contents of documents. Of course, the Defendants are not aware of contents, but they are not entitled under the applicable rules and procedures to discover this information, unless it is material information that is either exculpatory or impeaching. 'Mere speculation that a government file may	No ruling as of 3/20/08.

EXHIBIT D

Nigerian Barge

3 Barges assets of Enron Division

Her people were pretty tight trying to sell

Enron Sr approached some investors - one of which was ML.

Resulted in phone call to ©.

F was in, Fastow was in, Boyle,
Believe B Schnapper
plus litany of ML people

Believe R Furst ML Relationship officer

Content of call - ML had approved deal internally. Would invest.

What was that © would assure them in selling w/in 6 months. What assurance that © would
~~[illegible]~~ make efforts & syndicate it out to them.

Disc. between Andy & ML
Agreed that © would use best efforts to help them sell assets

Was then a desire to get sale by end of yr to boost assets

This was intl asset

Never made rep to ML that ~~you~~ (E) would buy them out at price r @ part of RFM.

Why needed someone to step in on short term basis?

Don't know - intl deal

I was involved b/c as treas, I was in charge of bank rela

ML wanted Deal thing intl team, me and AF.

Even tho 29mm - not unusual to have all these people involved if one of our fin institutions. wanted to make sure all our dir contacts of fin inst. (knew of)

AF agreed that Ⓔ would help them remarket the equity 6 mo. after Closing

What happened @ end of 6 mos – Read in the papers that LJM purchased it

Involved after the MC phone call? None that I recall

Never recall any disc that such a promise was made in phone call

Were they big & make sure commitment was supported @ top level of Co.

Know if LJM was paid a fee to purchase MC interest? No idea.

Anyone ever call you after conf call to remind you that Ⓔ had made representation?

No: involved of HES purchase. My knowledge was from press report. Took place in Nov 2000 – was out of Finance Dept

- Did credit agencies know ~~how~~ why prepays? Doesn't know
- Think it would be important to them ⇒

Delta Energy - ~~[illegible]~~ doesn't recall hearing of it outside of [illegible] [illegible]

Mahonia - entity related to prepays done w/ Chase
- doesn't know who owns it or anything about it

Nigerian Barges

↳ wouldn't take the WSJ article as a secret source.

→ 3 barges owned of Intl. Div. run by Rob McDonald, then fin. people trying to sell those barges; fin folks approached sev. pot. investors; 1 was Merrill

4 PC from ML to E.; McMahon & Fastow on call (as well as Fin people from Enron)

↳ ML folks on call - Rob Furst (ML Relat. officer)
- doesn't recall if Schuyler Tilney on call

↳ Dan Boyle
↳ Barry Schnapper
↳ Intl. Div.

↳ ML had approved deal internally & wanted assurance E. would assist them in reselling that asset in 6 mos.

↳ use best efforts to try to resell

↳ not unusual to not be in writing

- Late: Dec. 1999 for the call

↳ ML ready to execute ⇒ but wanted to make sure he understood ML was

↳ trying to validate what had been ~~[illegible]~~ agreed upon @ a lower level; trying to confirm its understanding of the deal w/ the E. CFO

* doesn't recall any other convos. w/ ML or other invt. banks

- other prospective buyers

* desire to get done by yr. end? ⇒ I doesn't recall

Doesn't know why couldn't close long-term deal

↳ sep. division – the APACHI group → Don Boyle & Barry Schnapper worked in that div.

↳ he coordinated all bank relationships; ML asked for him to be on the phone

- Andy agreed E. would help them mkt. the equity w/in 6 mos. after closing

↳ E. & ML would ~~help them~~ work to remarket for the 6 mos. after ↳ it

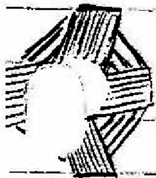
After 6 mos. →

* No involvement in barges after the phone convo.

* Doesn't recall there being such a ~~[illegible]~~ verbal assurance to get ML out w/in 6 mos.

- Doesn't know if LJM paid a fee to purchase ~~[illegible]~~ ML's interest
- Anyone from ML contact him & indicate to him that ML had been promised to be taken out w/ a point rate of ret.
↳ after call

↳ Not that he's aware of



WSJ Article
McMahon called Merrill

Recount

3 Barges – Assets of Int'l Divisn – Rebecca McDonald
Fihone [illegible] in Int'l appear several investors
– incl. Merrill
Merrill called E
McMahon, Fastow, Boyle, Schnaeffer on call
plus litany of Merrill people
– incl. Rob Furst
N.R. [illegible] Tilney
Recollection of call
Merrill had approval purchase of barges
Looking for Fastow's assurance that
E help Merrill Syndicate out w/in
6 months
Verbal agreement – best efforts
Not typically put in writing
Dec. '99 – [illegible] on vacation
Call – purpose was for Merrill to affirm
that resources put behind
Not believe spoke on call
N.R. hearing prior call / clearer w/ Merrill
– possible – not uncommon
N.R. – No desire to get done by year end

No – never guarantee to take out w/ rate of return

As treasurer coordinate all banks relations
– so Merrill asked for him to be on phone

Pentrouth (equity) not unusual
Boyle & Schaufeld in ~~Enron~~ APACHE
- based in Florida all here are

Andy assured Fz would help market equity w/in next 6 months,
- no further commitment
Fz as Treasurer at end of 6 mos
paid in options that [illegible]

No hand-off phone call

N.R. guaranty/promise ever being discussed

"No idea" Lucas call fee to ensure Merrill's interest

N.R. ever recalling call for Merrill afterwards

No reduction/lending (except Enron) to AES [illegible]

Nigerian barges

WSJ article.

- Says McMahon asked if ML would invest in the deal. Enron wanted to book $12mm

☐ 3 barges were assets of Int'l division

- + then people were selling the barges
- + finance Int'l approached several potential investors incl. ML
- + ML called Enron - A.F., J.M., Dan Boyle, Barry Schnapper and other ML people.

Context of call: ML approved the deal internally. They wanted EWE to help them resell it w/in the next six months

Enron would use best efforts to help remarket the equity.

bonds debt
Stocks equity

This was in Dec. 1999 - I recall bc I was @ home on vacat. I participated from my home. They wanted to make sure that Enron would help them. Did not speak on that phone call.

happens a lot when Banks would loan us $

Common to cut them in - later to collectively market it later.

My recollection was that this was a conference call.

3 prospective buyers

If the buyer would not be a l/t holder it was not unusual to help them market it later.

Doesn't recall any other discussions.

This was an int'l asset - something that I didn't know.

Why involved? BC I had the role of coord all the bank relationships.
They wanted me & A.F.
J.M. was trying to coordinate the overall relationship of the bank

ML wanted A.F. to be involved

Dan Boyle) finance in Int'l — worked in
Schnapp) APACHE

Transaction Support: doesn't know who worked on it

I recall that A.F. agreed that ENE would help them remarket in 6 mos

Powers report said that LJM bought it

After phone conv - no more involvement

I don't recall any promise that Enron would get them out.

did not follow what was going on

Doesn't recall LJM being mentioned at all.

~~XXXXXXXX~~

Enron Industrial Markets

Fishtail - Bacchus - Sundance

CEO of EI Markets in mid-2000

(pulp, paper & steel). My job

Size: 250-300 people

Houston, London, Quebec City

he took over - 100 people.

assets: trading book $10s of millions

total value $200mm (paper value)

Book value → at end

Fishtail: we were going to buy 50% for cash (of all ENE Ind. Mkts)

Skilling killed deal in 4th Q 2000

- Fishtail was a replacement for that transaction

it securitized in the industrial mkts.

governance: BAN wanted features in JV that made sure ENE Ind Mkts was in line but not necessarily in line w/ Enron Corp

Nigerian Barges:

WSJ article: McMahon's version:

3 barges
Assets of Int'l Division under Rebecca McDonald
- For finance people were talking to a # of people about selling, among them ML
- Barry Schnapper, ASF, McMahon and Dan Boyle and others were on the call to discuss ML investing/buying the barges

late Dec. 99 ← ML wanted ENE/JF Fastow's assurance that ENE would use best efforts to "syndicate" or find a buyer for these assets.
- This was a verbal agreement, nothing in writing
- "This was not unusual"
- Can't recall if there was a definitive push to get this done by year-end.

- He was involved b/c as Treasurer he had all the financial instit. relationships, and since ML was involved, McMahon joined the call.
- Why was ASF involved in a deal so small? He thinks it was at ML's request.
- He doesn't recall any "guaranteed

McMahon 4

take-outs at the end of the 6 month re-marketing period.

- It turns out at the end of 6 months, LJM bought the barges.
- He was not involved apart from this Dec '99 phone call.
- DK if ML was paid a fee to purchase the barges.
- Doesn't believe LJM was ever mentioned on this call.
- Only knows of AES's subsequent purchase from the Powers Report

Enron Industrial Markets

Fishtail → Bacchus → Sundance . . .

- Made CEO of EIM, mid-2000
- EIM: pulp and paper and steel business. His job was to grow the business
- Size: ≈ 250-300 people
  Houston, London, Quebec
  - Trading book: 10s of millions when started
  - ≈ $200 million when sold in bankruptcy

"Fishtail et al."

- 50% of EIM for sale. Bain Capital was looking at it.
- JKS killed the deal in 4Q 2000

he didn't want to give up control ← : corp governance, compensation

McMahon - 5

(3)

One's not better than the other

[Look at credit-worthiness o[f] comp[any]]

- Not Calculated in debt to capital ratio - look at obligations of Company Not Debt; look at obligations that Aren't classified as Debt
- prepay intended to offset a similar Commodity; offset Non-cash earning & cash earning

[Intention of Yosemite]

- where Enron owed money to the banks into public securities

Prepay v. debt

- doesn't know if easier to execute a prepay than get a loan

Yos I - only one familiar c̄ & doesn't recall what the proceeds were used for

*U.48

- Not familiar c̄ details of prepay
- previous treasurer was fired b/c of his lack of relationship c̄ credit agencies
  Bill Gathman

*W. - Never heard of Delta entity that engaged in prepay c̄ Chase
has heard of Mahonia - [illegible]
doesn't know who owns Mahonia

Nigerian Barges

WSJ Article → inaccurate; Agrmt. wouldn't typically be put in writing

- 3 Barges of [illegible] Division run by Rebecca McDonald & finance people were putting together financing
- phone call from M Lynch & Enron; call included Dan Boyle, Barry Schnapper, ASF, & A bunch of M Lynch people

ML approved deal internally & wanted Enron's Assurance that Enron would Assist them c̄ in next 6 mos - Common practice

(4)

- Dec. '99 – At home on vacation – big conference call
  one thing they (MC) wanted since Enron knew assets better than anyone
- affirm what Int'l. Finance people had promised + wanted to confirm c AsF
- buying equity in companies that owned barges – only 1 conference call – doesn't recall additional conversations re: deals

no involvement — Andy said — Enron help remarket in next six months
I recall — Jointly market
after that — What did happen — LJM bought it! Powers Report
Syndicated it out for them — AF verbally agreed
"why not in writing — no — did this all time
— when happened — late Dec 1999 — I was on vacation — participated from home — conf. call — ML set up conf. call

we knew assets (buyer) best — They were trying to affirm what Int assets had told them — help sell
— I don't feel I had a speaking part in phone call
— happened all time they'd loan we'd help syndicate

That's my recollection
— don't I recall any others — Rebecca McDonald's Int Group
ML other calls — don't recall any — [illegible]

Don't recall if year end hooking was imp —

Ever make any representation to Merrill — get out w/in 6 mos and return investment w/ profit!

International — Why need short term buyer — I'd K — Int assets
Dan Boyle / Schnapper — Why were you involved? — They asked for me AF + Deal Team — my relationships

no — Don't I recall any promise beyond six months!
VERBAL agreement
Shortly after phone call I was no longer Treas
[illegible]

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Filed in TXSD on 07/09/10 Page 1 of 34

EXHIBIT C

UNITED STATES GRAND JURY

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

RE: INVESTIGATION OF ENRON

BE IT REMEMBERED that on the 15th day of April, 2003, beginning at 9:42 a.m., in the Federal Building, 515 Rusk Avenue, Houston, Texas, the United States Grand Jury convened, at which time the following proceedings were had and testimony adduced as hereinafter set forth.

TESTIMONY OF KATHERINE ZRIKE

* * *

[46] I think we were very concerned in the group that vetted this as well as our legal department about that sort of reputational risk from the disaster scenario where – you know, we all remember the Bhopal incident – where, yes, you lose your investment like the barge blew up.

So you don't have the barge anymore. Yet, you've got loss of lives; you've got environmental [47] pollution which could cost you a lot more; you've got a country that is, you know, very corrupt or known to be corrupt on issues associated with how that barge business is being run.

Being 100 percent owner of it and not being – you know, we're not actually in the business of running the barge, electrical barge. So what could be attributed to Merrill Lynch as being responsible for, all sorts of issues. And those were raised and discussed in our consideration of this.

Q. Is there anything that goes beyond the representational risk that could also go to that optimal economic risk?

* * *

A. Right. It's more of this could cost more than our loss of the $7 million that was the investment in the barge. It could lead to loss of life, litigation, money, entanglement, complications beyond –

* * *

[55] A. That's just not my understanding of how the conversations were. Everyone understood the rules, the accounting rules and the accounting treatment. Everyone appreciated that – people were talking about this as a worst-case scenario. There was no real expectation that any of this was going to be happening. The focus was on the fact that this would be gone in January to Marubeni.

I was trying to make sure that Mr. Davis and Mr. Bayly understood that this was a true risk that we would end up owning this barge and so – and from an exit perspective, we either had to be willing to own it until the thing got sold or – and keep the risk of what that entails on our balance sheet and – making sure

that they are comfortable with that in the context of making the decision.

*   *   *

[63] Merrill – the Merrill Lynch lawyers in my group and myself did ask that we include a provision that – two types of provisions that we thought would be helpful to us.

One would be to indemnify us or hold us harmless if there was any sort of liability like a barge explosion or an environmental spill, loss of life, or something that was, you know, a disaster scenario; and that was the first thing we talked to them about.

The second, it may have been around the same time. You know, we marked the agreement up one time and sent it back to them.

The other thing that we marked up and we wanted to add was a best efforts clause, what's called a best efforts clause that they would use their best efforts to find a purchaser to conclude the purchase with the – another third-party purchaser besides ourselves and that – realizing that from our perspective as Merrill Lynch lawyers that this was not – this was still a – was not a guarantee, it was not an absolute, but that at least would give us an angle, it would give us a legal angle to get them to focus on that obligation if, in fact, we saw them not paying attention to what was the business deal.

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[64] the response from the Enron legal team was that that – both of those provisions would be a problem or could be viewed by the accountants as undermining the true sales tax because, first of all, with the indemnity, it was a bit of a stretch but we tried. It would – it would insulate Merrill from any risk of loss, which was the whole point of there being a true sale. And so, it would negate that treatment; and it certainly made sense that the response would be that.

Now, you know, we tested what if we put the damages in caps. You know, we tried to keep it – we were trying to be creative to protect Merrill, but they kept coming back to the fact that it really had to be a true passage of risk and that – any risk whatsoever.

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[66] Q. Now, in terms of the best efforts provision, did you have any conversation either directly or indirectly with your staff or outside counsel regarding whether there would be any accounting problem in having a re-marketing agreement?

[67] A. With the discussions we had with my staff, who I believe were reflecting Alan's discussions with the other law firm and Alan's, you know, acquiescence in that position or at least understanding where they were coming from, in that a re-marketing agreement or approach to use best efforts to find another purchaser could be problematic for the accounting, there couldn't be any contractual obligations in that regard.

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The discussions that were had with the lawyer, our lawyer and my staff, were that any contractual obligations that would require Enron to use their best efforts to take action to sale – to sell the equity interest on our behalf could be viewed as then [sic] being obligated to buy it back.

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[68] I think, you know, their perspective is they didn't want any risk that –

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A. I think we – we tried a lot of different, you know, ideas to try to get some – something, you know, contractual that we could go to court, as they say, and get enforced; and the answer was that anything that could be used that could be taken to require them to buy it in the event that they were unable to find a third party would not be acceptable and that's –

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– why the language was not put into the agreement.

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[69] I think that was our approach in that we were trying to do what we could to get – consistent with what the business deal was to get some protection, and we were not successful in negotiating that end [sic] with Vincent & Elkins.

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[70] The focus I remember is that they will use their best efforts to find a purchaser to close the

transaction with a third party, to finish, for a period of time.

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[73] The "no" part is that they could do whatever it took to get us out of the investment. That was – they were not committing to do whatever it took. They were committing to take – and the business ended up being a, you know, oral business understanding as, "Look. We understand you're not only going to hold this and that we have to find another buyer if Marubeni does come through, does not happen."

That was the extent of my understanding. It was more than an understanding. It was representations that were made to me about what they were willing to do.

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[74] There was some of that discussion when we were trying to negotiate the terms of the purchase agreement itself; and I was looking at it from the perspective of I don't want anyone at Merrill Lynch coming to me and saying, "Why can't we get rid of this barge?"

This is – was our – this was our business deal. This was our basis for us going forward and doing a short-term investment.

[75] The fact that they would not put in writing an obligation to buy it back, to indemnify us, all those things were consistent with the business deal and

were not things that I felt were nefarious and [sic] were problematic.

My focus was more on the fact that our management and – understand that we are owners of this and could be owners of this for longer than the period of time that they thought –

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– because there was no obligation for them to buy it back.

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[123] A. It went to the DMCC because that's where I decided it would be best to be vetted, yes.

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[128] I wanted to get it reviewed, by people who were familiar with transactions like this – structured deals, complicated ownership interest – that had some expertise in the area and they could be convened within 24 hours to 48 hours depending on when they got the materials –

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– and to be reviewed.

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[133] – I – you know, I had asked that this meeting be convened to look at this and they stayed and they continued to review it. No one walked out of the room saying, "I'm not wasting my time."

They appreciated – from the get-go I told everyone it was going to be going up to Mr. Davis, that I wanted someone other than the DLT to look at it and to provide input and their issues. They had a chance to read the document.

And this was a way for me, as one of the control people, and for our commitments chairman, who I know Mr. Davis would turn to, to get some, you know, neutral, not-involved input; and it was done quickly.

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[147] There was a business understanding to re-market it [sic] There was a business arrangement. You know, when you say the word "commitment," it sounds like a legally binding commitment.

If Enron had done nothing to help us re-market it, we would have – we would be pretty much annoyed and angry and we could shake our fist at them but there's not going to be much recourse to us to get them to do their job other than just sort of threatening to sell it to somebody that they wouldn't want to be a partner with.

So there was no commitment in a legally binding way; but, yes, there was a business understanding that that's what was going to happen. It was the whole point. I mean, how can you be a temporary bridge to permanent equity and not be the permanent equity? That was the basis for the deal.

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[186] A. I gave legal advice that I didn't see any actions here – in looking at the year-end trade and the – you know, whether there was a part [sic] because those things were specifically considered – that this transaction did not – well, this – it was a right avenue to consider. It didn't lead to their – in my view, there was not a part and this was not a sham transaction.

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A. It was in the context of the Mr. Davis discussion. You know, it was there – "What are your views, Kathy, about this transaction?"

And I talked about the fact that we had gotten comfortable on two important, sort of what we call legal issues: One is the earnings management, whether or not there is some facilitation of them moving or taking earnings when they shouldn't; and the other is, the parking aspect.

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[187] A. I remember explicitly talking about it with Mr. Davis and I also remember explicitly talking about the same issues with Mr. Bayly,

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I gave him my legal views on an opinion on the fact that based on what we knew and the information we had and – this is not illegal.

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