July 20, 2010

Mr. Eric H. Holder, Jr.
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

RE: *Brady violations continue in the wake of Stevens*.
United States v. Brown requires your attention.

Dear Attorney General Holder:

We represent James A. Brown, the last of the Merrill Lynch defendants in the Enron or Nigerian Barge case arising from a 1999 year-end transaction between Merrill and Enron pursuant to which Enron ultimately profited $53 million and Merrill made $775,000. Mr. Brown took nothing and made nothing on the transaction. In addition, it is undisputed that Brown advised his colleagues at Merrill not to participate in the transaction at all. We write, as a former United States Attorney for the Southern District of Texas[1] and a former AUSA of 10 years service in the Department and frequent Faculty member of the Advocacy Institute,[2] to request your personal attention to a matter important to the administration of Justice and to the reputation of the Department. Despite Judge Sullivan's strong statements and actions in *United States v. Stevens*, and the issuance of new

[1] Dan Hedges, partner of Porter & Hedges, was United States Attorney for the Southern District of Texas from 1981-1985. While in the Justice Department, Mr. Hedges co-founded the Organized Crime Drug Enforcement Task Force. In addition to his private practice, Mr. Hedges currently serves as the chairman of Senators Cornyn and Hutchison's Federal Judicial Evaluation Committee which screens prospective federal judges and U.S. Attorneys.

[2] Sidney Powell represented the United States in approximately 350 criminal appeals and has been lead counsel in more than 500 appeals to the Fifth Circuit. She is a past President of the American Academy of Appellate Lawyers, past President of the Bar Association of the Fifth Federal Circuit, member of the American Law Institute, and former Assistant United States Attorney for the Western District of Texas, the Northern District of Texas and the Eastern District of Virginia, 1978-1988.

discovery "guidance," the Department still refuses to comply with its *Brady* obligations or acknowledge violations and take appropriate steps to remedy the injustice.

1. Brown was indicted on September 16, 2003, primarily for conspiracy to defraud Enron of the honest services of Andrew Fastow, two substantive counts of wire fraud, and perjury and obstruction of justice *based on his testimony to the grand jury of his "personal understanding" of a telephone call to which he was not a party*. The trial–and the guilt or innocence of all four Merrill Defendants–turned on whether Enron Treasurer Jeffrey McMahon and CFO Fastow orally guaranteed that Enron would buy-back the barges or whether, as the defense maintained, Merrill received nothing more than an assurance that Enron would use its "Best Efforts" (an industry term of art) to re-market the barges to a third party and that they acted completely in reliance on counsel. The Task Force's prosecution was premised on the assertion that the Defendants lied and hid the real deal (the oral guarantee of a buy-back) from the lawyers. Its proof rested on early drafts of documents that were rejected and on the hearsay testimony of persons who were not parties to the conversations in which the purported guarantee was made. **Recent disclosures of *Brady* material 6-8 years old belies the ETF's entire case**.

2. Counsel for all Defendants made repeated requests for *Brady* materials. Dkts.85, 86, 89, 90, 113, 125, 158, 166, 180, 182, 197, 216, 219, 221, 236, 237, 238, 244, 245, 305, 494, 541. *See* Chart 1 attached. The Enron Task Force (ETF) repeatedly said, alternately, that (1) the government has satisfied its *Brady* obligations; (2) the government's *Brady* obligations are satisfied where the government provides the names of witnesses who may have exculpatory information (even under circumstances where the witnesses are unavailable to the defense and where the government possesses 302s and actual Grand Jury testimony and SEC testimony of these witnesses which is exculpatory); and (3) erroneously advocated that *Brady* is subject to a test of admissibility. Dkts.234, 248, 285. *See* Chart 2 attached.

3. The ETF conditioned interviews, even of Merrill Lynch witnesses (executives and attorneys who, we later learned, shared the exact same understanding of the transaction as Brown and the rest of the Merrill Defendants) and Andrew Fastow, on a member of the Task Force being present. Dkt.180. This effectively denied Defendants any access to witnesses. *Id*. (Including attachments regarding correspondence with ETF prosecutor, Matthew Friedrich, who refused to

withdraw "request" to attend any witness interviews).[3] Defense counsel objected vehemently to no avail[4] and filed motions which the ETF opposed.

4. Nine months after the indictment was filed, and after vehement arguments by the Defendants that the ETF was violating its *Brady* obligations, the Court ordered the government to produce materials *in camera* for review. Dkt.234. The government thereafter produced improperly and prejudicially highlighted materials for Judge Werlein to review. The ETF's highlighting avoided clear, relevant exculpatory evidence–especially of McMahon, who purportedly made the original guarantee, and of Merrill counsel Zrike and Dolan who knew that a buy-back was discussed but rejected, and, who tried to document the oral best-efforts agreement–which V & E also rejected because Enron could retain no risk. Based on representations of current government counsel (Patrick Stokes), the government produced more than 1,000 pages of the following documents that (unbeknownst to the Defendants) it *highlighted* for *in camera* review:

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[3] Merrill Lynch had previously been forced to enter into a plainly unconstitutional Non-Prosecution Agreement–which provisions evidence the sort of coercion that required dismissal in *United States v. Stein*, and which the Department has since disavowed on at least two occasions. *See* Thompson Memorandum, January 20, 2003, at 7-8, *available at* http://www.usdoj.gov/dag/cftf/business_organizations.pdf (Last visited February 28, 2008) ("[A] corporations's promise of support to *culpable* employees and agents either through the advancing of attorneys fees, through retaining the employees without sanction for their *misconduc*t, or through providing information to employees about the government's investigation ... may be considered by the prosecutor in weighing the extent and value of the corporation's cooperation," and hence a determination whether to indict.) (emphasis added). The Thompson Memorandum was superceded, after *Stein*, by the McNulty Memorandum, *available at* http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf (Last visited February 28, 2008). Evidently, recognizing that the guidelines in the McNulty Memorandum were too draconian, the Department of Justice issued new guidelines yet again on August 28, 2008. *See* Press Release, Department of Justice, Justice Department Revises Charging Guidelines for Prosecuting Corporate Fraud, August 28, 2008, *available at* http://www.usdoj.gov/opa/pr/2008/August/08-odag-757.html (Last visited August 29, 2008). The new guidelines omit all of the qualifications on internal corporate decision-making which made the Thompson Memorandum, and the McNulty Memorandum unconstitutional.

[4] Dkt.180, Declaration of Richard Schaeffer, attorney for Daniel Bayly: "During the telephone conversation [about the government's so-called "requests"], I advised Mr. Friedrich that I believe the ETF's request to Merrill Lynch to be improper and would have an obvious chilling effect upon the willingness of Merrill Lynch employees to meet or speak with defendants' attorneys. Mr. Hagemann told Mr. Friedrich that he believes the ETF's request raised serious Sixth Amendment, and other, issues for Mr. Bayly. In response, Mr. Friedrich stated that he would not argue the propriety of the ETF's request, except to state that he believed it was proper. Mr. Friedrich also declined my request that he provide us with legal authority supporting the propriety of the ETF's request to Merrill Lynch. Mr. Friedrich stated that we would have to seek judicial intervention to obtain any relief with respect to this issue.... Several minutes after this telephone conversation, Mr. Friedrich called me back in order to make sure I understood that the ETF had only made a "request" of Merrill Lynch. I then asked Mr. Friedrich "whether Merrill Lynch was free to ignore the request of the ETF without consequence." Mr. Friedrich stated that it was "just a request" and "I'll leave it at that." *See also* Dkt.180, Ex. C (letter to ETF memorializing conversations between defense counsel and Mr. Friedrich).

FBI 302 of Kelly Boots, February 18, 2004 (5 pages).
FBI 302 of Eric Boyt, October 22, 2003 (6 pages).
FBI 302 of Gary Carlin, September 13, 2002 (11 pages).
Grand Jury Testimony of Kevin Cox, June 17, 2005 (132 pages).
FBI 302 of Mike Debellis, October 3, 2003 (4 pages).
Enron Investigation Testimony of Mark DeVito, July 25, 2003 (152 pages).
Grand Jury Testimony of Bowen Diehl, March 25, 2003 (192 pages).
FBI 302 of Gary Dolan, November 4, 2002 (7 pages).
FBI 302 of Alan Hoffman, October 12, 2002 (6 pages).
FBI 302 of Gerard Haugh, September 13, 2002 (6 pages).
FBI 302 of James Hughes, February 27, 2004 (14 pages).
FBI 302 of Mark McAndrews, October 31, 2003 (6 pages).
Raw Notes of PSI interviews with Jeff McMahon, June 21, 2002 (138 pages).
FBI 302 of Ace Roman, August 28, 2002 (16 pages).
FBI 302 of Barry Schnapper, April 10, 2003 (9 pages).
FBI 302 of Scott Sefton, November 1, 2002 (10 pages).
Grand Jury Testimony of John Swabda, May 29, 2003 (75 pages).
FBI 302 of Kira Toone-Meertens, September 13, 2002 (5 pages).
Grand Jury Testimony of Kira Toone-Meertens, October 15, 2003 (85 pages).
Raw Notes of PSI interview with Schuyler Tilney, July 15, 2002 (100 pages).
FBI 302 of Joseph Valenti, September 18, 2002 (10 pages).
FBI 302 of Paul Wood, October 3 2002 (8 pages).
Grand Jury Testimony of Kathy Zrike, April 15, 2003 (201 pages).

Notably, this did not include the crucial raw notes of Andrew Fastow.[5]

5. Thereafter, Judge Werlein ordered: "the Government no later than July 30, 2004, shall provide to Defendants summaries of the exculpatory information that led the Government to identify Kathy Zrike and other witnesses as having exculpatory testimony." Dkt.290. The judge also reminded the government of its *continuing obligation*: "The Government's compliance with this Order, moreover, is required in addition to, and not as an implied fulfillment of, *the Government's continuing obligation to disclose to Defendants any Brady material that it may have or acquire*." *Id*.

6. Over Kathryn Ruemmler's signature and the names of Weissmann, Friedrich and Hemann, *and in apparent compliance with the court's order*, the government gave defense counsel a letter containing eight pages of its "summary" of various witnesses purporting that it "*may provide you*

[5] After the ETF denied that Fastow's statement that he did not use the word "guarantee" was not *Brady*, Defense counsel requested production of these very materials to the defense before trial and argued prophetically, "we cannot trust the government's judgment with regard to the materials that it continues to hold . . . materials that could go to the heart of this case." Pre-Trial Hearing Transcript, June 25, 2004, Dkt.283, at p. 43

with even more than is required to be disclosed pursuant to Brady." This summary included key persons involved in the actual transaction–Merrill Lynch counsel Katherine Zrike and Gary Dolan, and former Enron Treasurer Jeff McMahon who supposedly made the original "guarantee" and was on the crucial phone call with Fastow that purportedly reaffirmed McMahon's illegal "guarantee." It made no disclosure whatsoever–not even the name–of Alan Hoffman, outside counsel for Merrill who negotiated the documents with V & E.[6] Recent scrutiny of these materials–as provided to the court in 2004 but not disclosed by the government until March 30, 2010–reveals startling misconduct: **the ETF withheld from the court-ordered summaries, *inter alia*, irrefutable *Brady* material of Zrike, Dolan, Tilney and McMahon–material that the ETF had itself highlighted in these documents (and which were delivered to the Court with highlighting)–evidence that destroyed the ETF's case**.

7. Despite having withheld evidence from its *Brady* summary that even the ETF itself had highlighted as *Brady* material, the ETF prosecutors continued to deny, through the trial and thereafter, that there was any *Brady* material and steadfastly refused to produce 302s, grand jury testimony, and raw notes from interviews of crucial witnesses–first-hand witnesses with personal knowledge of the representations actually made and the negotiations of the transaction–including Zrike, Dolan and McMahon. See Dkts.302, 305, 321, 336, 494; Charts 1, 2, *infra*.

8. At trial, the government put on a case based solely on hearsay. Neither Fastow nor any individuals on the actual phone call testified for the government. At the same time, the government made numerous representations to the Court and jury that were contradicted by the materials they withheld. *See* attached Charts 3, 4, 5, 6. Specifically, the following is a sample of ETF false or misleading representations–all contradicted by evidence they knew was *Brady*, including what they highlighted as such, and still withheld from the defense in their "apparent" compliance with the court order.

Government Representations at Trial	***Brady* Evidence Withheld By Task Force**
1. McMahon made original illegal guarantee. 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.	**From Raw Notes of Interviews of McMahon in 2002, withheld until March 30, 2010**. "**Never made [a] rep[resentation] to ML [Merrill Lynch] that E[nron] would buy them out at price or @ set rate of return."**, *Id*. at 000449,

[6] Despite having included Hoffman's 302 in its *Brady* production to the court, the government omitted Alan Hoffman from any disclosure. Hoffman was Merrill's outside counsel on this transaction and negotiated directly with Vinson & Elkins (counsel for Enron) for the inclusion of various best efforts and indemnification clauses to no avail. He also told Andrew Weissman in 2002 that Brown was a highly ethical banker who always alerted him to any accounting issues. In other words, he was an important repository of exculpatory information.

* *Yellow highlighting denotes material the ETF itself highlighted as Brady in its prejudicial submission to the court but still failed to include in its court-ordered summary to defendants. The other quotes in the right column are crucial Brady material that the ETF also failed to disclose.*	"Andy said E would help remarket equity w/in next 6 months. –no further commitment." *Id*. at 000494. "AF [Fastow] agreed that E[nron] would help them [Merrill Lynch] remarket the equity 6 mo[nths] after closing." *Id*. at 000450. "Disc[ussion] between Andy [Fastow] & ML [Merrill Lynch]. Agreed E[nron] would use best efforts to help them sell assets." *Id*. at 000447.
2. It was not a best efforts or remarketing agreement. 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.	**From the raw notes of interviews of Andrew Fastow; withheld until order of the Fifth Circuit in March 2008**: "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. *See also above notes of McMahon interviews.*
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. "**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. Friedrich: "There is a suggestion . . . that what's going	**ETF withheld that Merrill Counsel Kathy Zrike testified to the Grand Jury**: "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.1217, Ex. C, at 75 (Grand Jury testimony of Kathy Zrike, highlighted by ETF in 2004 and withheld from "summary"). "Zrike tried to insert a "best efforts" clause but Enron said it was too much of an obligation and that they could not have this clause in the agreement." From Zrike 302 withheld until December 12, 2007. "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 harmless if there was any sort of liability like a barge explosion of environmental spill, loss of life, or something that was, you know, a disaster scenario....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 [for Merrill's equity interest.***

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-faith negotiating process.** Tr. 6493-94.	**[T]he response from the Enron legal team was that – both of those provisions would be a problem or could be viewed by the accountants as undermining the true sales tax [sic] [status] because, ... 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. . . . [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."** Zrike Grand Jury Testimony, withheld until 2007, at **63-64, 69. *See also* id. at 66-70 (same, including Alan Hoffman's involvement negotiating with V & E).**
3. No Reliance on Lawyers. Hemann: "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. 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. **4. Hiding facts from Lawyers**. Friedrich: "The fact that Fuhs is sending lawyers documents with the bad language deleted out of the engagement letter doesn't prove anything about his intent. . . . 'reliance on advice of counsel' doesn't mean just some random attorney someplace getting a document that has strike-out language. . . The lawyer has to know what's going on; they have to know all the facts. . . . **there's no evidence that Mr. Fuhs made any efforts to talk to a lawyer or had any reliance on a lawyer about what was going on. . . . [Fuhs] gets copies, for example, of the engagement letter that had the offending language included, and that shows**	Zrike: "Everyone understood the rules, the accounting rules and the accounting treatment. . . . I was trying to make sure that [senior executives] understood that this was a true risk that we would end up owning this barge and so – and from an exit perspective, 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.1217, Ex. C, at 55. "We were making it clear to everybody, ...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..." Zrike SEC Testimony, withheld to this day; Dkt. 1168, Ex. Y, at 192. "FUHS did tell HOFFMAN that Enron did not have an obligation to find someone to purchase ML's interest in the Nigerian Barge. However, FUHS did state that Enron would try to help ML find a buyer for their interest in the Nigerian Barge." Dkt.1204, Ex. A. at 5. Hoffman talked with Dolan about the draft engagement letter with the strike-outs. *Id.* "[I]t was HOFFMAN's understanding that there was an unwritten understanding that Enron would help ML find a purchaser for their interest in the Nigerian Barge." *Id.* "DOLAN also had a conversation with JEFF WILSON

you what he knew at the time the deal was." Tr. 6538-39. **The Fifth Circuit affirmed Brown's convictions on perjury and obstruction by pointing to the fact that Brown signed the engagement letter that had the buy-back language deleted. United States v. Brown*, 459 F.3d 509, 528 (2006) ("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."), *cert. denied*, 550 U.S. 933, 127 S. Ct. 2249 (2007). *The withheld evidence proves that ML counsel deleted the buy-back language and had full knowledge of the transaction. Further, Brown did not "execute" the final engagement letter–he was in Arizona on vacation.*	[who worked under Fuhs] about the engagement letter. DOLAN believes WILSON helped draft the engagement letter. DOLAN requested that WILSON delete some of the language in the engagement letter." Dkt.1217, Ex. B-1, at 5. "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." *Id*. at 5. (Highlighted by ETF in Dolan 302 in 2004 but withheld from summary). "Enron did not object to the language in the original draft of the engagement letter which stated that 'Enron will buy or find affiliate to buy.' However, DOLAN did object to this language and made the necessary changes." *Id*. at 6. The word "promises" refers to the assurances made by Enron regarding finding a buyer for ML's interest in the Nigerian Barges. *Id*. at 5.

9. All of the Merrill Lynch Defendants were convicted. **The Task Force sought terms of imprisonment of more than 14 years and opposed bail pending appeal on the grounds that there was no substantial issue for appeal**.

10. On May 31, 2005, **the Supreme Court unanimously reversed the ETF's first trial**. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703-06, 125 S. Ct. 2129, 2134-36 (2005) (convictions unanimously reversed because prosecutors procured unconstitutional jury instructions).

11. In the Summer of 2005, the Merrill Defendants reported to prison. Appeals began.

12. On March 30, 2006, the Fifth Circuit ordered the immediate release of William Fuhs–a young father–who had been incarcerated in a *maximum security prison.*

13. On June 13, 2006, the Fifth Circuit ordered the immediate release of Daniel Bayly and Robert Furst.

14. On August 1, 2006, the Fifth Circuit, in a 2-1 decision, reversed the convictions of all Defendants on the conspiracy and wire fraud charges, holding that Defendants' conduct was not a

federal crime under the honest services statute. It *acquitted Bill Fuhs*, who the ETF had blamed for deleting the buy-back language from the engagement letter while (still unbeknownst to Defendants and the Fifth Circuit) the ETF withheld the evidence that Merrill counsel Dolan had done that. Fuhs was the only other defendant who worked in Brown's division. *United States v. Brown*, 459 F.3d 509 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 2249 (2007). Brown's convictions for perjury and obstruction were affirmed by the divided panel, which pointed to the wrongful suggestion that Brown had signed the letter that had the buy-back language deleted as evidence of his criminal conduct. Judge DeMoss wrote separately to urge Brown's acquittal on perjury and obstruction.

15. On August 3, 2006, Brown filed a motion for his release from prison *instanter* because he had served longer than the maximum possible punishment for the perjury and obstruction convictions which the Fifth Circuit affirmed. **On August 6, 2006, Stephan Oestreicher, from the Appellate Section of the Criminal Division, who represented the government on appeal, *agreed* with Brown's Motion for Release *Instanter***. On August 8, 2006, the Fifth Circuit orders the release of Brown *instanter*.

16. On March 19, 2007, the primary Enron civil suit–by Enron's shareholders against third-party banks, including Merrill Lynch–is stopped in its tracks. *Regents of University of California v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372 (5th Cir. 2007), *cert. denied*, 552 U.S. 1170, 128 S. Ct. 1120 (2008). **The court held, *inter alia*, that the bank and bankers in this very transaction owed no duty to Enron or Enron's shareholders**.

17. On August 2007, the (approximate) one year anniversary of Brown's release from prison, a new prosecutor, AUSA Arnold Spencer, **moved to remand Brown to custody to serve a 46 month term of imprisonment despite the government's prior agreement to his release *instanter***. Dkt.946. Indeed, in breach of the government's admission (that Brown was entitled to be resentenced) and his ministerial duty as an officer of the court, on July 10, 2007, Mr. Spencer advised Brown's co-counsel, Paul Coggins, former United States Attorney in Dallas, that Brown was "his number one priority" and that he had **"tremendous leverage" over Brown**. Further, in moving to remand, the prosecutor failed to cite controlling Fifth Circuit precedent, and when advised of the determinative decision he failed to cite, he still maintained that Brown must be remanded. Dkt.953. The prosecutor argued that the government's agreement to Brown's release was a hurried mistake–a "misstatement of law." *Id*. *See* Hearing Transcript, November 16, 2007, Dkt.1010, at p. 59 ("I believe the Government said he should be resentenced here because the Government responded in one day and didn't do the research and didn't identify this issue."); *id*. at p. 64 ("It is simply that. It is a misstatement of law.").

The Court denied the government's motion to revoke bond, holding: "When Brown's convictions were reversed on the conspiracy and wire fraud counts, and affirmed only on the perjury and obstruction counts, it is obvious from the immediate filings made for Brown's release both by Brown and by the Government that *both parties* recognized that an *unbundled* sentencing package now pertained to Brown that required his resentencing if the Fifth Circuit's judgment were not changed on rehearing." Dkt.1027, at p. 7 (emphasis in original). Further, the Court stated that "t]he

guideline range [of 48 months for all convictions] was largely driven by the Court's finding of the loss amount on the wire fraud convictions.... No separate calculation was ever made as to what the Guidelines range would have been had Brown been convicted only of perjury and obstruction of justice; his sentences on those convictions were interdependent with, grouped, bundled, and driven by the wire fraud conviction, which produced the highest offense level." *Id*. at p. 4.

18. Throughout 2007 and the first quarter of 2008 (prior to an interlocutory appeal on double jeopardy grounds), **the Defendants continued vigorously to demand *Brady* disclosures**. Dkts.925, 939, 948, 974, 979, 993, 1003, 1010, 1029, 1030, 1034. One year after the case was reversed and remanded to the District Court, the government began to trickle out exculpatory information (which remarkably, it categorized as "not *Brady* material"), including FBI 302s from Fastow and other vital witnesses, and the Grand Jury testimony of crucial witnesses–all of which the ETF withheld from the Defendants during the pendency of the first trial and for over three years afterward. This material constitutes clear *Brady* material and *should have been disclosed to all Defendants in time to prepare for the first trial*. This material directly refuted the representations made by the prosecutors in their hearsay-only case. The following is a timeline and list of information that has been produced sporadically which continues to this day:

<u>September 28, 2007</u>:

FBI 302 COMPOSITE of Andrew Fastow, December 18, 2003 (4 pages).
FBI 302 COMPOSITE of Andrew Fastow, January20, 2004-January 6, 2005 (15 pages).

<u>December 13, 2007</u>:

Grand Jury Testimony of Charles Bynum, March 19, 2003 (265 pages).
Grand Jury Testimony of Kevin Cox, March 13, 2003 (123 pages).
Grand Jury Testimony of Kevin Cox, June 17, 2005 (132 pages).
Grand Jury Testimony of Bowen Diehl, March 25, 2003 (192 pages).
FBI 302 of Vince DiMassimo, May 17, 2005 (8 pages).
Grand Jury Testimony of Vince DiMassimo, June 9, 2005 (187 pages).
FBI 302 of Merrill Counsel Gary Dolan, October 24, 2002 (7 pages).
FBI 302 of Merrill Counsel Alan Hoffman, October 12, 2002 (6 pages).
FBI 302 of Mark McAndrews, October 10, 2002 (6 pages).
FBI 302 of Ace Roman, August 28, 2002 (16 pages).
FBI 302 of Ace Roman, September 28, 2002 (2 pages).
FBI 302 of Ace Roman, March 16, 2004 (7 pages).
FBI 302 of Paul Wood, October 3, 2002 (8 pages).
Grand Jury Testimony of Paul Wood, June 9, 2005 (155 pages).
FBI 302 of Merrill Counsel Kathy Zrike, October 8, 2002 (19 pages).

Grand Jury Testimony of Merrill Counsel Kathy Zrike, April 15, 2003 (201 pages).

Upon order of the Fifth Circuit over vehement and repeated government opposition, the government finally produced on March 24, 2008[7]:

Raw Notes of government interviews with Andrew Fastow (413 pages).

February 13, 2009:

Judge Sullivan holds government prosecutors William Welch II, Brenda Morris, Kevin Driscoll, and Patricia Stemler, in contempt for failure to disclose documents in *United States v. Stevens*.

April 7, 2009:

Judge Sullivan Orders Dismissal and Criminal Contempt Investigation (of Prosecutors) in *United States v. Stevens*. In the Hearing on the Order of Dismissal, Judge Sullivan states that he will commence criminal contempt proceedings against the original trial team and their supervisor, and appoint a non-government lawyer to prosecute the case. Judge Sullivan officially orders a special prosecutor, Henry Schuelke III, to investigate whether government attorneys had broken the law by failing to ensure that former Sen. Stevens received a fair trial.

May 18, 2009:

A *second set* of new prosecutors produced **long-requested SEC notes and attorneys' notes** (>2,000 pages).

June 8, 2009:

Counsel for Brown made a special trip to Washington, D.C. and met with the alleged decision-makers to discuss the *Brady* violations and misconduct (known at that date) in an attempt to resolve the case without further litigation. *See* Letter from Sidney Powell to Lanny Breuer, June 17, 2009; Letter from Gary Grindler to Sidney Powell, July 13, 2009, both attached hereto. Ms. Glavin, the purported decision-maker, left the Department shortly after our meeting. Mr. Grindler changed roles, and Mr. Tyrell left the Department for private practice. **We never received a response to our request for an independent review of this case**. *See* Grindler Letter, July 13, 2009.

[7] These notes were also the subject of litigation in the *Skilling* case–Skilling's Motion for New Trial for *Brady* violations is still pending in the District Court.

June 18, 2009:

> **The Supreme Court reversed the second ETF prosecution that was tried to conviction**. *Yeager v. United States*, — U.S. —, 129 S.Ct. 2360 (2009) (reversing on the collateral estoppel arm of double jeopardy where prosecutors erroneously sought to retry defendant); *see also Hirko v. United States,* — U.S. —, 129 S. Ct. 2858 (2009) (vacated and remanded in light of *Yeager*).

January 4, 2010:

> **New Department of Justice Discovery Guidance Issued to All Federal Prosecutors**.

January 24, 2010, the second set of new prosecutors produce to Brown:

> **FBI 302 of Eduardo Andrade**, November 20, 2002 (11 pages).
> **FBI 302 of Yao Apasu**, November 11, 2003 (11 pages).
> **FBI 302 of Dan Boyle**, October 3, 2002 (10 pages).
> **FBI 302 of Gary Carlin**, September 26, 2002 (11 pages).
> **FBI 302 of V & E Att'y Christopher Clement-Davies**, March 25, 2004 (8 pages).
> **FBI 302 of James Hughes**, November 8, 2002 (32 pages).

March 19, 2010[8]: The second set of new prosecutors finally produce the long-requested notes of interviews of Enron Treasurer McMahon and Merrill executive Schuyler Tilney, along with the grand jury testimony of Zrike and the 302 of Dolan–all **highlighted**. **The electronic format includes the highlighting prejudicially placed on the documents by the ETF itself when it submitted the documents to Judge Werlein for his *in camera* review**. These documents formed the basis for the ETF's court-ordered "summaries," provided to the Defendants in July 2004, in apparent compliance with the court's order, **but the ETF withheld pivotal statements that the ETF itself had highlighted as *Brady***:

> **FBI 302 of Kelly Boots**, February 18, 2004 (5 pages).
> **FBI 302 of Eric Boyt**, October 22, 2003 (6 pages).
> **FBI 302 of Gary Carlin**, September 26, 2002 (11 pages).
> **Grand Jury Testimony of Kevin Cox**, June 17, 2005 (132 pages).
> **FBI 302 of Mike Debellis**, October 3, 2003 (4 pages).
> **Enron Investigation Testimony of Mark DeVito**, July 25, 2003 (152 pages).
> **Grand Jury Testimony of Bowen Diehl**, March 25, 2003 (192 pages).
> **FBI 302 of Gary Dolan**, November 4, 2002 (7 pages).
> **FBI 302 of Merrill Counsel Alan Hoffman**, October 12, 2002 (6 pages).

[8] Actually received by Brown on March 30, 2010.

FBI 302 of Gerard Haugh, September 13, 2002 (6 pages).
FBI 302 of James Hughes, February 27, 2004 (14 pages).
FBI 302 of Mark McAndrews, October 31, 2003 (6 pages).
Raw Notes of government interviews with Jeff McMahon (138 pages).
FBI 302 of Ace Roman, August 28, 2002 (16 pages).
FBI 302 of Barry Schnapper, April 10, 2003 (9 pages).
FBI 302 of Scott Sefton, November 1, 2002 (10 pages).
Grand Jury Testimony of John Swabda, May 29, 2003 (75 pages).
FBI 302 of Kira Toone-Meertens, September 13, 2002 (5 pages).
Grand Jury Testimony of Kira Toone-Meertens, October 15, 2003 (85 pages).
Raw Notes of government interviews with Schuyler Tilney, July 15, 2002 (100 pages).
FBI 302 of Joseph Valenti, September 18, 2002 (10 pages).
FBI 302 of Paul Wood, October 3 2002 (8 pages).
Grand Jury Testimony of Kathy Zrike, April 15, 2003 (201 pages).

May 14, 2010:

Brown filed additional Motion to Compel Production of *Brady* Materials.

June 24, 2010:

The Supreme Court reversed its third Enron Task Force prosecution. *Skilling v. United States*, — S. Ct. —, 2010 WL 2518587 (June 24, 2010). **The ETF's ignominious record is now complete–every single case that it tried to completion has been reversed on appeal, either by the Fifth Circuit,** *United States v. Brown*, 459 F.3d 509 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 2249 (2007) (no cognizable honest services allegation); *see also United States v. Howard*, 517 F.3d 731 (5th Cir. 2008) (affirming the vacating of convictions of Enron executive and grant of new trial where prosecution over-reached in charging decision), **or by the Supreme Court.** *See supra*.

Despite endless *Brady* requests, the prosecutors **never disclosed the following materials**, but Brown was finally able to obtain them from other sources. They contain significant *Brady* material.

Jeffrey McMahon Letter to DOJ, April 25, 2005 (12 pages).
Jeffrey McMahon Memorandum to SEC, July 28, 2006 (17 pages).
SEC Interview Testimony of Kathy Zrike, October 29, 2003 and November 8, 2003 (335 pages).

19. The government is proceeding to trial against Brown a second time on conspiracy and wire fraud charges, having recently convinced Judge Werlein that the indictment charges an actual money or property fraud–the **property being an unalleged "shareholder's right to accurate economic" information**.[9] This is a blatant end-run around *Skilling*'s rejection of honest services fraud in the absence of bribery and kickbacks and violates the Supreme Court's holdings in *Cleveland* and *Carpenter*. If the case were ever to be tried to a guilty verdict, reversal would be required on this basis alone. **The indictment is insufficient on its face to allege an actual wire fraud offense**.[10] We believe that review of the redacted indictment by Deputy Solicitor General Michael Dreeben should quickly confirm this.

20. Upon issuance of mandate following the interlocutory appeal and remand to the district court, the government proceeded expeditiously against Bayly and Furst–who had previously been severed from Brown. Meanwhile, the government failed to initiate *any proceedings* against Brown for over seven (7) months.

21. On January 8, 2010, the government *sua sponte* moved to dismiss all charges against Bayly with prejudice. Dkt.1100. Bayly was previously represented in this case by Lanny Breuer. The Court immediately ordered dismissal with prejudice on January 11, 2010. Dkt.1101.

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[9] This finding of a *property* right in "shareholder information" where the shareholders do not accumulate or possess this information in their hands is unprecedented and contrary to *Carpenter* and *Cleveland*. It is also compromised by the Deputy Solicitor General's arguments in the trilogy of honest services cases decided last term. *See*, *e.g.*, *Black v. United States,* No. 08-876, Oral Argument Transcript, at pp. 29 ("this Court held in *McNally* that the mail fraud statute did not protect intangible rights"); 46 ("this Court held [in *McNally*] that the mail fraud statute did not protect the deprivation of intangible rights"); 48 ("Congress intended to basically say to this Court [after *McNally*], you have determined that intangible rights are not protected under the mail fraud statute. . . . . Congress desired to correct the statute [via § 1346] by protecting frauds that involve intangible rights."); *Weyhrauch* Oral Arg. Tr. 28 ("purpose of the statute [§ 1346] was to restore at least some part of the pre-*McNally* doctrine of intangible rights."); 41 ("the phrase 'intangible rights' is at the center of the *McNally* majority opinion."). *See also Weyhrauch v. United States,* No. 08-1196, Oral Argument Transcript, at pp. 31-32 ("[N]on-disclosure of material information," standing alone, is "not enough" to constitute a valid charge of wire fraud under the honest services statute.); *see also id*. at 29 ("We are not here to argue that there is a free-standing federal duty of disclosure that applies in all cases. . .").

[10] On interlocutory appeal to challenge further prosecution under the Double Jeopardy Clause, the Fifth Circuit ruled that Brown's argument (that the prosecution was only ever an honest services case and trial again on the same indictment constituted Double Jeopardy) was more appropriately categorized as a challenge to the sufficiency of the indictment–not cognizable on interlocutory appeal in a criminal case. The Court held specifically that it was not ruling on the sufficiency of the indictment. *United States v. Brown*, 571 F.3d 492, 499 (5th Cir.), *cert. denied*, — U.S. —, 130 S. Ct. 767 (2009) ("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.").

22. On April 13, 2010, Brown filed a Motion To Dismiss for Speedy Trial Act Violations. Dkt.1137. Judge Werlein and the government immediately communicated *ex parte*, and the government filed an immediate opposition. Dkt. 1140.

23. On May 14, 2010, Furst accepted a deferred prosecution agreement on the remaining counts. Dkt.1165.

24. On June 15, 2010, Brown's Motion to Dismiss for Violation of the Speedy Trial Act was erroneously denied by the district court. Dkt.1208. **This issue represents the second reversible error requiring reversal of any conviction in this case**.

25. The most egregious violations yet are revealed.

As noted above, on March 30, 2010, Brown received a new production of more than 1000 pages of *Brady* material from Mr. Stokes. Each time there is a production, startling new *Brady* violations come to light. *See* Dkt. 1168, Charts 1-10. In the March letter, Stokes stated: "The disk contains scanned copies of the witness statements, notes and grand jury transcripts submitted to the court, pursuant to its request, on June 1, 2004. These documents formed the basis of the government's July 30, 2004, disclosure letter." This was the first time the government has produced the long-requested raw notes of the interviews of Enron Treasurer McMahon and Merrill executive Schuyler Tilney who were both on the purported phone call that formed the basis of the "crime." Careful review of the **electronic copy** disclosed that the disk contains highlighting of selected *Brady* material done by the ETF itself in 2004. The highlighted material was the basis for the ETF's "summary" that the court ordered to be given to the defense in 2004–over government objection–after its *in camera* review. Additional scrutiny has disclosed startling misconduct: **the ETF withheld from the court-ordered summaries irrefutable *Brady* material–especially of Zrike, Dolan, Tilney and McMahon–that even the ETF had itself highlighted in these documents**. This could only have been a strategic and deliberate decision to keep this material from the defense, and it raises a host of new questions that will require an evidentiary hearing with live testimony from former ETF prosecutors as well as current Department employees.

The conclusion is now inescapable that the ETF engaged in a calculated, multi-step process to deprive Brown of his constitutional right to Due Process. **(1)** They repeatedly denied the existence of *Brady* material, told the court they had met their *Brady* obligations and fought vehemently against producing anything (Charts 1, 2). **(2)** They highlighted only selected material in a veritable garden of *Brady* evidence–much of their selections being vague, tangential and marginal–while working around clear, declarative, relevant, exculpatory material even on the same page, in the same paragraph or in the same document. **(3)** When *ordered* by the Court to produce summaries to the defense, they *further withheld* certain crucial facts that *they* had highlighted as *Brady* while acting in apparent compliance with the court order and representing that they were exceeding their *Brady* obligations. **(4)** They egregiously capitalized on their misconduct and exacerbated the prejudice to Brown at trial by making assertions that were directly belied by the exculpatory evidence they withheld. **(5)** And, to this day, despite Judge Sullivan's actions in *Stevens* and "changes" in DOJ

discovery policy, current prosecutors still deny any *Brady* violation or misconduct here and strongly oppose *even a hearing* on the issues.

It is now beyond dispute that the Task Force deliberately and strategically withheld exculpatory evidence of first-hand witnesses with personal knowledge that no crime was committed while they told the court and jury that there was a guaranteed buy-back and that the Merrill Defendants lied to their lawyers. All of their assertions of any crime in this case are demonstrably false. The *Brady* violations in this case have caused as much or more harm than in *Stevens*. In this case, the reputations of four innocent men have been ruined, their careers ended, and they each served up to a year in prison. That damage can never be remedied–to them or their families.

At a minimum, the government should confess error as it did in *Stevens*, agree to vacate Brown's convictions for perjury and obstruction, and then dismiss all charges against him. The injustice and persecution he has suffered in this case demands nothing less. And nothing less will even begin to restore the reputation of the Department from the ETF's wrongful actions to convict these Defendants by any means.

Sincerely,

Daniel K. Hedges

Sidney Powell

SP:hpg
Encls.

cc: Jack Smith, Chief, Public Integrity Section
Michael Dreeben, Deputy Solicitor General
Patrick Stokes