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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

CHART 1
DEFENDANTS' BRADY REQUESTS

Filing/Docket/Date	*Brady* Requests & Misconduct Allegations	Disposition
Motion by Fuhs for Rule 16 discovery, Dkt.85, 2/9/04 (joined at Dkts.86, 89, 90; supplement 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	**Denied** at Dkt.177 (as to *Brady*) on 4/21/04.

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	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 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). 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* p. 15 (**Zrike** grand jury testimony).	
Pre-Trial Hearing, August 5, 2004, Dkt.175.	"The next point I want to make, your Honor, is that some of these individuals [designated as possessing 'arguably exculpatory' information as per government letter] have advised us that not only will they not talk to us but they have been called either a target or a subject of the Government's investigation. Furthermore, we've been advised that in some cases, if called as witnesses by the defense, notwithstanding they won't even talk to us now because, I respectfully suggest, of the chilling effect of them being designated as targets and subjects, they will assert the Fifth Amendment privilege if called as a witness to presumably permit us to elicit this exculpatory material that they have which would assist us. We went so far, your Honor, as to talk to some counsel and are prepared to submit affidavits and letters to the Court in which those counsel for some of these people have said exactly what I said, that if called they will assert the privilege and they have been targeted or subject -- or designated as subjects." Pre-Trial Transcript, April 15, 2004, at pp. 8-9 "I will wrap up, your Honor, by respectfully referring the Court to our papers and urge the Court respectfully that the	Denied, Dkt.177.

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	Government can't have it both ways. They can't interview a witness, hear what the witness has to say, write it down, then designate the witness as a target, chill that witness, intentionally or otherwise -- and I'm not suggesting intentionally -- and then keep that information in its files, not disclose it to the defendants, and then submit a letter some six months after they said they didn't have *Brady* material and say, 'These witnesses may have exculpatory information; but since they're available and you know who they are, we're out of it.'" *Id*. at pp. 11-12. "I submit, your Honor, that fundamental fairness and the language and cases we cited in our brief under particularized need, .., mandate that we should at least see this information. If the Government wants to put restrictions on us that we can't disclose it, we would have to return it, we think we can work something out. But I respectfully submit the Government can't do it the way they've been doing it, the timetable they set, and under the terms that they set." *Id*. at p. 12. "That is correct, your Honor she [**Zrike**] did not invoke, we are told by Mr. Romano that she spent the better part of the day answering questions before the Grand Jury. Mr. Romano has told us that Ms. **Zrike** will not meet with us to discuss this case. ... Mr. Romano has also advised us that if called to testify at this trial she will invoke her rights under the Fifth Amendment. Mr. Romano has also shared with us that he believes that the testimony that Ms. **Zrike** gave both in front of the Securities and Exchange Commission and in front of the Grand Jury is clearly exculpatory as to Mr. Bayly and would be extremely helpful to Mr. Bayly. **Your Honor, Ms. Zrike is unavailable to us. We can't get to speak to her, and we can't get her testimony pursuant to subpoena down here. We want her Grand Jury testimony. We want her SEC testimony. We want any other exculpatory information that the Government has with respect to Ms. Zrike.**" *Id*. at pp. 14-15.	
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.	Unknown – no evidence in Docket that it was ever ruled on.

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DEFENDANTS' BRADY REQUESTS

	2. (4) Charging violations of Fifth and Sixth Amendments and attorney work product doctrine.	
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 Dkts.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. … 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). Further, the Court has stated its expectation that the gov't will comply with *Brady* & Giglio. By 7/30/04 the government should provide to the defendants summaries of the exculpatory information that lead to the gov't identifying Kathy **Zrike** & other witnesses as having

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		exculpatory testimony.
Bayly Motion to Compel Disclosure of **Zrike**, Dkt.237, 6/3/04.	Request for all **Zrike**/*Brady* material.	**Denied**, Dkt.290
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 (Dkt.276) & Amended Motion (Dkt.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 Dkt.336, 8/10/04)	Improper use or misconduct before Grand Jury.	**Denied** at Dkt.397, 9/13/04.

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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.
Pre-Trial Motions Hearing, 6/25/04, Dkt.285	DEFENSE: "Your Honor, we have received from the government what the government characterized as not *Brady* material, a summary of what Mr. Fastow said to the government. They said it is not *Brady* material. Why didn't we receive it then? How come they are giving this to us? With respect to *Brady*, we offered months and months ago in our motion, contrary to what Mr. Friedrich says, a list of people we attempted to talk to and who refused to talk to us because the government -- we offered to submit letters from lawyers, which we have, of the 20 people that the government -- 20 people who the government said had exculpatory information, 7 from Enron, 13 from Merrill. We've run into a brick wall. We've made the effort. That's why we're trying to deal with this issue of calling these individuals at trial and having them assert the privilege. Mr. Friedrich has been over this. He knows precisely what we've attempted to do. We have run into every single wall that the government set up. If that turning Fastow over to us, which is not *Brady* material -- in their view -- of course, we take a different view -- then there's no reason, Your Honor, legally, logically, ethically, why they shouldn't turn over to us the information of the individuals who they have identified as having exculpatory material, who we have prepared and had done for the Court, identified all the efforts we've made to talk to these people and do it their way. And we've been stopped." Pre-Trial Hearing Transcript, June 25, 2004, Dkt.285, at pp. 37-38 DEFENSE: "… **we think we need a hearing on *Brady*. Let me explain why: If the Fastow statement, according to the government, is not *Brady* material, then there's a fundamental difference of view between the defense and the government and the case law as to what exculpatory material means. And, Your Honor, we are now at the point where the materials that the government handed over to you –** DEFENSE: "What I'm suggesting, Your Honor, is now that we've received this disclosure this late in the day, even though we got this disclosure this late, the government tells us	**Denied** – same hearing:

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	this is not *Brad*y material, this is not exculpatory. *** THE COURT: This is the way they view it. But they have presented it to you and you do regard it as exculpatory. So, now you have that information in your possession; and you have your ability -- as to Mr. Fastow. DEFENSE: "I'm raising a *Brady* issue. I apologize for not explaining it clearly. *** DEFENSE: "But my point, Your Honor, is that the materials that the government selected as arguably *Brady* material were through the government's own view of what is exculpatory. THE COURT: What materials are you talking about? DEFENSE: "The statements by witnesses other than Mr. Fastow. THE COURT: The 302's? DEFENSE: "Correct, Your Honor. And grand jury testimony. THE COURT: And grand jury testimony. DEFENSE: "And SEC testimony. **I'm not only worried about what the government provided to you, I'm worried about what the government did not provide to you. Because if we now know that the government's definition of *Brady* is such that the Fastow statement is not exculpatory, then I am concerned that the application and definition of exculpatory that the government is using is skewed and is not in conformity with the law. And we don't know what we don't know.** What we do know is that the presumption that the government would like the Court to accept that it is complying with *Brady*, I suggest, is bankrupt. And it is bankrupt because we now know that a statement that is plain as day exculpatory, the government tells us is not exculpatory. It is an Alice in Wonderland world. **If we think that the government is calling this Fastow statement non-exculpatory, then I suggest that we cannot trust the government's judgment with regard to the materials that it continues to hold of SEC testimony, FBI 302's, and other materials that could go to the heart of this case. I join in the request of Mr. Schaeffer that the materials that**	THE COURT: I've previously ordered the government to have these transcripts available at the time of trial, if they should be required, that is to say on grand jury testimony. I forget whether I said SEC. I'm not sure how you would ever get SEC testimony in. In any event, the grand jury testimony which I think the defendants may have some argument to make. 302's do not have to be delivered by the government to the defendants at this time. They've been reviewed by me in order to see the basis for the government having disclosed these people to you as arguably having some information that may be exculpatory. Or in the case, I think, of Mr. Fastow, which I have not seen -- made his statement. I have seen the same description you've seen. The government is putting a characterization on that as not being exculpatory because they're looking at it in

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	were submitted to Your Honor be disclosed. I am also concerned about the materials that were not provided to Your Honor. And that is why I think we need a hearing on what the government views *Brady* to be as it's reviewing the materials within its possession. I hope I've made myself clear." Id. at pp. 35-43.	a larger context of what they think is incriminating testimony that he has given. So, it's a fine argument made by Mr. Zweifach. But at the same time, I tend to weigh these things in the context of advocates putting their own spin on this on their side of the table just as you do on your side of the table. And these witnesses are available subject to your subpoena power, same as the government. All right."
Furst Motion in Limine to Introduce Prior Testimony of Unavailable Witness, Dkt.348, 8/13/04 (Dkt.347 also)	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 Amendment privileges if called to testify at trial." In sum, the ETF simultaneously alerted the defense to the existence of witness who possessed arguably exculpatory testimony at the same time they designated those same *Brady* witnesses as "unindicted co-conspirators."	**Denied** at Dkt.397, 9/13/04. **Denied** again at trial. Tr. 4863-66
Bayly's Motion for Disclosure of Prior Testimony of Kathy **Zrike**, Dkt.494, 10/8/04.	*See* Dkt.230.	No docket ruling. See Dkt.290.
Furst's Motion to Admit prior statements of witnesses under Rule 806, Dkt.528, 10/12/04.	Request to admit various prior sworn exculpatory statements (withheld) of unavailable witnesses.	**Denied** at trial. Tr. 4863-66

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Bayly's Notice of prosecutorial duty to correct demonstrably false testimony and request for a hearing, Dkt.541, 10/14/04.	**Motion concerning failure of government to correct Trinkle's misrepresentation of the date of the so-called "Trinkle call" which the government knew was wrong from discovery materials in its possession and failed to disclose until after Trinkle had testified and returned to London.** "Notwithstanding their knowledge of this fact, the government has refused to correct the false testimony of Ms. Trinkle despite repeated requests by counsel for Mr. Bayly." Dkt. 541, at 1.	No docket ruling.
ON REMAND		Third Superseding Indictment Filed, Dkt.937, 4/5/07.
Status Conference Hearing, Dkt.925, February 16, 2007.	Request for production of exculpatory materials from Fastow generated in the discovery in the *Newby* civil litigation.	No docket ruling. No production of any materials from Government.
Status Conference Hearing, Dkt.939, April 4, 2007.	**Defendants concerned that there were not full disclosures made in the first litigation, there are "significant concerns that full discovery had not been given either in terms of *Brady* or possible other relevant material."** "We need all of Fastow's material. We never got Fastow's 302s in the first case. I understand that there are multiple volumes of Fastow's 302s." Dkt. 939, at 21. We repeatedly asked for *Brady* material from Mr. Fastow, particularly in the first trial. And that was never fully produced. We understand from Fastow's testimony in the Lay/Skilling trial, part of which I have seen, that there were multiple volumes of Fastow's 302s. And we don't know how many of those pertained to the barge trial because we still haven't been given those." *Id*. at 24. "And we don't know the full extent of all Fastow's possibly *Brady* material because it's never been provided." *Id*. Request for production of exculpatory materials from Fastow specifically generated in the discovery in the *Newby* civil litigation. (AUSA Spencer's Response: "I understand that all of the Enron documents and all of the Merrill Lynch documents were produced as part of the first litigation. And while I will go back and see … what new documents have been produced in that third category of unknowns, I, again, think that it's reasonable to say that it's going to be a nominal amount of documents." *Id*. at 22.)	**No docket ruling. No production of any materials from Government**. AUSA Spencer response: (1) Well, I'll commit to the Court that I personally will 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 we will make subsequent supplemental production, Dkt.939, at 15; (2) Well, that's obviously going to require quite a bit of work on my part to fulfill the

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	The Court stated: "Well, this is the first I've ever heard of any *Brady* claim being made against the Government in connection with this." *Id*. at 24.	Government's obligation. *Id*.; (3) "my agents inform me that we believe that we have produced most of the documents," *Id*. at 16; (4) "As I said, your Honor, I think the discovery -- additional discovery is going to be a nominal amount." *Id*. at 20.
Brown's Motion to Compel Production of Documents and *Brady* Material, Dkt.948, 8/15/07.	Requests for production of exculpatory materials, including, for example, (1) Fastow raw notes and any other record evidence (existence of which was clearly evidenced by interim proceedings in *Newby* and *Skilling*); (2) evidentiary materials from Merrill's inside and outside counsel and Enron's inside and outside counsel; (3) agreements, understandings made by or between the ETF and Glisan; (4) evidence from individuals who participated in and regarding the Fastow/Bayly Phone call; and (5) recorded evidence, in any form, supporting Defendants' theory that Fastow and Enron only agreed to use best efforts to re-market Merrill's interest in the Barges.	No docket ruling. No production of any materials from Government.
Brown's Motion for Order Granting Motion to Compel Production of Documents and *Brady* Material, Dkt.974, 9/18/07.	Renewing requests for production of exculpatory materials listed above.	No docket ruling. Government produces two "composite" 302s of Fastow on 9/28/07.
Bayly and Furst's Motion to Compel the Production of Specific *Brady* Material, Dkt.979, 9/28/07	**Request for exculpatory information from the following noting that the prior "summaries" from the first trial are insufficient**: Kelly Boots, Kathy **Zrike**, Mark McAndrews, Kevin Cox, Paul Wood, Vince DiMassimo, Jeff McMahon, Andrew Fastow, Schuyler Tilney, **Gary Dolan**, **Alan Hoffman**, Tina Trinkle, Brad Bynum, Bowen Diehl, and Ace Roman.	No docket ruling. No production of any materials from Government.
Brown's Reply in Support of Motion to Compel Production of Documents and	Renewing requests for production of exculpatory materials listed above.	No docket ruling. No production of any materials from Government.

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Brady Material, Dkt.993, 10/10/07.		
Reply in Support of Bayly and Furst's Motion to Compel the Production of Specific *Brady* Material, Dkt.1003, 10/26//07	Renewing request for exculpatory information from the following individuals (and noting that the prior "summaries" from the first trial are insufficient): Kelly Boots, Kathy **Zrike**, Mark McAndrews, Kevin Cox, Paul Wood, Vince DiMassimo, Jeff McMahon, Andrew Fastow, Schuyler Tilney, Gary Dolan, Alan Hoffman, Tina Trinkle, Brad Bynum, Bowen Diehl, and Ace Roman.	No docket ruling. No production of any materials from Government.
Pre-Trial Conference Motion Hearing, Dkt.1010, 11/16/07.	"Judge, we really can't work [*Brady*] out. I don't know if you want to hear argument right now, but, with all respect, we tried to work it out with Mr. Spencer. He keeps saying, 'I am going to comply with *Brady*.' … [W]e are asking the Court to do -- We need your help on this one." Dkt. 1010, at 78. Specific requests, as enumerated in Motions to Compel, for evidence regarding Fastow, **Zrike** ("Ms. **Zrike**'s grand jury testimony, Ms. **Zrike**'s SEC testimony and on and on – it's all listed there -- these are things we do not have. I believe I just demonstrated to you they have to be *Brady*. They are *Brady*. We're not speculating. And, yet, Mr. Spencer steps up and says, 'We'll comply with *Brady.* But **Zrike**'s grand jury and SEC? Huh-uh. You can't have that at all.'" *Id*. at 83. "Mr. Spencer's view of *Brady* to date discloses nothing other than the fact he cannot define what it is, and it includes exculpatory and impeaching information. The Supreme Court in *Strickler vs. Greene* held that Mr. Spencer has a duty to learn of and to disclose all exculpatory information or impeaching information. On April 4th Mr. Spencer committed to this court that he would personally review all the documents that the Government had reviewed the first time, the additional documents, even though we were talking at that point about the Newby discovery, we were talking at that point about the volumes of Fastow's 302s that are still out there. He has not done that. He said he would produce supplemental discovery by August 1. We got nothing. Only recently we received from him a few meager pages of additional Fastow 302 material that is actually the composite Fastow 302 that Agent Bhatia did after a number of revisions and consultation with other people. It's not even the original 302s. And we still don't have any material underlying Fastow's 302s, which I am sure is equally *Brady* material. The Fifth Circuit just recently over the Government's objection has ordered the Government to produce all the	**No docket ruling. No production of any materials from Government**. AUSA Spencer response: "And, Your Honor, I have not reviewed all of the decisions that were made by the Task Force the first time. I have consulted with them. I believe that they acted in good faith the first time." Dkt.1010, at 83-84. "So, there are different incidents that they're using to say, 'Ah ha! We discovered this piece of information. This is critical to our defense' -- which I don't think it is – '**It must be in the 302 or it must be in the grand jury testimony' -- which it's not**. And it's frustrating for me." *Id*. at 85.

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	material underlying Fastow's 302s in the Skilling case. We want that material as well to the extent it applies to the *Nigerian Barge* case, Merrill Lynch and any LJM2 transactions. We have no doubt that anything Mr. Fastow said in that regard that the Government has any sort of recording or knowledge of will constitute exculpatory information and/or impeaching information as to these defendants." *Id*. at 88.	
Motion for leave to issue Rule 17(c) subpoenas, Dkt.1013, 12/7/07	Request to obtain access to internal government documents concerning Brown's outstanding conviction, and sentence.	No docket ruling. Government produces exculpatory evidence, withheld for five years in violation of *Brady*, on December 13, 2007, including Grand Jury testimony and 302s from Merrill inside/outside counsel.
Pre-Trial Conference Motion Hearing, Dkt.1034, 12/21/07.	Request renewed for all Fastow materials (raw notes, original 302s, Binders, etc.). Possibility of Motion to Dismiss based on outrageous prosecutorial misconduct in light of *Brady* production of 12/13/07, demonstrating that critically exculpatory materials were withheld for 4+ years and the prosecutor's purposefully misrepresented facts to the jury and the Court as evidenced by that new discovery.	No docket ruling. No production of any materials from Government.
Brown's Supp. Motion to Compel Production of Documents and *Brady* Material, Dkts.1029, 1030 1/7/08.	In light of (1) the government's recent, and still incomplete production of *Brady* material, which has clarified the existence of additional, significant exculpatory material; and (2) the discovery of critical exculpatory evidence from an Enron executive, withheld from Defendants in this case in violation of *Brady* and its progeny, and which also demonstrates that additional exculpatory materials are likely being withheld, Defendant Brown files this Supplemental Motion to Compel Production. Specific and renewed request for all previously requested and still undisclosed materials; specifically (1) the complete Andrew Fastow File, including all raw interview notes, 302s, composite 302s, as well as the so -called Fastow Binders, and any material in the possession of the S.E.C., including raw notes from interviews; (2) any material, exculpatory letter(s) or submissions, written by any attorney for a material witness to and/or participant in the Barge transaction to the Enron Task Force or Department of Justice, the Assistant Attorney General for the Criminal	No docket ruling. No production of any materials from Government.

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	Division and/or her deputy on or around April 25, 2005, and to the SEC, on or around July 28, 2006, providing a first-hand account of the Barge transaction by a significant participant in it, and all attachments/exhibits to those letters and submissions, including e-mails written within Enron, evidencing that there was no buyback agreement or promise to buyback or guarantee a buyout of Merrill's equity (including copies from the files of named ETF members); and (3) in light of still deficient production, renewed and specific requests for additional evidence (clearly in existence) from Kathy **Zrike**, Kevin Cox, Gary Dolan, and Alan Hoffman.	
ON APPEAL TO FIFTH CIRCUIT Dkt.1038, 1/15/08	**Pursuant to Court Order, all three defendants file notices of appeal (for interlocutory review of their claims that a second prosecution would violate Double Jeopardy)**	
Motion to Compel Production of Fastow Binders, Dkt.1039, 1/15/08.	Request for all materials, evidence, raw interview notes, 302s, draft 302s, composite 302s, interview memoranda, and any other communications by, regarding, from, and to Andrew Fastow by the Department of Justice, Enron Task Force, IRS, and SEC (all cooperating agencies in the Task Force investigation)–as the government has been ordered to produce them in *United States v. Skilling*.	No docket ruling. No production of any materials from Government.
Brown's Second Supplemental Motion to Compel Production of Documents and *Brady* Material, Dkt.1041, 1/16/08.	Specific and renewed request in light of external discovery, for (1) any material, exculpatory letter(s) or submissions, written by any attorney for a material witness to and/or participant in the Barge transaction to the Enron Task Force or Department of Justice, the Assistant Attorney General for the Criminal Division and/or her deputy on or around April 25, 2005, and to the SEC, on or around July 28, 2006, providing a first-hand account of the Barge transaction by a significant participant in it; and (2) all materials, evidence, raw interview notes, 302s, draft 302s, composite 302s, interview memoranda, and any other communications by, regarding, from, and to Andrew Fastow by the Department of Justice, Enron Task Force, IRS, and SEC (all cooperating agencies in the Task Force investigation)–as the government has been ordered to produce them in *United States v. Skilling*.	No docket ruling. No production of any materials from Government.
Brown's Motion to Compel Production of Documents and *Brady* Material *Instanter*, Dkt.1063, 3/17/08.	Specific and renewed request for (1) Fastow materials; (2) McMahon materials; (3) **Zrike**, Dolan, and Hoffman materials; and (4) exculpatory evidence from Barry Schnapper.	No docket ruling. No production of any materials from Government.

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ON APPEAL TO FIFTH CIRCUIT 3/24/08	**On 3/24/08, and only after the Fifth Circuit orders the Fastow raw notes unsealed in Skilling, government produces Fastow raw notes to the defense. They contain significant *Brady* materials.**	
ON APPEAL TO FIFTH CIRCUIT	**On 5/28/09, Brown receives over 2,000 pages raw notes and transcriptions of interviews withheld since 2004, and clarifying various other belated productions. Stokes writes that Skilling has recently received these documents, and while many have nothing to do with the Brage transaction, he is providing them out of "an abundance of caution"**	
ON REMAND 8/13/09	Mandate from Fifth Circuit is issued as to Brown on August 13, 2009. Brown files his Motion to Dismiss for Violations of the Speedy Trial Act on April 13, 2010. No activity in case until court sets pre-trial conference for April 16, 2010.	
ON REMAND	Neither the court nor the government filed anything as to Brown as of 3/31/10.	On 3/30/10 Brown receives production of 1000 pages of *Brady* material from Stokes. Careful review of the electronic copy disclosed that the disk contains highlighting of *Brady* material selected by the ETF in 2004. The highlighted material was the basis for the ETF's "summaries" that the court ordered given to the defense in 2004 – over ETF objection – after its in *camera* review. Additional scrutiny discloses that the ETF withheld from the court-ordered summaries irrefutable *Brady* material of **Zrike**, Dolan, Tilney and McMahon–that the ETF had itself highlighted in these

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		documents.
Brown's Motion to Compel Production of Documents and *Brady* Material, Dkt.1157, 5/14/10.	Brown sets forth, again, a series of discrete areas of *Brady* material which must be produced, including, (1) the McMahon materials which have been requested since 2007; (2) additional materials from outside counsel for Enron; (3) correspondence by and between counsel for Merrill and counsel for Enron; (4) transcripts of any undisclosed Grand Jury testimony related to the Barge transaction; and, other categories of materials. All of this material has been "requested" for years.	No docket ruling. On 6/1/10 government produces two FBI 302s and one SEC transcript of Vinson & Elkins Attorneys, and ETF testimony from a Merrill employee. Government says this is not *Brady* material. Otherwise, response states, Dkt.1189, that there is no additional *Brady* material.
Brown's Reply in Support of Motion to Compel Production of Documents and *Brady* Material, Dkt.1197, 6/11/10.	Renewing, and where necessary, clarifying requests for specific *Brady* materials still not produced.	No docket ruling. No production of any materials from Government.

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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 p. 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. Dkt.1168, Ex. N.	"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." Dkt.1168, Ex N, 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, KiraToone-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.
Pre-Trial Transcript, April 15, 2004, Dkt.175.	Friedrich: "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. If, as Mr. Sorkin indicated, that they, you know, try to reach these people and are unable, for example, to place them	

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	under subpoena, are unable to find out from the person's lawyer what the person might say, then we're willing to revisit the issue and we may provide further information at a later time." Dkt.175, at p. 22.	
Government letter with list of "unindicted co-conspirators" in Barge transaction4/22/04. Dkt.1168, Ex. T.	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, BenGlisan. 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 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. "[W]e've provided a list of names of potentially exculpatory individuals. **Ourbelief 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 thesame 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	**No underlying grand jury testimony of witnesses, identified as possessing exculpatory information, was turned over to Defendants until December 2007.**

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	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.	
Government Response to Furst's Motion for Reconsideration of *Brady* Motion 5/7/04, 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 known 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 *Brady*. And that procedure is **providing the defense with a list of potentially exculpatory witnesses complies with *Brady***."Dkt. 234, at 23-24.	Court ordered *in camera* review of some government material – which production to the Court was government selected. Dkt.285, at 34-35.
Government "*Brady*" letter, 6/1/04. Dkt.1168, Ex. I.	"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. I, at 2. Highly-redacted summaries of information from KiraToone-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 ofits substance and disclosure … but also because thedefendants [a]re aware of Fastow's identity and his role as a coconspirator.**" Dkt.248, at 2. "Ironically, Fastow's mere assertion (that histestimony would incriminate him) would belie the suggestion that his testimony is exculpatory inthis 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.	MR. SCHAEFFER (for Bayly): … the *Brady* issue….[I]n connection with it, Your Honor, at your direction, my understanding is that the government produced to you, I believe, on June 1st, approximately a week before our	**Court finds that government has met its *Brady* obligations**. Dkt.282, at 92-93.

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	previously scheduled June 7th trial date, *Brady* material. Your Honor, my application is to you to direct the Court -- to direct the government at this time to make that material available to each of the defendants. Thank you, Your Honor. *** MR. FRIEDRICH: Yes,Your Honor. I don't think – I don't believe just the fact that they've been given to the Court to review means that should be turned over for the same reasons that we've argued about. I think this is now the third time. There's a procedure that we set up to turn those over to the Court to review. **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." Pre-Trial Hearing Transcript, June 25, 2004, Dkt.285, at pp. 35-37. FRIEDRICH: "Just to say, number one, in terms of some of the things that Mr. Cogdell said, it seems every time that *Brady* comes up, it's just sort of compassion speeches by the defense, but absolutely no response to the law we cited to the Court and the authority that we've cited ... that says what we are doing is correct. And it complies with *Brady* by making the names of witnesses available. That is a process that complies with *Brady*, period. There's no response to that. They just don't respond. They just get up and get angry and make compassion speeches. The reason for that is clear, Your Honor. We submit what these defendants desperately want to avoid is a trial on the merits of this case. And by talking again and again and	July 14, 2004 **Court orders government to provide summaries**.

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	again about *Brady* and things that we've already briefed, that we've already litigated, they are distracting us from moving the case forward. They are distracting us from litigating things like the motion in limine. Those have been briefed for weeks and weeks. Those will matter. Those are definitely opportunities for the Court to review and clarify and narrow the issues that will be presented to the jury. That's where we think it makes sense to go next." *Id*. at p. 44.	
Government "*Brady*" letter,7/30/04. Dkt.1168, Ex. O.	"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 trial. [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 witness's' 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."	**Newly produced evidence shows:** **Summaries, now known to be substantially false, misleading or incomplete especially as to information possessed by Gary Dolan, Alan Hoffman, Jeff McMahon, and Kathy Zrike**
8/1/04 through 9/1/07.	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	

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	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 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.	**Fifth Circuit does not reach any *Brady* issues on appeal**.
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. Court says in response to defense: "Well, this is the first I've heard of any *Brady* claim being made against the Government in connection with this." *Id*. At 24.	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 7/15/10**.
Government's Opposition to Brown's Request for Production of *Brady* Materials, 10/1/07. Dkt.986.	"Defendants' 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	**No Court disposition on this or any other *Brady* matter as of 7/15/10**. **Defendants tried repeatedly to use the Fastow summary at trial to impeach witnesses. The government**

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	Defendants in the first trial . . . used the summary of [Fastow's] statements to impeach other witnesses." *Id*. at 9.	**vehemently objected, and the District Court did not allow use of evidence.**
Government's Opposition to Bayly and Furst's Request for Production of *Brad*y 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 contain *Brady* material is not sufficient to require a remand for in *camera* review, much less reversal for a new trial.' *United States v. Morris*, 957 F.2d 1391, 1403 (7th Cir.1992)." *Id*. at 3-4. "Finally, Defendants seek discovery of information which is inculpatory, even though such information is not discoverable under *Brady*. ...**It is undisputed that these lawyers were not fully informed of the terms of the transactions, or even involved in the negotiations**." *Id*. at 6. "The Defendants' requests for materials related to Katherine Zrike are illustrative. The Defendants called Ms. Zrike, a sympathetic colleague of the Defendants, at the first trial, and the Defendants elicited information they believe was exculpatory. Clearly, they were able to obtain this information 'through … other means.' Having obtained her testimony, the Defendants are hardpressed to argue that they did not have an opportunity to discover additional, exculpatory testimony, and therefore are entitled to discovery of the Form 302s, grand jury testimony, or other testimony." *Id*. at 7.	**No Court disposition on this or any other *Brady* matter as of 7/15/10**. **Zrike testimony disclosed after these representations reveals startling exculpatory information the government withheld. Government still withholding Zrike SEC testimony.**
Pre-Trial Conference Transcript, 11/16/07. Dkt.1010.	"And, Your Honor, I have not reviewed the decisions that were made by the Task Force the first time. I have consulted with them. I believe that they acted in good faith the first time. I have reviewed a number of pieces of evidence. They've asked me to review a number of specific pieces of evidence, particularly those documents and testimony that's been taken since the first *Barge* trial has ended, and what I have identified as *Brady* in those or when I just even thought it wasn't *Brady* but itwas going	

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	to be argued as some sort of extreme theory, I produced those also." Dkt.1010, at 83-84. "I am happy to submit any piece in-camera. I am happy to review the former Task Force's decisions." *Id*. at 85. "**The Government understands its *Brady* obligations as being fulfilled by disclosing exculpatory information without necessarily disclosing the 302, without necessarily disclosing the grand jury testimony, and the Task Force did that in advance of Barge I**. There were no issues that came out of that on appeal. There were no decisions that were made. There were no sanctions that were issued. There was no finding that we didn't submit all the *Brady*. **They now believe that we have this Fastow evidence and they keep repeating that. And, suffice it to say, the Government takes a very different view.**" *Id*. at 86-87.	Fifth Circuit did not reach any *Brady* issues on appeal. AUSA Spencer makes limited production of additional 302s and Grand Jury testimony of Merrill employees on December 12, 2007.
Pre-Trial Conference Transcript, 12/21/07. Dkt.1034.	AUSA Spencer: "[W]ith regard to the *Brady* materials, there are several points to be made there. First of all, the defense is taking the position this is the first time that any of this [the production of December 2007] has been disclosed, and that's simply not the case. **The Court is aware the government made extensive disclosures about the testimony, and *Brady testimony* prior to the first trial**." Dkt.1034, at 21 (emphasis added). AUSA Spencer: "I have not [had] a chance since Mr. Hagemann filed the motion to sit down and compare what was disclosed in the summaries to - - -." *Id*. at 22. "THE COURT: Well, then how can I accept what you are saying to me that it was all disclosed and it wasn't a *Brady* violation if you haven't examined the letters yourself in order to make those comparisons? **AUSA SPENCER: If the question is whether or not there is a *Brady* violation, that needs to be seriously briefed and considered**."*Id*. at 22. "AUSA SPENCER: With regard to the Fastow notes, I don't think those will be – it sounds like we are going to make, come to a resolution on that relatively quickly, and again – THE COURT: When do you expect that will be resolved? AUSA SPENCER: Well, I have not even seen the order	**No Court disposition on this or any other *Brady* matter as of 7/15/10**.

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	yet on it, Your Honor. Nobody has seen the order. THE COURT: Is it your understanding, though, that the Fifth Circuit has ordered the disclosure of those notes? AUSA SPENCER: I have heard that representation from the defense attorneys this morning. It's the first I heard about it, when I walked in the courtroom today. **** THE COURT: How long would it take you to come up, I No. 1, determine whether you are going to make the same disclosure on Mr. Fastow in this case since the Fifth Circuit now has ordered in the other, in the case that I gather that it has before it on appeal, and how long would it take you to review all those notes and disclose the portions of it that, or at least, I guess, No. 1, reach agreement with the defendants on what portions should be. Mr. Hagemannis wanting something dealing with those LJMs, or whatever they were, in addition to just what had to do with the barge transaction? AUSA SPENCER: I understand the Court implicitly to be saying that you would urge us to conduct ourselves, the government, to the extent the government – THE COURT: I am just asking how long will it take to work through all of that, because if this is a precedent that would indicate **these defendants ought to have the same kind of information or basic notes of what Mr. Fastow said, since he was pretty critical to this barge transaction**. AUSA SPENCER: I guess the answer to my question, is the Court looking at the Fifth Circuit ruling as precedential? To the extent that it is, I would answer the question that we would anticipate producing the notes within the -- assuming the order says what it says, assuming there are no other significant issues, I would be in a position to produce these notes by the end of next week." *Id*. at 25-27.	
Government's Response to Defendants' Motions to Compel Production of Fastow Binders and	**Government resumes opposing production of Fastow raw notes: "These Motions should be denied because the Defendants have no right under Federal Rule of Criminal Procedure 16 or *Brady* to review any and all**	**On 3/24/08, and only after the Fifth Circuit orders the Fastow raw notes**

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Related Materials, 2/19/08. Dkt.1059.	**notes of** federal law enforcement agents. The Defendant's Motion to compel production based upon *Brady* is not timely, given the absence of a current trial setting." Dkt.1059, at 1. "**[T]he government is not obligated to produce the notes under *Brady* and its progeny**."*Id*. at 5. "**There has been no finding that these raw notes contain such *Brady* information - not by several different teams of government lawyers, not by any District Court, and not by the Fifth Circuit. But at this time, there is no ground on which to order the government to produce the raw notes**."*Id*. at 6.	**unsealed in *Skilling*, government produces Fastow raw notes to the defense. They contain significant *Brady* materials.**
ON APPEAL TO FIFTH CIRCUIT	Stokes writes that Skilling has recently received these documents, and while many have nothing to do with the Barge transaction, he is providing them out of "an abundance of caution." Letter from Patrick Stokes to Sidney Powell, May 28, 2009.	On 5/28/09, Brown receives over 2,000 pages of raw notes and transcriptions of interviews withheld since 2004, which clarify various other belated productions.
ON REMAND Government "production" letter, 3/30/10.	The accompanying letter states that these documents formed the basis for the ETF's "summaries" that thecourt ordered given to the defense in 2004 – over ETF objection–after its*in camera* review. Stokes further represents via email that these were, in fact, the exact same documents that were provided for the court's*in camera* review. Email from Patrick Stokes to Sidney Powell, March 19, 2010.	On 3/30/10 Brown receives production of 1005 pages of *Brady* material from Stokes. **Materials were highlighted before submission to the court; yet, in court-ordered "summaries" to the defense, highlighted and other *Brady* material was willfully excluded.**
Pre-Trial Conference Transcript, 4/16/10. Dkt.1051.	"Ms. Powell has throughout this accused the government of misconduct, ...,*without any basis in fact whatsoever*.We are not -- nonetheless, we are recognizing that it's Mr. Brown who is on trial. And so, we are trying to be -- trying to work out a reasonable resolution. But it isdifficult when the *allegations against the government are simply not founded in any fact* and it makes it difficult for us to negotiate in that sort of posture." Dkt.1051, at 13.	**No Court disposition on this or any other *Brady* matter as of 7/15/10**.
Government's Response	"The Court should deny Brown's motion in its entirety	**No Court disposition**

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in Opposition to Brown's Motion to Compel, 5/28/10. Dkt.1189.	because Brown has already received from the government all the *Brady* materials in the government's possession, custody and control to which he is entitled." Dkt.1189, at 1. "As has become standard fare for Brown, he levels serious allegations of prosecutorial misconduct with little to no regard for actual facts. In this motion, Brown breezily accuses prosecutors of rampant *Brady* violations as his basis for a stunningly broad set of requests. Hisallegations are without basis, and his requests far exceed any reasonable interpretation of *Brady*. **Moreover, his motion should be denied in whole because the government has complied and will continue to complywith its discovery obligations in this case**, whether under Rule 16, *Brady*, *Giglio*, or *Jencks*." *Id*. at 4-5.	**on this or any other *Brady* matter as of 7/15/10**.
Government "production" letter, 6/1/10.	"While these memoranda do not contain exculpatory information, the government will provide them to Brown. Dkt.1189, at 7. "The government does not possess exculpatory material related to Lyons. **However, because the government has continued to provide extensive disclosures related to this case despite it exceeding its discovery obligations**, it will make available to Brown a transcript of his testimony related to issues raised in Brown's motion." *Id*. at 8.	On 6/1/10 government produces two FBI 302s and one SEC transcript of Vinson & Elkins Attorneys, and ETF testimony from a Merrill employee. Government says this is not *Brady* material. **No Court disposition on this or any other *Brady* matter as of 7/15/10**.

CHART 3: 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. Dkt.1217, Ex. B-1, at pp. 4-7.
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.	**Dkt. 1217, Ex. D, at 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." ***Id.* at 000494**: "Andy agreed E[nron] would help remarket [the] equity w/in next 6 months–**no further commitment**" ***Id.* at 000513**: "Enron would use best efforts to help remarket the equity." ***Id.* at 000514**: "A.F. *agreed* that E[nron] would help them remarket in 6 mo[nth]s." ***Id.* at 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.1217, Ex. C, at p. 18.

DOCUMENTS WITH ETF HIGHLIGHTING	**PORTIONS HIGHLIGHTED BY ETF AS *BRADY* BUT OMITTED FROM JULY 30, 2004 "SUMMARY" DISCLOSURES**
Raw Notes of Schuyler Tilney from 2002	Ex. F, at 000675, 000703 – Tilney wanted Bayly involved because in the event the Marubeni deal fell through, he didn't want it on his neck alone *Id*. at 000679 -ML had no legal recourse to Enron and that ML was willing to place 7 million at risk to benefit relationship with Enron. *Id*. at 000727 -"no legal obligation for Enron to do anything"

CHART 4
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, Not Disclosed Until 2007 and 2010.**
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, Fastow 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.	**From notes just disclosed 3/30/10:** **Jeffrey McMahon: "Disc[ussion] between Andy [Fastow] & ML [Merrill Lynch]. Agreed E[nron] would use best efforts to help them sell assets." Dkt.1217, Ex. D, at #000447.** **"NO - never guaranteed to take out [Merrill Lynch] w/rate of return." *Id.* at 000493.** ***Id.* at 000494**: "Andy agreed E[nron] would help remarket [the] equity w/in next 6 months–**no further commitment**" ***Id.* at 000513**: "Enron would use best efforts to help remarket the equity." ***Id.* at 000514**: "A.F. *agreed* that E[nron] would help them remarket in 6 mo[nth]s." ***Id.* at 000560**: "Andy said Enron would help remarket in next six months." **"[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.** *** 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.1217, Ex. C, at p. 8.** **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. 9-10, 14.**

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.** **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.** **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.	**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.**

Government Representations at *Brown I*	ETF Concealed *Brady* Evidence Requiring New Trial
Matthew Friedrich: "Mr. Fuhs – there's no evidence that Mr. Fuhs made any effort to talk to a lawyer or had any reliance on a lawyer about what was going on." Tr. 6539. ***THE GOVERNMENT MADE NO DISCLOSURE WHATSOEVER FOR ALAN HOFFMAN WHO HAS SIGNIFICANT EXCULPATORY EVIDENCE.**	**Alan Hoffman: "HOFFMAN had a discussion with FUHS in which he mentioned that ML hoped to be out of the deal in a few weeks or months." FBI 302 of Alan Hoffman, October 12, 2002, Dkt. 1204, Ex. A. at p. 3.** **"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." *Id.* at p. 5.** **"Moreover, there was nothing in the written agreement between Enron and ML which reflected that Enron would help ML find a third party buyer for their interest in the Nigerian Barge. However, it 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.*** **"A few days before Christmas 1999 HOFFMAN received a phone call from BROWN. BROWN needed HOFFMAN's assistance with a deal involving ENRON and the purchase of NIGERIAN BARGES. BROWN wanted HOFFMAN to focus on three (3) areas; the non-recourse loan, the indemnification agreement, and reviewing the deal to make sure that there were no adverse tax consequences." *Id.* at p. 1.** **"HOFFMAN held a very high opinion of BROWN and FUHS and felt that they were very ethical. He felt that they were excellent bankers who would point out any problematic accounting issues and they were very vigilant about pointing out accounting issues." *Id.* at p. 4.** **"HOFFMAN was shown a copy of an E-mail from FUHS to HOFFMAN dated 12/28/1999 (bate stamped ML41589).... HOFFMAN had oral conversations with DOLAN about this draft engagement letter." *Id.* at p. 5.**

Government Representations at *Brown I*	ETF Concealed *Brady* Evidence Requiring New Trial
Matthew 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 you what he knew at the time the deal was." Tr. 6538-39. ***See also* Dkt.1204, at p. 14 n.16. The government attributed all Fuhs' wrongs to Brown: "Mr. Brown's group was tasked with getting the deal done, with actually getting the deal closed. Mr. Bill Fuhs worked for Mr. Brown. His job was to make sure that the deal actually got executed. Mr. Fuhs, when it came down to actually getting the stuff put together, was the guy who dealt with Mr. Boyle at Enron." Tr. 6167. Even more explicit and misleading is Ruemmler's argument in summation: "The engagement letter is addressed to Mr. McMahon, again, consistent with the evidence that Mr. McMahon is the person who makes the original guarantee. … And Mr. Fuhs says -- who we know has already had a conversation with Mr. Brown… -- told you he has no idea why that language is in the letter and that is totally inconsistent with his understanding of the deal. That's just not credible on its face, ladies and gentlemen." Tr. 6222. *See also* Tr. 412, 6143, 6212, 6220-21, 6223, 6230-31, 6266, 6534, 6538.**	**Gary Dolan: "DOLAN was shown a copy of an E-mail from WILSON to DOLAN dated 12/23/1999 (Bate stamped ML034707). This E-mail contained a copy of the proposed changes to the engagement letter made by DOLAN. DOLAN acknowledged that the handwriting on the page is his. DOLAN does not remember talking to anyone at Enron about the changes he made to the engagement letter. However, DOLAN did receive handwritten comments from someone from Enron. 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." Dolan knew "that such an agreement would be improper because such a transaction could be viewed as a 'parking' transaction." Dkt.1217, Ex. B-1, at pp. 5-6;** **"DOLAN also had a conversation with JEFF WILSON 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." *Id.* at p. 5.** **"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." Dkt. 1217, Ex. B-1, at 6.**

Government Representations at *Brown I*	ETF Concealed *Brady* Evidence Requiring New Trial
Kathryn Ruemmler: "And so what did they do, ladies and gentlemen? They cut her [Zrike] out. They cut her out of this call on December 22nd, and they cut her out of this call between Mr. Bayly and Mr. Fastow. Ms. Zrike was never present for these conversations in which this verbal guarantee was discussed." Tr.6206.	**Schuyler Tilney: Tilney believed that Katherine Zrike, in-house counsel for Merrill Lynch was on the Bayly/Fastow phone call. Dkt.1217, Ex. F, DOJ-ENRONBARGE-000678. *See id.* at 000677 (listing call participants, including Kathy Zrike); 000726 (same).** **Kelly Boots: "On the telephone call between Enron and Merrill Lynch were: from Merrill Lynch SCHUYLER TILNEY (who was involved as a Relationship Manager), FURST, a Merrill Lynch credit person (BOOTS does not know if this person's name was KEVIN COX), a female who may have been an attorney and a senior person from the Investment Banking side." Boots FBI 302.**

CHART 5: ZRIKE'S GRAND JURY TESTIMONY CONTAINS MATERIAL THE ETF RECOGNIZED AS *BRADY*, BUT WITHHELD AND IT PROVES BROWN'S INNOCENCE

Government's "Summary" Pre-trial "*Brady*" production regarding Katherine Zrike, from July 30, 2004.	**ETF WITHHELD Evidence From Katherine Zrike's Grand Jury Testimony of 4/15/03, Disclosed to Brown on 12/12/07, and Brady Highlighting Produced on 3/30/10.**
The government's summary was misleading, incomplete and altered to minimize Zrike's actual testimony: "*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." Dkt.1168, Ex. O, at p. 9. "Zrike *believed* that there was a business understanding between Enron and Merrill that Enron would remarket the barges." *Id.* "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." *Id.* "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 [Nigerian Barge Deal]." *Id.* BROWN'S GRAND JURY: "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." (GJ Tr. at 88, lines 13-23)" (Dkt. 311; RE2). I thought we had received comfort from Enron that we would be taken out of the transaction within 6 months or we would get that comfort. If assurance is synonymous with guarantee, then that is not my understanding. If *assurance* is interpreted to be more along the lines of strong comfort or use best efforts, that is my understanding." (BrownX980, 980B: 76, 77, 81, 82, 88, 91, 92; Tr. 3238-41). Yellow highlighting is material the ETF itself highlighted as *Brady* but then withheld from its summary disclosures. Other material, in **right** column, herein was also withheld.	"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 p. 75. "[T]hey 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 [to assist in locating a third-party]." *Id.* at pp. 10-11, 15. "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." *Id.* at 55. "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.***[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. *See also* id. at 66-70 (same, including Alan Hoffman's involvement negotiating with V & E). "It went to the DMCC because that's where I decided it would be best to be vetted. *Id.* at 123, 128. "I talked [with Tom Davis] 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 ..." *Id.* at 186.

CHART 6: ETF-HIGHLIGHTED McMAHON RAW NOTES CONTAIN MATERIAL IT RECOGNIZED AS *BRADY* BUT WITHHELD AND WHICH BELIES GOVERNMENT REPRESENTATIONS AT TRIAL

The ETF's Representations At Trial Regarding The "McMahon Guarantee" Are Directly Belied By Evidence IT Marked As *Brady* But Withheld	**ETF-Highlighted Raw Notes of Statements by Jeff McMahon in June 2002, Withheld From Brown Until March 30, 2010**
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 (emphasis added). **Hemann**: "The purpose of the handshake … was to confirm the deal that had been cut by Mr. McMahon." Tr.404 (emphasis added). **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 (emphasis added). **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 (emphasis added). **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 (emphasis added). **Ruemmler**: "Remember again what Mr. Glisan told you, that ... Andy Fastow was the one who ratified the commitment that had already been made by Mr. McMahon." Tr.6218-19. * Yellow highlighting denotes material that the ETF deemed *Brady* evidence in 2004 but withheld from the defense. Other material herein was also exculpatory evidence that was wrongly withheld.	"Context of Call - ML [Merrill Lynch] had approved deal internally." Dkt.1217, Ex. D, DOJ-ENRONBARGE-000447 (Roach). "**Never made rep[resentation] to ML [Merrill Lynch] that E[nron] would buy them out at price or @ set rate of return.**" *Id.* at 000449 (Roach). Andy said–Enron help remarket in next six months. *Id.* at 000560 (Pittrizzi). "No recollection of a promise (to re-buy)" *Id.* at 000544 (DeMots). "**NO - never guaranteed to take out [Merrill Lynch] w/rate of return.**" *Id.* at 000493 (Kirschner). Andy said E would help remarket equity w/in next 6 months. –**no further commitment**. *Id.* at 000494 (Kirschner). "AF [Fastow] agreed that E[nron] would help them [Merrill Lynch] remarket the equity 6 mo[nths] after closing." *Id.* at 000450 (Roach). "Andy [Fastow] 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." *Id.* at 000478 (Henseler). "A.F. agreed that E[nron] would help them remarket in 6 mo[nth]s." *Id.* at 000514 (Casette). "Disc[ussion] between Andy [Fastow] & ML [Merrill Lynch]. Agreed E[nron] would use best efforts to help them sell assets." *Id.* at 000447 (Roach).

CHART 7: ALL CALL PARTICIPANTS VERIFY BROWN'S GRAND JURY TESTIMONY WAS TRUE

Matthew Friedrich: "The people who testified there was a buyback agreement were many, many witnesses. ... The people who told you, among others, that there was an oral side deal and a buyback agreement were Eric Boyt, John Garrett, Ben Glisan, Michael Kopper, Tina Trinkle. And they're all telling you the same thing, that there's a buy-back agreement." (Tr. 6524).

ENRON	STATUS
Jeff McMahon: "at no time did Mr. McMahon say anything during [his original telephone conversation with Merrill Lynch on the barge transaction] (or at any other time, for that matter) regarding any alleged commitment by Enron or any of its affiliates to repurchase, or guaranty a rate of return on, the equity interest to be sold to Merrill Lynch in the transaction"; and "at no time during the [Fastow/Bayly] 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 [Barge equity] investment." Dkt.1168, Ex. C, at 4-6. "Context of Call - ML [Merrill Lynch] had approved deal internally. *** Want[ed] ass[urances] that E[nron] would assist them in selling [the interest] w/in 6 months." Dkt.1217, Ex. D, DOJ-ENRONBARGE-000447. "**Never made rep[resentation] to ML [Merrill Lynch] that E[nron] would buy them out or [] @ set rate of return." *Id.* at 000449.** **"NO - never guaranteed to take out [Merrill Lynch] w/rate of return." *Id.* at 000493.** **Andy agreed E would help remarket equity w/in next 6 months. –no further commitment.** *Id.* at 000494 "Disc[ussion] between Andy [Fastow] & ML [Merrill Lynch]. Agreed E[nron] would use best efforts to help them sell assets." *Id.* at 000447, 000513. "Andy [Fastow] 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." *Id.* at 000450, 000478, 000514. "Call: ML [Merrill Lynch] had approved investment in the Barges, + wanted assurance that E[nron] would assist in the sale to 3rd parties in the next 6 mos. (Verbal agreement)-(typical)." *Id.* at 000544.	Enron Treasurer, CFO, President: *Never indicted*
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. "Summary not consistent w/AF's memory b/c not word 'promise.' ... "Phone call did not obligate ENE to buy-out." *Id.* "On phone call, didn't say EN would buy-back – Rep. of 3rd party. Explicit." *Id.* "Phone call did not obligate [Enron] to buy out. Did not intend to bind [Enron]." *Id.*	Enron CFO; Indicted on 100+ counts; plead to 2 counts; cooperated with ETF in hundreds of hours of interviews improperly reduced to a "composite" 302.

Kelly Boots: Boots was "aware that Merrill Lynch's equity ha[d] to be at risk in order for the transaction to be approved." She "felt that the equity was at risk." FBI 302 of Kelly Boots, at p. 4. "In [her] mind, after the telephone call, Merrill Lynch was still at risk in the [transaction]." She "did not think that there was an enforceable guarantee giv[en] to Merrill Lynch in the [Barge deal]." Boots "d[id] not think that Fastow used the word guarantee on the telephone call with Merrill Lynch." *Id.*	Enron Employee *Never indicted*
Dan Boyle: Enron did not give Merrill a "promise" or "guarantee," but merely provided assurances "that Enron was going to stick with this project ... [to] make sure that they continued to develop it so that it could generate cash flows and everybody could be repaid or the project sold." Tr. 4962-63.	Convicted; did not appeal.

MERRILL LYNCH	STATUS
Daniel Bayly: "I considered [Fastow's] statements the equivalent of a best-efforts statement that they were going to facilitate our exit." Dkt.1168, Ex. S. "[W]e engage in best-efforts transactions frequently." *Id.* at 67. "Best-efforts transaction after a conversation with a company, that's very different than a firm commitment." *Id.*	*Convictions reversed; all charges dismissed with prejudice by government in January 2010.*
Schuyler Tilney: Fastow told Merrill Lynch that Enron "will find a new home" for Merrill's equity interest. Dkt.1217, Ex. F, DOJ-ENRONBARGE-000704. *See id.* at 000681 ("a strong verbal understanding [that] they would find a home for this"); 000704 (same). Tilney stated that a "'commitment to guaranty' conflict[ed] w[ith]/his understanding of what would take place under [the] transaction." *Id.* at 000706. There was "no legal obligation for E[nron] to do anything." *Id.* at 000727. Fastow's representations *did not include a guarantee–orally or in writing*. *Id.* at 000680. There was "no legal recourse [for Merrill Lynch] to force" Enron to do anything. *Id.* at 000727, 000745. This was a "best efforts" transaction agreement with no further obligation for Enron. *Id.* at 000676, 000679, 000683, 000727.	Merrill Senior Relationship Manager with Enron; *Never indicted*

OTHER NEWLY DISCOVERED EVIDENCE	
Katherine Zrike: "[W]e were trying to be creative to protect Merrill but they kept coming back to the fact it really had to be a true passage of risk, . . . the other part of this was the best efforts clause, the concern that could be used again to require them to buy it back; and that would not be - - was not the deal . . . that would not be consistent with the business deal that's being a true sale." Dkt.1168, Ex. F, at pp. 6-7; *see also* Dkt.1217, Ex. C.	Merrill Lead Counsel: Never indicted
Gary Dolan: "*Dolan requested that Wilson delete some of the language in the engagement letter.* Generally, ML engagement letters use general terms to describe a deal *because the deal terms can subsequently change*." (emphasis added). Dolan believed that "such an agreement [obligating Enron to take Merrill out of the transaction as contained in the first draft of the engagement letter] would be improper because such a transaction could be viewed as a parking transaction," and he deleted the buy-back language. Dkt.1217, Ex. B-1, at p. 6.	Merrill Counsel: Never Indicted
Alan Hoffman: "Enron did not have an obligation to find a buyer of Merrill Lynch's interest, but Fuhs did state that Enron would try to help Merrill Lynch find a buyer for their interest." Dkt.1204, Ex. A, at p. 5.	Merrill Lead Outside Counsel: Never Indicted
Paul Wood: Wood confirmed that the transaction was "an equity-like investment," which did not contain "an Enron Corp. Guarantee." Dkt.1168, Ex. R, at pp. 39-40.	Merrill Executive: Never Indicted

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FACSIMILE COVER LETTER

PLEASE DELIVER THE FOLLOWING FACSIMILE

TO: **Asst. Atty. General Lanny A. Breuer**
Criminal Division
Department of Justice
FAX: (202) 514-9412

CC: **Attorney General Eric Holder**
FAX: (202) 514-4507

FROM: **Sidney Powell**

DATE: **June 17, 2009**

RE: ***United States v. James Brown*, Case No. 08-20038**

Total pages including cover: 3

Please see attached letter.

IF YOU HAVE A PROBLEM RECEIVING THIS TRANSMISSION, PLEASE CALL US AT (828) 274-4063.

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June 17, 2009

CONFIDENTIAL

Mr. Lanny A. Breuer, Asst. Attorney General
Criminal Division
Department of Justice
950 Pennsylvania Avenue
Washington, D.C. 20530-0001

RE: *United States v. James Brown*, Case No. 08-20038. United States Court of Appeals for the Fifth Circuit.

Dear Mr. Breuer:

Rita Glavin called me shortly after I faxed my letter to you on May 19th, and we met on June 8th with Ms. Glavin, Steve Tyrell, Gary Grindler, and Patrick Stokes for a confidential discussion regarding settlement of this case without further litigation and the prosecutorial misconduct we have identified. I understand that you are conflicted and cannot participate in the decision-making itself, but I write to request that you ask someone–who has *not* served in the Department during Friedrich's tenure and had no connection with the ETF members or the prosecution of this case–to make a *fresh* evaluation of it.

When we met, Ms. Glavin had not read our Motion to Dismiss the Indictment for Egregious Prosecutorial Misconduct (serious *Brady* violations and patent misrepresentations to the court and jury). She began trying to end our discussion at the 5 minute mark, leaving us with the clear impression that she had no real interest in giving these serious misconduct issues any meaningful or open-minded consideration. Her attitude and tone appeared dismissive and, at times, hostile, resentful and indignant. I don't know Mr. Tyrell's history with the case, but apparently he previously served under Matthew Friedrich, and I have heard that Mr. Stokes was hand-picked by Friedrich to reinvigorate this wasteful prosecution of a true business transaction in which Enron ultimately profited by $53 million, Merrill Lynch made $750,000 and the individual defendants did not make "a dime."

I was raised in a Department of Justice that truly taught us–and I taught others–to practice the dictates of *Berger* and Attorney General Jackson's speech to the U.S. Attorneys. I have only represented four criminal defendants since I left the Department 20 years ago, and I have declined significant opportunities to represent high profile defendants that I knew were guilty. The Merrill defendants are innocent of any crime. My client, Jim Brown, was not even charged by the SEC, and all third-party civil actions against him have been dismissed. The indictment still pending does not state a criminal offense.

As you may know, the Enron Task Force spent tens of millions of dollars of taxpayer resources, and most of their trial results have been reversed for their various means of prosecutorial overreaching. We can certainly continue to litigate this matter to the fullest and the Department can waste millions more in taxpayer dollars pursuing three businessmen who did not take anything from anyone; or make any misrepresentations to the market; or, have any control for or responsibility over Enron's books and records–and who have already served a year in prison. And, we can have an extensive trial devoted only to the serious and blatant misconduct we have raised regarding Weissmann, Friedrich, Ruemmler, and Hemann. However, I remain hopeful that our new administration really does seek *change*—including much-needed ones within the Department—and that the standards for propriety and ethics in prosecutions demonstrated by Attorney General Holder's recent decisions in the Ted Stevens case and those of other Alaska defendants will be applied to this matter as well.

Accordingly, I ask that you assign someone closer to the Attorney General, new to the Department of Justice and completely independent from any member of the Enron Task Force to undertake a full, objective and independent review of the serious government misconduct we have identified so far in this matter and of the appropriateness of a full dismissal of all charges against Jim Brown, without further litigation.

Thank you.

Sincerely,

Sidney Powell

SP:hpg

cc: Attorney General Eric Holder

U.S. Department of Justice

Criminal Division

Deputy Assistant Attorney General *Washington, D.C. 20530*

July 13, 2009

Ms. Sidney Powell, Esq.
Sidney Powell, P.C.
3831 Turtle Creek Blvd, #5B
Dallas, Texas 75219

Re: *United States v. James Brown*, Case No. -08-20038

Dear Ms. Powell:

At the request of Assistant Attorney General ("AAG") Lanny Breuer, I write in response to your letter of June 17, 2009, requesting that he appoint someone new to the Department of Justice who had no contact with the Enron Task Force ("ETF") to review your request that the Department dismiss charges against your client, Mr. Brown. As you noted, AAG Breuer is recused from this matter.

Your letter seriously mischaracterized the June 8, 2009 meeting with me, Acting Principal Deputy Assistant Attorney General Rita Glavin, Fraud Section Chief Steve Tyrrell, and Trial Attorney Patrick Stokes. The meeting lasted for approximately one full hour, during which time you made a presentation that the case against Mr. Brown should be dismissed for the reasons set forth in your pending motion to dismiss. At various points during this meeting, Ms. Glavin made clear that we wanted to hear any arguments you wished to make on behalf of Mr. Brown, and that she would carefully review the materials you were referencing. Ms. Glavin repeatedly inquired as to whether you had anything additional to add to your presentation beyond the allegations and arguments set forth in your pending motion to dismiss the indictment for alleged prosecutorial misconduct, alleged *Brady* violations, and double jeopardy. You responded that you did not. At the end of the meeting, Ms. Glavin promised that she would read the misconduct motion you filed in the case, which consists of hundreds of pages, and that we would get back to you.

All decisions in this case, as in every case, will be made on the facts and law.

Please feel free to contact me with any additional concerns or questions.

Sincerely,

Gary Grindler
Deputy Assistant Attorney General