

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

JAMES A. BROWN,
Defendant.

§
§
§
§
§
§
§

CR. NO. H-03-363-2 (Werlein, J.)

**DEFENDANT JAMES A. BROWN'S EMERGENCY
MOTION TO COMPEL THE PRODUCTION OF *BRADY* MATERIAL**

For over seven years, Brown has repeatedly requested and moved to compel disclosure of *Brady* materials favorable to the defense. *See* Chart 1, attached. Finally, upon order by the Fifth Circuit, the government produced raw notes of Andrew Fastow. More recently, it produced **highlighted raw notes** underlying interviews with Jeffrey McMahon and Schuyler Tilney—and **other highlighted materials** of various Merrill counsel—which prove that the ETF deliberately and strategically withheld information that it had specifically recognized as *Brady*¹ and even prejudicially marked for this court's review but did not produce or "summarize" for Defendants *even when the court ordered it to do so*. Accordingly, it is now beyond dispute that the ETF withheld material exculpatory evidence from Brown, and there is likely still more. It is well-settled that the government "has no interest in interposing any obstacle to the disclosure of facts, unless it is

¹ The Due Process Clause requires federal prosecutors to disclose to defendants all favorable, material information in the government's possession. *Brady v. Maryland*, 373 U.S. 83, 87-90, 83 S. Ct. 1194, 1196-98 (1963); *Kyles v. Whitley*, 514 U.S. 419, 434, 437-40, 115 S. Ct. 1555, 1566-69 (1995); *United States v. Agurs*, 427 U.S. 97, 108, 96 S. Ct. 2392, 2399-400 (1976). This Court should now, and finally, intervene to make sure that all additional and relevant exculpatory materials are produced directly to Brown. The Constitution requires this much. *United States v. Lowder*, 148 F.3d 548, 551 (5th Cir. 1998) (defendant need only make a "plausible showing" that the prosecutor's file will produce material evidence.).

interested in convicting accused parties on the testimony of untrustworthy persons.” *Gordon v. United States*, 344 U.S. 414, 419, 73 S.Ct. 369, 373 (1953).

In fact, every time a new prosecutor has made any new production of raw notes (or any other material), the notes have revealed extraordinary exculpatory information that could only have been deliberately withheld from 302s or purported summaries. For example, *none* of the “composite” 302s of Andrew Fastow (which Brown did not have before *Brown I*) mention that Fastow made only a *best-efforts* representation to Merrill or explain what he told his subordinates and why. *Rather, that extraordinary exculpatory material appears only in the raw notes which required orders of the Fifth Circuit to obtain.* Likewise, the ETF’s Dolan “summary” failed to mention that *Dolan edited the buy-back language out of the engagement letter* for which Brown and Fuhs were convicted. Likewise, the ETF’s McMahon “summary” failed to mention that McMahon consistently told multiple government interviewers that neither he nor Fastow ever gave more than a *best-efforts* representation that Enron would remarket the barges to a third party. That pivotal fact of purely lawful conduct appears *only in the McMahon raw notes from interviews in 2002* that the government apparently produced only by *accident* on March 30, 2010. (See Dkt. 1212: 16). Brown has requested all raw notes of all interviews with attorneys involved in the barge transaction, and the government has specifically refused to provide them without order of this court. Email from Patrick Stokes to Sidney Powell, July 21, 2010, attached.

For these reasons, it is now clear that (1) (and Mr. Stokes admitted (Dkt. 1212: 62)), the government retained raw notes from interviews with all crucial witnesses to the Barge transaction, and (2) these raw notes are and will be materially different and more exculpatory than the government-sanitized versions that have previously been produced. This is not a fishing expedition,

but a pointed and discrete demand for materials which admittedly exist in the government's files, and because of the variances exhaustively demonstrated by Brown in prior filings, the government cannot be relied upon to determine what is exculpatory to the defense. As any delay continues to be incrementally prejudicial, these materials must be immediately produced. Therefore, Brown requests that this court compel the government to produce immediately the following discrete categories of documents.²

- (1) All **raw interview notes of any government agent or attorney,³ draft 302s, including copies containing any highlighting by the ETF,** and any other evidence in the government's possession (and not previously disclosed) from the following Merrill Lynch attorneys: Katherine **Zrike**, Gary **Dolan**, Frank **Marinano**, Doug **Madden**, Alan **Hoffman**, and Ronda **Jafaar**, as well as from Enron's attorneys:

² **Brown is entitled to these specific materials immediately so that he will have the opportunity to meaningfully prepare his defense.** *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S. Ct. 837, 845-46 (1977) (**The Prosecutor has "duty under the due process clause to insure that 'criminal trials are fair' by disclosing evidence favorable to the defendant upon request."**); *United States v. Sipe*, 388 F.3d 471, 485 (5th Cir. 2004) (same, even if inadmissible at trial); *United States v. Rodriguez*, 496 F.3d 221, 226 (2d Cir. 2007) (Disclosure required "in a manner that gives the defendant a reasonable opportunity either to use the evidence in the trial or use the information to obtain evidence for use in the trial.").

³ It is well settled that **witness interview notes are subject to *Brady*.** *United States v. Brown*, 303 F.3d 582, 593 (5th Cir. 2002) (FBI agent's notes can contain *Brady*), *cert. denied*, 537 U.S. 1173, 123 S. Ct. 1003 (2003); *Williams v. Whitley*, 940 F.2d 132, 133 (5th Cir. 1991) ("We have recognized that information contained in police reports may be *Brady* material."); *Conley v. United States*, 415 F.3d 183, 188-89 (1st Cir. 2005) (reversing conviction where undisclosed FBI memorandum contained information not reflected in witness's grand jury testimony); *United States v. Harrison*, 524 F.2d 421, 427 (D.C. Cir. 1975) ("too plain for argument" that notes can contain *Brady*: "Whether or not the prosecution uses the witness at trial, the notes could contain substantive information or leads which would be of use to the defendants on the merits of the case. ... The possible importance of the notes for these purposes is not diminished in cases where the prosecutor turns over to the defense the 302 reports."). For example, in *United States v. Pelullo*, 105 F.3d 117, 118-19 (3d Cir. 1997), the court reversed a CEO's wire-fraud conviction on a much less direct showing of suppression. There, the key disputed factual issue was whether Pelullo used company funds *improperly* to pay a loan shark or *properly* to repay an intercompany debt. *Id.* at 119. FBI Agent Wolverton testified that, before trial, he interviewed Pelullo and Pelullo admitted using the money to pay the loan shark. *Id.* After the jury convicted, Pelullo obtained Wolverton's raw interview notes. As here, the notes contradicted his testimony, stating that Pellulo's reason for the payment was "repaying intercompany debt." *Id.* at 120. As here, this crucial exculpatory statement appeared only in the raw interview notes, and "did not appear[] in the FBI 302 report." *Id.* The notes, thus, constituted "valuable *Brady* material" that the government had a duty to disclose. *Id.* at 122.

Christopher **Clement-Davies**, William **Montjoy**, Yao **Apasu**, and Boyd **Carano**.
See Brown's Motion to Compel Production, Dkt. 948, Section L (pp. 27-29).

- (2) All **raw interview notes of any government agent or attorney, draft 302s, including copies containing any highlighting by the ETF**, and any other evidence in the government's possession (and not previously disclosed) from Andrew Fastow.

The recent, still incomplete and eleventh-hour disclosures of exculpatory materials—themselves evidencing additional misconduct—confirms Brown's entitlement to this information by court order.

CONCLUSION

For these reasons, and pursuant to *Brady* and its progeny, Defendant Jim Brown requests this Court order the Government immediately to produce all of the documents sought by Defendant, directly to the Defendant.

Dated: July 22, 2010

Respectfully submitted,

PORTER & HEDGES LLP

SIDNEY POWELL, P.C.

DANIEL K. HEDGES
Texas Bar No. 09369500
1000 Main Street, 36th Fl.
Houston, TX 77002
Telephone: (713) 226-6000
Facsimile: (713) 228-1331

By: /s/ Sidney Powell
SIDNEY POWELL
Texas Bar No. 16209700

TORRENCE E. LEWIS
IL State Bar No. 222191
3831 Turtle Creek Blvd. #5B
Dallas, TX 75219
Telephone: (214) 653-3933
Facsimile: (214) 319-2502

ATTORNEYS FOR DEFENDANT JAMES A. BROWN

CERTIFICATE OF CONFERENCE

I hereby certify that the parties have conferred on the above and foregoing and that AUSA Stokes advised that the Government opposes this motion.

/s/ Sidney Powell
Sidney Powell

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served upon Patrick Stokes, counsel for the United States, via the ECF system on July 22, 2010, and on all counsel of record.

/s/ Sidney Powell
Sidney Powell

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 <i>Brady</i> ; 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 <i>Brady</i> material.	Denied at Dkt.177 (as to <i>Brady</i>) 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 <i>Brady</i> 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 <i>Brady</i>) on 4/21/04.
Bayly Request for <i>Brady/Giglio</i> 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 meet its <i>Brady</i> obligations. Government “has even gone so far as to express a view of its obligations under <i>Brady</i> and/or <i>Giglio</i> 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 <i>Brady</i> 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 <i>Brady</i>) on 4/21/04.

**CHART 1
DEFENDANTS’ BRADY REQUESTS**

	<p>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). <i>See also</i> p. 15 (Zrike grand jury testimony).</p>	
<p>Pre-Trial Hearing, August 5, 2004, Dkt.175.</p>	<p>“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</p> <p>“I will wrap up, your Honor, by respectfully referring the Court to our papers and urge the Court respectfully that the</p>	<p>Denied, Dkt.177.</p>

**CHART 1
DEFENDANTS’ BRADY REQUESTS**

	<p>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 <i>Brady</i> 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.’” <i>Id.</i> at pp. 11-12.</p> <p>“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.” <i>Id.</i> at p. 12.</p> <p>“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.” <i>Id.</i> at pp. 14-15.</p>	
<p>Bayly’s Motion to Dismiss or for an order requiring government to withdraw request to attend witness interviews, Dkt.180, 4/26/04.</p>	<p>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.</p>	<p>Unknown – no evidence in Docket that it was ever ruled on.</p>

CHART 1
DEFENDANTS' BRADY REQUESTS

	2. (4) Charging violations of Fifth and Sixth Amendments and attorney work product doctrine.	
Furst Motion to Reconsider <i>Brady/Giglio</i> 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 <i>Brady</i> 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 <i>Brady</i> 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 <i>Brady</i> 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’ <i>Brady</i> 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 <i>Brady</i> 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) “<i>Brady</i> 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, <i>Jencks</i>, <i>Giglio</i>, and, above all, <i>Brady</i>, 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 <i>Brady</i> 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 <i>Brady</i> & <i>Giglio</i> . 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

CHART 1
DEFENDANTS' BRADY REQUESTS

		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 <i>Brady</i> 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 <i>Brady</i> and its progeny so well document in this very courthouse and outlined in <i>United States v. Rammning</i> , 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.

CHART 1
DEFENDANTS' BRADY REQUESTS

<p>Bayly Request for <i>Brady/Giglio</i> Materials, Dkt.305 (refiling of Dkt.125, 3/1/04).</p>	<p>Comprehensive request for all testimony from exculpatory witnesses (Fastow, Zrike, Hoffman, etc.). Government has not even attempted to meets its <i>Brady</i> obligations. Government “has even gone so far as to express a view of its obligations under <i>Brady</i> and/or <i>Giglio</i> that is inconsistent with the law of this Circuit.”</p>	<p>Denied at Dkt.397 on 9/13/04.</p>
<p>Pre-Trial Motions Hearing, 6/25/04, Dkt.285</p>	<p>DEFENSE: “Your Honor, we have received from the government what the government characterized as not <i>Brady</i> material, a summary of what Mr. Fastow said to the government. They said it is not <i>Brady</i> material. Why didn’t we receive it then? How come they are giving this to us? With respect to <i>Brady</i>, 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 <i>Brady</i> 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</p> <p>DEFENSE: “... we think we need a hearing on <i>Brady</i>. Let me explain why: If the Fastow statement, according to the government, is not <i>Brady</i> 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 –</p> <p>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</p>	<p>Denied – same hearing:</p>

**CHART 1
DEFENDANTS' BRADY REQUESTS**

<p>this is not <i>Brady</i> material, this is not exculpatory.</p> <p style="text-align: center;">***</p> <p>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.</p> <p>DEFENSE: "I'm raising a <i>Brady</i> issue. I apologize for not explaining it clearly.</p> <p style="text-align: center;">***</p> <p>DEFENSE: "But my point, Your Honor, is that the materials that the government selected as arguably <i>Brady</i> material were through the government's own view of what is exculpatory.</p> <p>THE COURT: What materials are you talking about?</p> <p>DEFENSE: "The statements by witnesses other than Mr. Fastow.</p> <p>THE COURT: The 302's?</p> <p>DEFENSE: "Correct, Your Honor. And grand jury testimony.</p> <p>THE COURT: And grand jury testimony.</p> <p>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 <i>Brady</i> 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 <i>Brady</i>, 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</p>	<p>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</p>
--	--

CHART 1
DEFENDANTS' BRADY REQUESTS

	<p>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 <i>Brady</i> to be as it's reviewing the materials within its possession. I hope I've made myself clear." Id. at pp. 35-43.</p>	<p>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."</p>
<p>Furst Motion in Limine to Introduce Prior Testimony of Unavailable Witness, Dkt.348, 8/13/04 (Dkt.347 also)</p>	<p>Request to admit various prior sworn exculpatory statements (withheld) of unavailable witnesses. "These <i>Brady</i> witnesses ... are unavailable to testify as defense witnesses because the [ETF] has also deemed them 'unindicted co-conspirators,' and the <i>Brady</i> 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 <i>Brady</i> witnesses as "unindicted co-conspirators."</p>	<p>Denied at Dkt.397, 9/13/04. Denied again at trial. Tr. 4863-66</p>
<p>Bayly's Motion for Disclosure of Prior Testimony of Kathy Zrike, Dkt.494, 10/8/04.</p>	<p>See Dkt.230.</p>	<p>No docket ruling. See Dkt.290.</p>
<p>Furst's Motion to Admit prior statements of witnesses under Rule 806, Dkt.528, 10/12/04.</p>	<p>Request to admit various prior sworn exculpatory statements (withheld) of unavailable witnesses.</p>	<p>Denied at trial. Tr. 4863-66</p>

CHART 1
DEFENDANTS' BRADY REQUESTS

<p>Bayly's Notice of prosecutorial duty to correct demonstrably false testimony and request for a hearing, Dkt.541, 10/14/04.</p>	<p>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.</p>	<p>No docket ruling.</p>
<p>ON REMAND</p>		<p>Third Superseding Indictment Filed, Dkt.937, 4/5/07.</p>
<p>Status Conference Hearing, Dkt.925, February 16, 2007.</p>	<p>Request for production of exculpatory materials from Fastow generated in the discovery in the <i>Newby</i> civil litigation.</p>	<p>No docket ruling. No production of any materials from Government.</p>
<p>Status Conference Hearing, Dkt.939, April 4, 2007.</p>	<p>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 <i>Brady</i> or possible other relevant material."</p> <p>"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 <i>Brady</i> 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." <i>Id.</i> at 24. "And we don't know the full extent of all Fastow's possibly <i>Brady</i> material because it's never been provided." <i>Id.</i></p> <p>Request for production of exculpatory materials from Fastow specifically generated in the discovery in the <i>Newby</i> 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." <i>Id.</i> at 22.)</p>	<p>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</p>

CHART 1
DEFENDANTS' BRADY REQUESTS

	The Court stated: "Well, this is the first I've ever heard of any <i>Brady</i> claim being made against the Government in connection with this." <i>Id.</i> at 24.	Government's obligation. <i>Id.</i> ; (3) "my agents inform me that we believe that we have produced most of the documents," <i>Id.</i> at 16; (4) "As I said, your Honor, I think the discovery -- additional discovery is going to be a nominal amount." <i>Id.</i> at 20.
Brown's Motion to Compel Production of Documents and <i>Brady</i> 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 <i>Newby</i> and <i>Skilling</i>); (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 <i>Brady</i> 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 <i>Brady</i> 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 McMahan, 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.

CHART 1
DEFENDANTS' BRADY REQUESTS

<i>Brady</i> Material, Dkt.993, 10/10/07.		
Reply in Support of Bayly and Furst's Motion to Compel the Production of Specific <i>Brady</i> 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 McMahan, 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.	<p>"Judge, we really can't work [<i>Brady</i>] 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 <i>Brady</i>.' ... [W]e are asking the Court to do -- We need your help on this one." Dkt. 1010, at 78.</p> <p>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 <i>Brady</i>. They are <i>Brady</i>. We're not speculating. And, yet, Mr. Spencer steps up and says, 'We'll comply with <i>Brady</i>. But Zrike's grand jury and SEC? Huh-uh. You can't have that at all.'" <i>Id.</i> at 83.</p> <p>"Mr. Spencer's view of <i>Brady</i> 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 <i>Strickler vs. Greene</i> 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 <i>Brady</i> material. The Fifth Circuit just recently over the Government's objection has ordered the Government to produce all the</p>	<p>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.</p> <p>"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." <i>Id.</i> at 85.</p>

CHART 1
DEFENDANTS' BRADY REQUESTS

	material underlying Fastow's 302s in the Skilling case. We want that material as well to the extent it applies to the <i>Nigerian Barge</i> 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." <i>Id.</i> 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 <i>Brady</i> , 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 <i>Brady</i> 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 <i>Brady</i> Material, Dkts.1029, 1030 1/7/08.	In light of (1) the government's recent, and still incomplete production of <i>Brady</i> 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 <i>Brady</i> 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.

CHART 1
DEFENDANTS' BRADY REQUESTS

	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 <i>United States v. Skilling</i> .	No docket ruling. No production of any materials from Government.
Brown's Second Supplemental Motion to Compel Production of Documents and <i>Brady</i> 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 <i>United States v. Skilling</i> .	No docket ruling. No production of any materials from Government.
Brown's Motion to Compel Production of Documents and <i>Brady</i> Material <i>Instante</i> , 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.

CHART 1
DEFENDANTS' BRADY REQUESTS

<p>ON APPEAL TO FIFTH CIRCUIT 3/24/08</p>	<p>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 <i>Brady</i> materials.</p>	
<p>ON APPEAL TO FIFTH CIRCUIT</p>	<p>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”</p>	
<p>ON REMAND 8/13/09</p>	<p>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.</p>	
<p>ON REMAND</p>	<p>Neither the court nor the government filed anything as to Brown as of 3/31/10.</p>	<p>On 3/30/10 Brown receives production of 1000 pages of <i>Brady</i> material from Stokes. Careful review of the electronic copy disclosed that the disk contains highlighting of <i>Brady</i> 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 <i>camera</i> review. Additional scrutiny discloses that the ETF withheld from the court-ordered summaries irrefutable <i>Brady</i> material of Zrike, Dolan, Tilney and McMahon—that the ETF had itself highlighted in these</p>

CHART 1
DEFENDANTS' BRADY REQUESTS

		documents.
Brown's Motion to Compel Production of Documents and <i>Brady</i> Material, Dkt.1157, 5/14/10.	Brown sets forth, again, a series of discrete areas of <i>Brady</i> 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 <i>Brady</i> material. Otherwise, response states, Dkt.1189, that there is no additional <i>Brady</i> material.
Brown's Reply in Support of Motion to Compel Production of Documents and <i>Brady</i> Material, Dkt.1197, 6/11/10.	Renewing, and where necessary, clarifying requests for specific <i>Brady</i> materials still not produced.	No docket ruling. No production of any materials from Government.

From: Stokes, Patrick [Patrick.Stokes2@usdoj.gov]
Sent: Wednesday, July 21, 2010 4:18 PM
To: Sidney Powell; Stieglitz, Albert
Cc: Torrence Evans Lewis; hellengoldfarb@federalappeals.com; Hedges, Daniel K.; Stansbury, Nancy L.
Subject: RE: Please advise

Yes, we oppose your motion to compel.

From: Sidney Powell [mailto:fedapps@bellsouth.net]
Sent: Wednesday, July 21, 2010 4:17 PM
To: Stokes, Patrick; Stieglitz, Albert
Cc: 'Torrence Evans Lewis'; hellengoldfarb@federalappeals.com; 'Hedges, Daniel K.'; 'Stansbury, Nancy L.'
Subject: RE: Please advise

Thank you for your prompt response. I assume this means that you oppose our Motion to Compel, and I will so recite unless you advise otherwise. Sidney Powell

The information contained in this electronic message is attorney-client privileged and confidential information intended only for the use of the owner of the email address listed as the recipient of this message. If you are not the intended recipient, or the employee or agent responsible for delivering this message to the intended recipient, you are hereby notified that any disclosure, dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this transmission in error, please immediately notify us by telephone at 214-653-3933, The Law Offices of Sidney Powell P.C.

From: Stokes, Patrick [mailto:Patrick.Stokes2@usdoj.gov]
Sent: Wednesday, July 21, 2010 4:15 PM
To: Sidney Powell; Stieglitz, Albert
Cc: Torrence Evans Lewis; hellengoldfarb@federalappeals.com; Hedges, Daniel K.; Stansbury, Nancy L.
Subject: RE: Please advise

We do not believe the evidence we disclosed identifies any Brady violations, let alone “egregious” ones. Our opposition to your supplemental memorandum will address this. As for your request for

notes, we do not intend to turn over notes of interviews short of a court order. I think if you review the hearing transcript carefully, you will see that we told the Court that we do not intend to voluntarily provide raw notes of interviews.

From: Sidney Powell [mailto:fedapps@bellsouth.net]
Sent: Wednesday, July 21, 2010 3:43 PM
To: Stokes, Patrick; Stieglitz, Albert
Cc: 'Torrence Evans Lewis'; hellengoldfarb@federalappeals.com; 'Hedges, Daniel K.'; 'Stansbury, Nancy L.'
Subject: Please advise
Importance: High

Mr. Stokes, At the hearing on June 24, you indicated that you had nothing to hide and that if our request “relates to this case, we’re going to turn it over.” (tr. 63). Since that date, the raw notes (Tilney and McMahan and previously of Fastow) and other materials you disclosed have revealed even more egregious Brady violations—many apparent only from raw notes. Accordingly, please advise if you will immediately provide (without the necessity for a Motion to Compel) all raw notes of interviews and draft 302s of Kathy Zrike, Gary Dolan, Alan Hoffman, Frank Marinaro, Clement-Davies, Montjoy, Apasu, and any other attorney for Merrill or Enron in the Barge transaction. Thank you.
Sidney Powell

The information contained in this electronic message is attorney-client privileged and confidential information intended only for the use of the owner of the email address listed as the recipient of this message. If you are not the intended recipient, or the employee or agent responsible for delivering this message to the intended recipient, you are hereby notified that any disclosure, dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this transmission in error, please immediately notify us by telephone at 214-653-3933, The Law Offices of Sidney Powell P.C.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

UNITED STATES OF AMERICA
Plaintiff,

v.

JAMES A. BROWN,
Defendant.

§
§
§
§
§
§
§

CR. NO. H-03-363-2Werlein, J.)

ORDER

The Court has carefully considered Defendant's James A. Brown's Emergency Motion to Compel the Production of *Brady* Material and it is hereby ORDERED that said motion is GRANTED.

SO ORDERED this the _____ day of _____, 2010.

HONORABLE EWING WERLEIN, JR
UNITED STATES DISTRICT JUDGE