

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

JAMES A. BROWN,
Defendant.

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

**DEFENDANT JAMES A. BROWN'S OPPOSITION TO GOVERNMENT'S MOTION
TO STRIKE BROWN'S EMERGENCY MOTION TO COMPEL**

The government's time would be better spent producing **all** the *Brady* material Brown has requested for seven (7) years, including the raw notes of all interviews of all government witnesses, rather than filing a motion to strike. Brown's Emergency Motion to Compel was necessitated by¹: 1) his Constitutional rights and his need to protect the record and give this court every opportunity to rule correctly; 2) our recent discovery of the ETF's own highlighting on documents it gave only to this court and the shocking *Brady* omissions between what the ETF highlighted for the court and actually produced to the defense; 3) the quickly impending trial date without all raw notes having been produced; 4) the government's insistence on a court order to produce the notes; 5) the government's abject, desperate and increasingly shrill refusals to acknowledge the *Brady* violations of the Task Force and the requirements of the law itself; and 6) the lack of any ruling from this Court on Brown's *Brady* motions and motions to compel in six (6) years—since June 2004 when it ordered the government to produce what we now have proved are woefully incomplete, misleading and

¹ Notably, in a further effort to avoid bothering the court with this request, Brown requested this material directly from the government, but government counsel specifically refused to produce this material without a court-order—despite his repeated claim that it has nothing to hide. Of course, as the government's vigorous opposition (through rehearing to the Fifth Circuit) to the production of the Fastow binders and raw notes showed, it hid a lot—and apparently still does.

prejudicial “summaries” in complete violation of *Brady* while it withheld first-hand evidence it had marked as *Brady* and even more exculpatory evidence that directly contradicted its entire case. Dkt. 1217. Where, as here, “The Government knew of the [interview notes] and that [witness A] directly contradicted [the government’s trial] evidence. Had the defense known of the [interview notes], it could have deposed [witness A] and had his testimony contradicting [the trial witness] ready for trial. The Government’s failure to release this material information to the defense was error, and should have resulted in a new trial for [Brown].” *United States v. Fisher*, 106 F.3d 622, 635 (5th Cir. 1997), *abrogated on other grounds by Ohler v. United States*, 529 U.S. 753, 120 S. Ct. 1851 (2000); *United States v. Ferrara*, 456 F.3d 279, 293 n.11 (1st Cir. 2006) (“When the government responds incompletely to a discovery obligation, that response not only deprives the defendant of the missing evidence but also has the effect of misrepresenting the nonexistence of that evidence.”); *United States v. Jackson*, 345 F.3d 59, 70 (2d Cir. 2003) (“The fact that [the relevant witness] did not testify at the defendants’ trial presents no obstacle to application of *Brady* and its progeny.”); *United States v. Harrison*, 524 F.2d 421, 427 (D.C. Cir. 1975) (“[w]hether 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”); *United v. Bagley*, 473 U.S. 667, 682-83, 105 S. Ct. 3375, 3384 (suggesting that an incomplete response could “represent[] to the defense that the evidence does not exist” and cause it “to make pretrial and trial decisions on the basis of this assumption”).

Accordingly, the government’s motion to strike should be denied and Brown’s Motion To Compel the government to produce all raw notes of all interviews of Barge witnesses should be granted immediately so that Brown may have this material to prepare for trial as required by *Brady*

v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196 (1963), and *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 766 (1972).

CONCLUSION

For these reasons, Brown requests this Court deny the government's Motion to Strike and grant his Motion To Compel the production of the raw notes of all interviews of the Barge witnesses, specifically of all attorneys who worked on the transaction at Merrill, Enron, Whitman Breed, and V & E, and of Trinkle, Kopper, Glisan, Long, and any other witness on whom the government intends to rely at trial.

Dated: July 30, 2010

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT JAMES A. BROWN

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 30, 2010. It has also been served electronically on all counsel of record.

/s/ Sidney Powell
Sidney Powell