United States Courts
Southern District of Texas
FILED
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Michael N. Milby, Clerk

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

UNITED STATES OF AMERICA	§	
	§	
VS.	§	CRIMINAL NO. H-04-25(S-2)
	§	
RICHARD A. CAUSEY,	§	
JEFFREY K. SKILLING, AND	§	
KENNETH L. LAY	§	

DEFENDANT KENNETH L. LAY'S REPLY TO GOVERNMENT'S MEMORANDUM OF LAW IN RESPONSE TO DEFENDANT LAY'S MOTION FOR THE PRODUCTION OF MATERIAL FAVORABLE TO THE ACCUSED

TO THE HONORABLE SIM LAKE, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION:

COMES NOW, KENNETH L. LAY, defendant in the above-styled and numbered cause, by and through his attorneys of record, Michael Ramsey, Bruce Collins, George McCall Secrest, Jr., and Chip Lewis, and present the following reply:

I.

Mr. Lay relies fully on his Motion for the Production of Material Favorable to the Accused and Memorandum in Support Thereof. Notwithstanding the fact that the Task Force has conducted a "scorched earth" investigation for nearly three years, is in possession of tens of millions of documents, has interviewed hundreds of witnesses, generated well over a thousand FBI 302s, interrogated countless witnesses before the grand jury, reviewed scores of transcripts, has had the able assistance of a number of federal agencies and other entities, and proclaims that it "has complied and will continue to comply with its *Brady* obligations," Government's Memorandum of Law and Response to Defendant Lay's Motion for the Production of Material Favorable to the Accused, hereinafter referred to as Government's Response, it has failed to produce a *single* piece of paper of an exculpatory nature or divulge the name of *one* human being who has anything

exculpatory to say about Mr. Lay. That assertion by the Task Force, to be charitable, is preposterous on its face.

According to the Government, there are 114 unindicted co-conspirators (so far). Moreover, a significant number of individuals associated with the events of Enron have entered pleas of guilty. No doubt, many of these "cooperating" individuals were anything but that until they ultimately succumbed to the pressures and threats of being prosecuted for far more serious offenses that carry potentially harsher sentences which prosecutors are uniquely able to make. Prior to the revelation that these "cooperating" individuals were guilty and before their deals were formalized by written plea agreements, it is reasonable to believe that these individuals offered accounts of events, explanations of transactions, and recollections of facts that are not only at odds with their new "official" versions of what supposedly took place that were formulated by the prosecution as the bases for guilty pleas, but are also inconsistent with statements made by other individuals who have been interviewed by the prosecution and may or may not now be cooperating and ultimately may or may not testify for the Government at trial. To suggest that nothing exculpatory has been learned and/or nothing inconsistent has been stated by these individuals is simply unbelievable.

The Government uses as a crutch its reliance on "open file" discovery which, somehow, is supposed to subplant its constitutional obligation and "independent duty to identify and disclose *Brady* material." *Lockhart v. McCotter*, 782 F.2d 1275, 1282 (5th Cir. 1986), *cert. denied*, 479 U.S. 1030 (1987). In reality, the "open file" discovery policy of the Government is anything but that. Witness statements, FBI 302s (and similar official reports prepared by other cooperating agencies and entities, as well as "rough notes"), transcripts of witness testimony and documents of a similar pertinent nature have been and remain off-limits to defense counsel. The prosecution must produce *Brady* and *Giglio* material "at such a time as to allow the defense to use the favorable material

effectively in preparation and presentation of its case, even if satisfaction of this criterion require[s] pre-trial disclosure." *United States v. Pollack*, 534 F.2d 964, 973 (D.C. Cir. 1976). *See also United States v. Campagnuolo*, 592 F.2d 852, 859 (5th Cir. 1979) (recognizing that prior Fifth Circuit precedence "might be read as holding that *Brady* and the timing provisions of the *Jencks Act* are compatible as a matter of law. *Alternatively, they might hold that Brady would override the Jencks Act in cases where lack of pre-trial discovery resulted in prejudice to the defendant 'of substantial Due Process Character.'* "). (Emphasis added). Although the Task Force decrees it will provide *Jencks Act* material 30 days prior to trial, that decision, ultimately, is up to this Court and not the Government. As previously requested, in a case of this magnitude and complexity, pre-trial production of *Jencks Act* material should take place no later than 90 days before trial.

While Mr. Lay has chosen to forego Rule 16 discovery, that decision does not translate into a waiver or forfeiture of the constitutional protections afforded him by *Brady* or *Giglio v. United States*, 405 U.S. 150, 154 (1972), as the Task Force seems to suggest. Simply stated, Mr. Lay and his counsel have no obligation "to ferret[ ] through a virtually impenetrable morass of material to find, hopefully, the proverbial needle in a haystack." Motion for Production of Material Favorable to Accused and Memorandum in Support Thereof, p. 3. Mr. Lay and his defense team do not have the time, staff or resources to undertake a review of materials that are in the possession of the prosecution and/or its many cooperating agencies/entities that the Government has a constitutional duty to perform in the first place.

The Task Force seems to suggest that because Mr. Lay has had access to documents from the *Newby* litigation and because he "has not identified what he already knows or has access to," Government's Response, p. 3, that his *Brady* motion fails. Defense counsel are unaware of any requirement imposed by *Brady* or any other rule that as a condition precedent a criminal defendant

has to identify "what he already knows" or what he already "has access to." The buck cannot be shifted to the defense to discharge the Government's constitutional obligation and burden. As previously argued,

> [t]he prosecutorial duty to produce exculpatory evidence imposed by *Brady* may not be discharged by 'dumping' (even in good faith) a voluminous mass of files, tapes, and documentary evidence . . . (The Prosecutor) retains the constitutional obligation of initially screening the material before him and handing it over to the defense those to which the defense is unquestionably untitled under *Brady*.

Emmett v. Ricketts, 397 F.Supp. 1025, 1043 (M.D. Ga. 1975).

The Task Force is attempting to shirk its constitutional duty imposed by *Brady* in a number of other ways. It has obviously relied upon the very able assistance of a host of federal agencies and other entities in the course of this criminal investigation and yet attempts to shield the work product of those agencies and entities from the *Brady/Giglio* requirement. This it cannot be permitted to do. *United States v. Antone*, 603 F.2d 566, 569 (5th Cir. 1979); *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980). The Government states that it "will identify for the defense any witness who may have information helpful to the defense, so that the defense may interview them and call them witnesses if they wish to do so," Government's Response, p. 9, but then continues its penchant for gamesmanship by contending that the *substance* or *subject* of the exculpatory impeachment information apparently does not have to be disclosed.

It also refuses to undertake its *Brady* obligation *prospectively*. The Task Force is apparently claiming that what would otherwise clearly constitute exculpatory information to which a defendant is constitutionally entitled becomes non-producible if the prosecution dains that the information is "cumulative" or, determines that the accused would not be deprived of a fair trial if the information is not produced. Government's Response, pp. 7-8. The Government cannot be permitted *pre-trial* to filter what would reasonably be considered exculpatory information through a prism of

"materiality." Mr. Lay does not take issue with the fact that the materiality requirement imposed by *Brady* "depends almost entirely on the value of the evidence relative to the other evidence mustered by the" prosecution, *Spence v. Johnson*, 80 F.3d 989, 994-995 (5th Cir. 1996), or that "strictly speaking, there's never a real '*Brady* violation' unless the non-disclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict," *Strickler v. Greene*, 527 U.S. 263, 281 (1991). Those truisms, however, are made in the context of a *post-verdict* review of the evidence. Prior to trial, "[t]he 'materiality' component should be dropped." *United States v. Sudikoff*, 36 F.Supp.2d 1196, 1998 (C.D. Cal. 1999). Under any circumstances, the Government is not ordained with the prerogative of determining materiality for itself.[1] The Government has a knack for withholding impeachment evidence at trial — evidence that is clearly subject to pre-trial disclosure and then, if a conviction is obtained, arguing that the infraction does not violate *Brady* because the wrongfully withheld evidence did not reasonably call into question the jury's verdict. *United States v. Orena,* 145 F.3d 551 (2nd Cir. 1998).

Counsel for Mr. Lay respectfully request that a hearing be conducted as to all pending *Brady/Giglio/Jencks* issues, that the Court impose on the Government definitions that clearly and strictly set out what information and/or material will be considered exculpatory or impeaching necessitating production by the Government, that the Government be compelled to reveal all efforts,

[1]The government states that the "Azurix Strategy Memo," dated October 2, 2001, "[a]ssuming that Lay was aware of this memo," could possibly be used by Mr. Lay to "argue that this memorandum constitutes tangential evidence of a Wessex water strategy that might justify the avoidance of a goodwill write-down." Government's Response, p. 15. The Government goes on to assert, however, that "[a]mong other reasons, the Government does not regard this document as *Brady* material because it was created solely to manufacture a paper justification of a water strategy that did not in fact exist."*Id.*

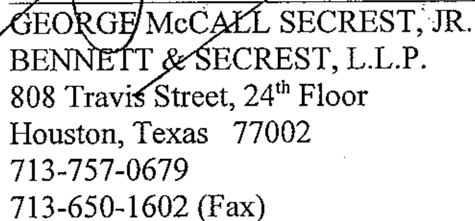
This is a telling example of the Government postulating that a particular document does not constitute *Brady* material — in this instance because it was allegedly "manufactured." Whether it was created for such a purpose or not is, itself, a question of fact for the trier of fact and is not amenable to an *ex parte* determination by the Government. With respect to *Brady*, the Government has an irrefutable obligation to identify and disclose "anything said or written, without regard for its reliability, credibility or provability" of which it is in possession. *United States v. McVey,* 954 F.Supp. 1441, 1450 (D.C. Colo. 1997).

if any, made to date to discharge its *Brady/Giglio* obligations, that the Government be ordered to divulge, in detail, the nature and extent of cooperation/assistance it has received from federal agencies and other entities, and that a date for full compliance with *Brady/Giglio/Jencks* be set.

Respectfully submitted,

MICHAEL RAMSEY
CHIP LEWIS
2120 Welch
Houston, Texas 77019
713-523-7878
713-523-7887 (Fax)

BRUCE W. COLLINS
CARRINGTON, COLEMAN, SLOMAN
& BLUMENTHAL, L.L.P.
200 Crescent Court, Suite 150
Dallas, Texas 75201
214-855-3000
214-855-1333 (Fax)



GEORGE McCALL SECREST, JR.
BENNETT & SECREST, L.L.P.
808 Travis Street, 24th Floor
Houston, Texas 77002
713-757-0679
713-650-1602 (Fax)

Attorneys for Defendant,
KENNETH L. LAY

Of Counsel:

EARL SILBERT
DLA PIPER RUDNICK GRAY CARY US LLP
1200 19th Street, N.W.
Washington, D.C. 20036-2412
202-861-6250
202-223-2085 (Fax)

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 21st day of January, 2005, a true and correct copy of the foregoing Defendant Kenneth L. Lay's Reply to Government's Memorandum of Law in Response to Defendant Lay's Motion for the Production of Material Favorable to the Accused has been delivered to the following, via email:

Daniel M. Petrocelli (DPetrocelli@OMM.com)
Matthew T. Kline (MKline@OMM.com)
O'MELVENY & MYERS, L.L.P.
1999 Avenue of the Stars, 7th Floor
Los Angeles, CA 90067-6035

Ronald G. Woods (RonWoodsLaw@aol.com)
5300 Memorial, Suite 1000
Houston, TX 77007

Reid H. Weingarten (Rweingarten@steptoe.com)
Mark J. Hulkower (mhulkower@steptoe.com)
STEPTOE & JOHNSON, L.L.P.
1330 Connecticut Avenue, NW
Washington, D.C. 20036

Linda Lacewell (Linda.Lacewell2@usdoj.gov)
John Hueston (John.Hueston@usdoj.gov)
Sean Berkowitz (Sean.Berkowitz2@usdoj.gov)
mailto:Kathy.Ruemmler2@usdoj.gov
Enron Task Force
DOJ Criminal Division
1400 New York Avenue, NW
10th Floor
Washington, D.C. 20530

GEORGE McCALL SECREST, JR.