

05-20319

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**UNITED STATES OF AMERICA,
Plaintiff-Appellee,**

v.

**JAMES A. BROWN, DANIEL BAYLY,
WILLIAM R. FUHS and ROBERT S. FURST,
Defendants-Appellants.**

**DEFENDANT-APPELLANT JAMES A. BROWN'S
MOTION FOR RELEASE ON CONDITIONS *INSTANTER***

**On Appeal From The United States District Court
For The Southern District Of Texas, Houston Division
No. CR H-03-363**

**Sidney Powell
Texas Bar #16209700
POWELL & PEARCE**

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**ATTORNEYS FOR DEFENDANT-APPELLANT
JAMES ARTHUR BROWN**

Brown files this Motion for Release *Instanter* because he has completed service of the term of imprisonment that could have been imposed on him for the only two convictions the majority opinion affirmed. In the alternative, there are substantial issues of both law and fact for further appeal. Finally, Brown's sentence, *if any*, would necessarily be reduced upon any resentencing or remand. For all of these reasons, Brown should be released *instanter*.

On August 1, 2006, this Court vacated the conspiracy and wire fraud convictions of each of the Defendants and vacated Defendant Fuhs' convictions on the basis of insufficiency of the evidence. The panel majority, Judge DeMoss dissenting, upheld *only* Defendant Brown's convictions for perjury and obstruction.¹ Because of prior orders of this Court granting releases pending appeal, the sole Defendant remaining in custody is Jim Brown. Brown should be released now. Counts I-III have been vacated and Brown's sentence for the affirmed counts has either been fully served or must be substantially reduced to a *matter of days*. Indeed, it is likely that Brown's sentence will be reduced to the amount of time already fully

¹ The government erroneously stated at oral argument that no other defendants were charged with perjury or obstruction. That is not true: Fuhs was charged with perjury and obstruction, but those counts were severed and later dismissed by the government (Dkt: 392; 688). *See also* Furst Sentencing Tr. 17, 19-20, 25, 36 (rejecting the government's effort to increase Furst's sentence because of alleged obstructive conduct, recognizing that Fastow himself denied making a guarantee).

served, if any sentence is warranted at all upon further review by either this Court or the United States Supreme Court.

I. Brown Has Served A Full Sentence For The Only Two Counts Of Conviction That The Majority Affirmed.

Brown was sentenced by the trial court on April 21, 2005. A judgment of conviction was entered against him on May 5, 2005. Brown voluntarily reported to federal prison on August 12, 2005. Brown has served twelve (12) months in prison.² In addition, he is entitled to good time credits of 54 days. 18 U.S.C. §3264(b).

Under the relevant Federal Sentencing Guidelines, U.S.S.G. § 1B1.11(b)(3); *see also* Brown Sentencing Tr. 20-21, 26, perjury and obstruction would be grouped, U.S.S.G. § 3D1.2,³ and Brown would be at Base Offense Level **12**. U.S.S.G. §§ 2J1.2, 2J1.3, 3D1.3, 4A1.1, 4A1.3. Furthermore, none of the upward departures articulated in USSG §§ 2J1.2, 2J1.3 apply to Brown's case.⁴ A Base Offense Level **12** would

² Brown is being incarcerated in a higher security prison than was recommended by the district court. Brown Sentencing Tr. 44-45.

³ Indeed, although legally distinct offenses, perjury and obstruction in this case represent essentially the same type of wrongful conduct with the same ultimate harm, and it is therefore appropriate to treat them as a single offense for the purposes of sentencing. *See* U.S.S.G. § 3D1.2. In Brown's case, there was literally no difference in the proof of the two offenses.

⁴ The jury and the district court already found that Brown did not substantially interfere with the administration of justice. Furthermore, any applicable upward departures contemplated in the PSR report and/or by the trial court at sentencing were predicated on

mean a term of imprisonment of at most 10-16 months. U.S.S.G. § 5A. Even without good time credit of almost two months, **Brown has now far exceeded service of a full term of incarceration had he received a sentence at the lower end of the applicable guidelines.**

Furthermore, a level 12 offense qualifies as a Zone C offense which means that a sentence can be served by half in prison and the other half on a form of supervised release. U.S.S.G. § 5C1.1(d)(2). Brown has no criminal history, has been an exemplary citizen, is not a flight risk,⁵ and would have been eligible for supervised release at the 8-month mark, even were he given the *maximum* sentence for a level 12 offense. U.S.S.G. § 5C1.1(d)(2).

In any event, when the district court originally imposed sentence on all five counts, it sentenced Brown at the *minimum* level provided by the guidelines and recognized that Brown was simply doing his job.⁶ (Brown Sentencing Tr. 23.) There

convictions for Counts I-III and no longer apply to Brown.

⁵ See, e.g. Brown Sentencing Tr. 66 (“I’m satisfied from clear and convincing evidence that Mr. Brown is not likely to flee or pose a danger to the safety of any other person in the community.”).

⁶ Brown Sentencing Tr. 39 (Imposing sentence of 46 months for Base Offense 23 which provides for a range between 46 and 57 months). See U.S.S.G. § 5A. Further, the trial court made a downward departure from the suggested range for Brown’s term of supervised release based on that term’s “adequacy” and the District Court’s determination that Brown “will be readily able to resume his place with family and society without further offense.”

is no reason to think that it would do otherwise upon any re-sentencing on the only two counts affirmed by the majority. Brown has already *far exceeded* service of the minimum or likely term of incarceration for the affirmed counts. It is therefore likely that any re-sentencing would be for time already served. Further, even if, on remand, Brown were sentenced to the *maximum* term (under level **12**) of 16 months for perjury and obstruction (which he has almost fulfilled), he should be allowed to complete any additional sentence (a matter of *only days*) under supervised release –not in a federal prison of even a higher level security than the district court recommended for his original prison term. U.S.S.G. § 5C1.1(d)(2).

II. In the Alternative, It Cannot Be Disputed That There Are Substantial Issues Of Law And Fact Raised For Further Appeal.

Further, and based on this Court’s opinion of August 1, 2006, it can no longer be said that Brown’s appeal has not or does not raise substantial issues of fact and law. Fuhs, who the government argued worked at Brown’s *direction*, has been acquitted of all charges. All other convictions against Brown’s co-defendants have been vacated. In fact, the Court has now reversed or vacated a total of 12 out of 14 counts of conviction. The standard for release has been satisfied under 18 U.S.C. § 3143(b).

Brown Sentencing Tr. 39.

As noted above, (1) Brown is not likely to flee or pose a danger to the safety of any other person or the community, (2) any further appellate proceeding are not initiated for the purpose of delay, and (3) further appellate proceedings will raise substantial questions of law or fact that, if resolved in the defendant's favor, are likely to result in reversal, or a sentence with (further) reduced imprisonment. Judge DeMoss's dissent alone is sufficient to meet this third prong that a substantial question of law or fact exists. The panel majority establishes that Brown's sentence has either been fully served or must be further reduced.

Finally, from the perspective of a request for bail pending appeal in all of the circumstances presented in this unique case, Brown respectfully submits that this Court should consider the possibility that it might be as wrong in affirming *any* count of conviction against Brown as it was when it affirmed the *Arthur Andersen* conviction (wrongly obtained by the same overly-creative prosecutorial team), and as wrong as it was when it denied bail pending appeal originally to *each* of the four Merrill Lynch Defendants. The sad fact is that four highly regarded Merrill-Lynch executives have served more than a cumulative three years in prison, when, it is decided now that three should never have served a single day. These families have no remedy for this injustice, and further injustice should not be inflicted upon Brown.

Brown will seek rehearing and/or a petition for writ of *certiorari*. Brown's appeal raises numerous issues worthy of further review. The majority's decision affirming these two counts rests on several mistakes of fact. *Inter alia*, there is not a whisper of evidence or even argument in this record that Brown saw the drafts of the engagement letter or signed the final one. In fact, the only evidence is that he did not, and, even more importantly, government trial counsel knows that he did not. (GRE33(first draft engagement letter), 37(black-lined letter), 39(final draft)); (15:1938; 16:1959, 1965, 1983-85, 2010-11; 19:3126); (X975A:31, 141; X980B:121-123; Dkt. 621 GX List).

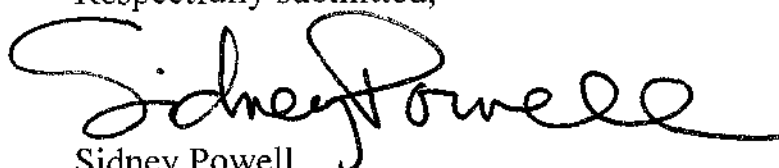
As evidenced by Judge DeMoss' dissent and Brown's prior briefing on the merits, rehearing *en banc* or *certiorari* may be granted. Judge DeMoss would have reversed all of the convictions against Brown, including the convictions for perjury and obstruction. Judge DeMoss, specifically, challenged the majority's decision on the actual truth of Brown's testimony and whether the testimony was material to the grand jury.

Several significant issues warranting Supreme Court review also undermine the perjury and obstruction convictions against Brown—not the least of which is that Brown was wrongly denied the use of Fastow's *Brady* material in which Fastow's own confession corroborated Brown's understanding of the transaction as Brown

expressed it to the grand jury. Brown also has additional grounds to challenge his convictions for perjury and obstruction under *Bronston v. United States*, 409 U.S. 362 (1973), and other precedent of this Court and the Supreme Court.

For these additional reasons, Brown respectfully requests his immediate release pending reversal of *all* counts by this Court, the Supreme Court or re-sentencing by the district court.

Respectfully submitted,

A handwritten signature in black ink that reads "Sidney Powell". The signature is written in a cursive, flowing style with a large initial "S".

Sidney Powell
Texas Bar #16209700

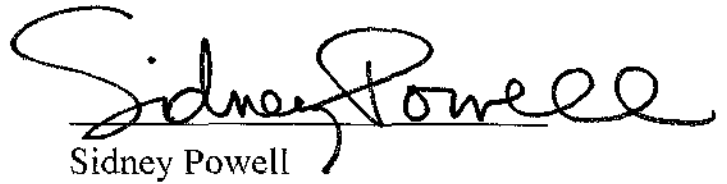
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CERTIFICATE RESPECTING CONFERENCE

I, Sidney Powell, do hereby certify that I contacted Douglas Wilson, Enron Task Force, counsel for the government, with a formal request for his response for purposes of this certificate on August 2, 2006 and he advised that the government opposes this motion.


Sidney Powell

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing document was served via electronic mail and U.S. regular mail to counsel for government and to all the following counsel this 3rd day of August, 2006:

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