

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,
ROBERT S. FURST,
WILLIAM R. FUHS,
Defendants-Appellants.**

**PETITION OF APPELLANTS
DANIEL BAYLY AND ROBERT S. FURST
FOR PANEL REHEARING**

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

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Pursuant to FED. R. APP. P. 40, Appellants Daniel Bayly and Robert S. Furst respectfully request that the panel rehear its August 1, 2006 decision on a discrete issue – whether the district court erred by admitting into evidence the so-called “Brown e-mail.” (GX240 (RE:11)) We ask that the panel reach the Brown e-mail issue for two reasons. First, if, as we hope, the panel’s well-reasoned decision on honest services stands, the case will return to the district court for a new trial. Because the government has consistently identified the Brown e-mail as evidence crucial to its case, the prosecutors will undoubtedly seek to admit it on any retrial – and the district court therefore needs guidance on the admissibility issue before the case is retried. Second, if the full Court is to decide whether to rehear the honest services issue en banc, prudence suggests that the other members of the Court should know before voting that the judgment of reversal – if our challenge to the admission of the Brown e-mail is correct – would be unaffected by a contrary holding on honest services.¹

¹ Although we continue to stand by the remaining arguments we have made on appeal, we believe that the panel need not reach beyond the Brown e-mail at this stage. Unlike the admissibility of the Brown e-mail, the remaining evidentiary and instructional issues may never be presented if and when the case is retried – or, if presented, may arise in a materially different way. Only the Brown e-mail is certain to be pressed by the government again – and, without this Court’s guidance, is highly likely to be admitted (erroneously) at a new trial.

ARGUMENT

I. THE PANEL SHOULD REACH THE BROWN E-MAIL ISSUE BECAUSE THE DISTRICT COURT NEEDS GUIDANCE ON REMAND

As we have explained in our briefs (Bayly Opening Br. 40-54; Bayly Reply Br. 23-32) and at oral argument, the district court’s decision to admit the Brown e-mail – in which co-defendant James Brown wrote that “we had Fastow get on the phone with Bayly and lawyers and promise to pay us back no matter what” – was patently wrong. First, the document, which Brown wrote 15 months after the Fastow call in an effort to push a wholly unrelated transaction, is *double* hearsay. Although Brown indisputably was not on the call that he describes in the e-mail, the government has offered nothing to overcome the embedded hearsay problem. To this day, Brown’s source of information is unknown. Second, the document lacks the “particularized guarantees of trustworthiness” required under FED. R. EVID. 804(b)(3). See *United States v. Bell*, 367 F.3d 452, 465 (5th Cir. 2004) (citation omitted). As Brown himself recognized under oath, the e-mail’s description of the Fastow call is riddled with inaccuracies and exaggerations. (Dkt. 455, Ex. – Pgs. 166-67) For instance, as the government itself has conceded (Dkt. 656 – Pg. 16), lawyers did not participate in the Fastow call. Perhaps most telling, the actual participants on the call – *including Fastow himself* – have contradicted the e-mail’s statement that Fastow “promise[d]

to pay us back no matter what.” See August 1, 2006 Slip Op. at 58 (DeMoss, J., concurring in part and dissenting in part) (“Fastow himself averred to the Government that he, in fact, made only assurances of best efforts to Merrill, not promises or guarantees to take Merrill out of the deal”); Bayly Opening Br. 46-47; Bayly Reply Br. 26.

The admission of the Brown e-mail into evidence against Bayly and Furst was devastating and cannot, under any standard, be deemed harmless. Bayly Opening Br. 51-54; Bayly Reply Br. 30-32; June 23, 2006 Letter On Behalf Of Bayly In Response To June 20, 2006 Gov’t Letter Pursuant To FED. R. APP. P. 28(j). Indeed, at oral argument, a member of the panel characterized the document as a “confession.” In that same vein, at trial the government *itself* characterized the Brown e-mail as “powerfully probative” evidence concerning “the issue” “at the nub of” the case. (Tr. 2970, 2973, 2979) In summation, the prosecutors told the jury that the Brown e-mail is “a critical document that you should focus on when you’re back in the jury room deliberating.” (Tr. 6274)

Both before and during trial, the district court struggled in deciding whether to admit the Brown e-mail. The government tried *three times* to convince the district court to admit the document, finally succeeding in the middle of trial. (Dkt. 290 – Pgs. 6-7; Tr. 330-53, 2954-81, 3241-42; Dkt. 283 (June 25, 2004 Hearing Transcript)

– Pg. 74.) Given the government’s repeated characterization of the Brown e-mail as crucial to its case, there is every reason to believe that the government will persist in its efforts to win admission of the e-mail at a second trial. Even more to the point, there is every reason to believe that the district court, in the absence of guidance from this Court, would reach the same conclusion as to the e-mail’s admissibility at a second trial.

Because the district court is likely to adhere at a new trial to its decision admitting the Brown e-mail, there is every reason to believe that, in the event of a second conviction, Appellants will be back before this Court again, raising precisely the same challenge to the erroneous admission of that document. If successful at that time, Appellants may have to endure yet another trial at which, at long last, the government will have been barred from offering against Bayly and Furst an e-mail written by Brown based on a conversation he learned about at best second-hand. Resolving the issue at this juncture will spare the litigants – and the courts – time and resources and protect Appellants from having to run the gauntlet unnecessarily.

II. A RULING ON THE ADMISSIBILITY OF THE BROWN E-MAIL WOULD ASSIST THE FULL COURT IN DETERMINING WHETHER EN BANC REVIEW IS WARRANTED

The government has stated that it is considering whether to petition for rehearing en banc. See Gov’t Motion For Extension Of Time To File A Petition For

Rehearing En Banc ¶ 4. If the full Court is going to consider whether to rehear the panel's decision on the honest services issue en banc, the other members of the Court should know that a contrary holding on the honest services charge – if we are correct in our challenge to the admission of the Brown e-mail – would not affect the judgment of reversal.

Although a decision in Appellants' favor on the Brown e-mail issue, in our view, is hardly the *only* reason that the judgment of reversal should stand if the panel's decision on the honest services issue is vacated, the Brown e-mail issue raises clear and discrete questions that have been briefed and argued exhaustively by both the Appellants and the government. See Bayly Opening Br. 40-54; Gov't Br. 187-202; Bayly Reply Br. 23-32. Given the extraordinary nature of en banc review, including the fact that it requires the time and attention of the panel members and every active judge on the court, the question whether the Brown e-mail was erroneously admitted warrants resolution now. By addressing that issue, and resolving it in Appellants' favor, the other Members of the en banc Court will know, before acting on the government's petition, that a decision in the government's favor on honest services would not alter the judgment of reversal – and that granting en banc review would therefore be inappropriate. Even apart from the district court's

need for guidance, therefore, we ask that the panel grant rehearing and decide the Brown e-mail issue.²

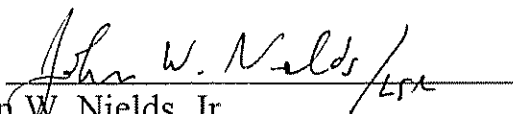
CONCLUSION

For the foregoing reasons, Appellants Daniel Bayly and Robert S. Furst respectfully request that the Court grant this petition for panel rehearing.

DATED this 29th day of August, 2006.

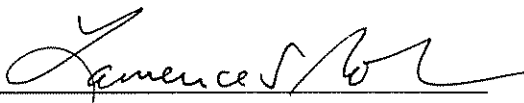
Respectfully submitted,

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² If rehearing en banc is granted, the panel's honest services decision is vacated, and no independent ground then exists to sustain the judgment of reversal, we intend to raise all of the grounds for reversal not yet reached.

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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a true and complete copy of the foregoing Petition of Appellants Daniel Bayly and Robert S. Furst for Panel Rehearing was served via hand delivery on the government's counsel of record and via U.S. mail on counsel for appellants at the following addresses this 29th day of August:

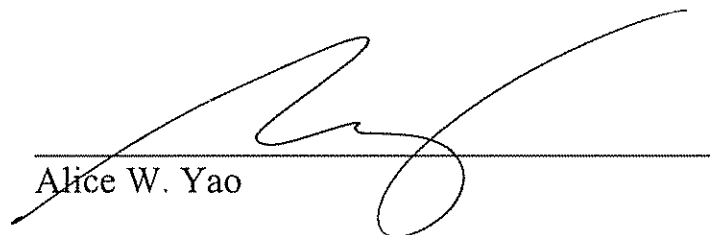
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