08-20038

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,
Defendants-Appellants

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

BRIEF OF APPELLANT JAMES A. BROWN

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to FIFTH CIRCUIT LOCAL RULE 28.2.1, the undersigned counsel for Defendant-Appellee, James A. Brown, certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal in this appeal, No. 08-20038.

1. United States of America, Plaintiff-Appellee;

2. Andrew Weissmann, Matthew W. Friedrich, Kathryn H. Ruemmler, Former Attorneys for Plaintiff-Appellee (Enron Task Force);

3. Stephan Oestreicher, Sangita K. Rao, Joseph Palmer, Arnold Spencer, Patrick Stokes, J. Douglas Wilson, Attorneys for Plaintiff-Appellee (Department of Justice);

4. James A. Brown, Defendant-Appellant;

5. Daniel Bayly, Defendant-Appellant;

6. Robert S. Furst, Defendant-Appellant;

7. Sidney Powell, P.C., Counsel for Defendant-Appellant James A. Brown (Sidney Powell, Torrence E. Lewis, of counsel);

8. Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP, Counsel for Defendant-Appellant Daniel Bayly (Lawrence S. Robbins, Alan E. Untereiner, Gregory L. Poe, Alice W. Yao, Brian A. Pérez-Daple, of counsel);

9. Gardere Wynne Sewell, LLP, Counsel for Defendant-Appellant Daniel Bayly (Thomas A. Hagemann, Marla Thompson Poirot, of counsel);

10. Dornbush Schaeffer Strongin & Weinstein, LLP, Former Counsel for Defendant-Appellant Daniel Bayly (Richard J. Schaeffer, Peter J. Venaglia, Brian Rafferty, of counsel);

11. Fish & Richardson, P.C., Counsel for Defendant-Appellant Robert S. Furst (Paul Coggins, Madeleine Johnson, Lauren Koletar, of counsel);

12. Merrill Lynch & Co., Inc.;

13. Enron Corp.

Respectfully submitted,

/s/ Sidney Powell
Sidney Powell

RECOMMENDATION ON ORAL ARGUMENT

Appellant James Brown requests extended oral argument of 30 minutes per side. The record is enormous. This is a complex, Class IV criminal case, certified by the district court for interlocutory appeal of Double Jeopardy issues upon the court's denial of Defendants' Motions To Dismiss the Indictment (RE2). The government originally indicted and convicted Merrill Lynch executives for depriving Enron of the "honest services" of Enron employees in a business transaction that Merrill conducted with Enron in 1999, ultimately netting Enron a profit of $53 million. No Merrill Defendant benefitted financially.

These businessmen served almost a year in prison while denied bail pending appeal. This Court then vacated their conspiracy and wire fraud convictions, rejecting entirely the government's honest services charges. Upon remand, the government did not seek a new grand jury indictment. Instead, it redacted the impermissible honest services allegations. However, the Indictment never alleged a discrete, traditional, "money and property" scheme to defraud. Therefore, Double Jeopardy bars a second prosecution on the only wire fraud the Indictment ever alleged. Oral argument would assist the Court in deciding this important Constitutional issue in a complex case with three Defendants.

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STATEMENT OF JURISDICTION

This is an interlocutory appeal in a criminal case from an order of the district court denying Defendants' Motions to Dismiss the Indictment. The district court certified the motion for appeal on "Defendants' contention that the Double Jeopardy Clause will be violated if they are retried for wire fraud on the money and property theory," finding that Defendants' Double Jeopardy arguments presented "a colorable, non-frivolous contention." *United States v. Bayly*, 2008 WL 89624, *9 (S.D. Tex. 2008) (Dkt. 1026:24; RE2:24).[1] The district court had jurisdiction pursuant to 18 U.S.C. § 3231. Its denial of Defendants' Motions to Dismiss the Indictment on Double Jeopardy grounds is appealable, and this Court has jurisdiction pursuant to 28 U.S.C. § 1291. *See Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, (1977). Defendants timely filed notices of appeal (Dkt. 1038, 1040, 1044; RE3).

STATEMENT OF THE ISSUE

The government's Third Superceding Indictment charged a conspiracy to: (a) commit wire fraud, and (b) falsify Enron's books and records (Count I); and, two substantive wire fraud counts (Counts II and III). On appeal following conviction, this Court vacated the conspiracy and wire fraud convictions of the Merrill

[1] Because of the enormity of the record, pleadings are referred to by Docket number [Dkt.]. All trial transcript citations are to the Fourth Supplemental Record unless otherwise indicated.

Defendants because "the scheme as alleged falls outside the scope of honest services fraud." *United States v. Brown*, 459 F.3d 509, 517, 523 (5th Cir. 2006), *cert. denied*, 127 S.Ct. 2249 (2007). On remand, the government merely redacted the honest services language. Brown, joined by Appellant Furst, raise one issue:

> Whether Double Jeopardy bars a second trial of the Merrill Defendants on wire fraud charges because the only wire fraud the Indictment ever alleged depended completely on the honest services allegations and alleged no discrete money or property offense for which Defendants can be placed in jeopardy a second time?

Reversal of the district court's decision on this issue would be dispositive of all wire fraud allegations.[2]

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below.

On July 22, 2004, the government obtained its Third Superseding Indictment charging, in relevant part, two Enron employees and four Merrill Lynch employees with:

- conspiracy to (a) commit wire fraud in violation of 18 U.S.C. §§ 1343, 1346 and (b) to falsify Enron's books and records, in violation of 15 U.S.C. §§ 78m(b)(2)(A) and (B), 78m(b)(5), 78ff, and Title 17 C.F.R. § 240.13b2-1 (18 U.S.C. § 371);

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[2] The conspiracy to falsify books and records charge remains standing, separately, in Count I of the Indictment, and is not implicated by the Double Jeopardy arguments.

- two counts of substantive wire fraud in violation of Title 18 U.S.C. §§ 1343, 1346, 2;
- and, with respect to James Brown only, perjury and obstruction of justice in violation of Title 18 U.S.C. §§ 1623, 1503. (Dkt. 311; RE4).

The government did not allege a substantive books and records offense.

After a six week trial, a Houston jury returned a guilty verdict against Merrill employees James Brown, Daniel Bayly, William Fuhs, and Robert Furst, and Enron employee Daniel Boyle (Dkt. 628; RE5). All were sentenced to at least 30 months in prison, restitution and substantial fines. (Dkt. 778; RE6). All Merrill Defendants were denied bail pending appeal and imprisoned (Dkt. 800, 825, 834).[3]

Approximately a year later, this Court vacated the conspiracy and wire fraud convictions of the Merrill Defendants. It acquitted Defendant Fuhs on all charges, and released Defendants from prison. *United States v. Brown*, 459 F.3d 509, 517 (5th Cir. 2006), *cert. denied*, 127 S.Ct. 2249 (2007).[4] This Court explained: "Because

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[3] Enron employee Kahanek was acquitted by the trial jury; Enron employee Boyle did not appeal his convictions. *Brown*, 459 F.3d at 513.

[4] This Court affirmed Brown's perjury and obstruction convictions. However, they are now before the district court on a pending motion for new trial based on significant, new and exculpatory evidence. Reversal and dismissal of all charges will be required because of the government's failure to turn over long requested and withheld *Brady* material, only some of which the government has produced to this day. This exculpatory material includes evidence from three Merrill corporate counsel, the raw notes of government interviews of Andrew Fastow, and Brown's independent discovery of extraordinary evidence from former Enron Treasurer Jeff McMahon, who was never indicted. The district court has not yet ruled on Brown's Motion for New Trial (Dkt. 1004,1020).

we hold that the honest-services theory of wire fraud does not extend to the circumstances contended by the Government, we vacate the conspiracy and wire-fraud convictions. We therefore do not reach the remaining issues...." *Id*. at 517. It continued: "We therefore need not address the viability of the Government's remaining theories of criminal liability (the money-or-property and books-and-records charges)."[5] *Id*. at 523. *See also id*. ("the scheme as alleged falls outside the scope of honest services fraud").

Upon remand to the district court, the government did not reconvene a grand jury and obtain a new indictment. Rather, the government merely redacted the Third Superseding Indictment, excising the honest services object of the conspiracy and wire fraud, references to the statute itself (§1346) and related language (Dkt. 935, 937). Defendants moved to dismiss, asserting that the indictment alleged only an honest services wire fraud and conspiracy. It never alleged a traditional scheme to defraud any victim of cognizable money or property. Therefore, Defendants could not be tried again on the same wire fraud allegations, simply shorn of the honest services language (Dkt. 952, 954, 964, 994, 998, 1011, 1012, 1022, 1025).

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[5] The Defendants have long maintained that any traditional wire fraud allegations, that is to say those not dependent on an honest services theory, were also fatally defective. *See* Brief for Appellant Brown at 25; Brief for Appellant Bayly at 63-78; Reply Brief of Appellant Bayly at 32-40; Reply Brief of Appellant Brown at 55; *United States v. Brown*, No. 05-20319 (5th Cir. Nov. 15, 2005).

The district court denied the motions to dismiss the Indictment[6] but found Defendants' Double Jeopardy claims worthy of interlocutory appeal, noting, *inter alia*, that it could find no authority "analyzing the government's ability to prosecute wire fraud on a money and property theory when the victim is an employer of persons charged in the scheme and where the underlying conduct of the employees has been held not to constitute a scheme to defraud the victim of the employees' honest services, let alone a case examining the interplay between these theories in the context of a factually similar indictment." (RE2:19).

B. Statement of the Facts.

(i) Background Facts. This case arises from a relatively small business transaction between Merrill Lynch and Enron at year-end 1999. At that time, Enron was a highly respected, $40 billion company with $957 million in profits (Tr. 3770; GX801, 806). Enron solicited Merrill to invest $7 million cash, and secure a $21 million loan, to purchase a minority interest in a company that would profit from three electrical power barges stationed off the coast of Nigeria to assist with that country's national energy crisis (Tr. 799, 814-15). Corporate and outside counsel for both parties negotiated the transactions, and Enron's counsel, Vinson & Elkins,

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[6] The district court granted Brown's Motion to Sever from co-Defendants Bayly and Furst (Dkt. 1028).

finalized documents for the sale that expressly excluded any prior oral conversations or representations (Tr. 1983-84, 4316-24; BaylyX 355, 356).[7]

None of the Merrill Defendants profited personally from this transaction. The government never alleged that they did. This transaction served corporate purposes only and involved businessmen engaged in the daily performance of their jobs. The district court correctly noted that "the Nigerian Barge assets were real, the negotiations with Nigeria for the sale of power generated from the barges were real, and a bona fide sale ultimately was consummated in the year 2000, producing an authentic profit for Enron of more than $50 million." (1stSR41:19).

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[7] The government prosecuted the Merrill employees based on its hearsay version of a telephone conversation in which Enron CFO Andrew Fastow allegedly guaranteed that Enron would buy the barges back within six months at a specified rate of return. No government witness was a party to that phone call, nor was Defendant Jim Brown. The government's theory of this honest services fraud depended on its assertion that Fastow's guarantee of a buy-back rendered the transaction a loan, and therefore, that Enron falsified its books when it recorded the earnings as a gain from a sale. The government's case necessarily depended on false or erroneous second and third-hand hearsay testimony from Fastow's subordinates at Enron.

The Defendants maintained that Fastow and Merrill had agreed only that Enron would use its "best efforts" and remarket the barges to a third-party–a representation that, even the government agrees, renders the transaction perfectly lawful. *See* Tr. 4519-20, 6485; Government's Opposition to Furst's Corrected Motion For Release on Conditions Pending Appeal at 3 n. 1, 17, *United States v. Brown*, No. 05-20319 (5th Cir. June 1, 2005); Brief for Appellee United States, at 229-230 n.87, *United States v. Brown*, No. 05-20319 (5th Cir. Oct. 11, 2005). The recently disclosed Fastow raw notes, testimony of Merrill counsel, and independently discovered evidence of former Enron Treasurer Jeff McMahon vindicate Defendants' position. *See supra* note 4 and accompanying text.

(ii) This appeal turns on what is now the government's fifth version of an Indictment (RE4), which has been stripped of its primary allegations of "honest services" fraud (RE7). In relevant part, the Third Superseding Indictment, on which Defendants were wrongly tried and imprisoned, alleged:

COUNT ONE
(Conspiracy to Commit Wire Fraud and Falsify Books and Records)
* * *

> 30. . . . defendants. . . along with conspirators Andrew S. Fastow and Ben F. Glisan, Jr. . . .conspired to (a) knowingly and intentionally devise a scheme and artifice to defraud Enron and its shareholders, including to deprive them of the intangible right of honest services of its employees, and to obtain money and property. . .all in violation of Title 18, United States Code, Sections 1343 and 1346; and (b) . . . falsify books and records and accounts of Enron . . .in violation of Title 15 . . .

COUNTS TWO AND THREE
(Wire Fraud)
* * *

> 33. defendants . . ., having devised a scheme and artifice to defraud Enron and its shareholders, including to deprive them of the intangible right of honest services of its employees and to obtain money and property. . .

The redacted version of the same Indictment alleges no different or discrete wire fraud offense than did the Indictment on which the Defendants were originally tried.[8] It now reads, in pertinent part:

[8] The government has never fully redacted all the honest services language and other allegations previously stricken from the Indictment, and the district court never ruled on Defendants' Motions to Strike (Dkt. 940, 941, 944, 962, 995; RE4, 7). However, enough

COUNT ONE

(Conspiracy to Commit Wire Fraud and Falsify Books and Records)

* * *

30. . . . defendants . . .conspired to: (a) knowingly and intentionally devise a scheme and artifice to defraud Enron and its shareholders, [redacted] and to obtain money and property . . . in violation of Title 18, United States Code, Section 1343 [ ]; and (b) . . . falsify books, records and accounts . . .

COUNTS TWO AND THREE

(Wire Fraud)

* * *

33. . . . defendants . . ., having devised a scheme and artifice to defraud Enron and its shareholders, [redacted] and to obtain money and property . . .

(Compare RE4 with RE7).

SUMMARY OF THE ARGUMENT

Defendants cannot be placed in jeopardy again on the same Indictment, for the only wire fraud, and on the same theory, already rejected by this Court. *Abney v. United States*, 431 U.S. 651, 660-61, 97 S.Ct. 2034, 2041 (1977) ("Double Jeopardy Clause . . . is a guarantee against twice being put to trial for the same offense."). This Court found that the case the government originally alleged, constructed, presented to the grand jury and tried–a deprivation of honest services fraud under §§ 1343 and

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was redacted for this Court to determine that the Indictment alleges no wire fraud offense different from that which required this Court to vacate the Defendants' convictions. In so doing, this Court necessarily acquitted the Defendants of any honest services wire fraud violation because the government did not prove that the Defendants engaged in any conduct within the purview of those statutes. *Brown*, 459 F.3d at 517, 522-23.

1346–was legally insufficient. It did so because the government did not prove that Defendants engaged in conduct within the reach of those statutes. It necessarily concluded, as a matter of law, that Defendants did not defraud Enron or its shareholders of honest services. *United States v. Brown*, 459 F.3d 509 (5th Cir. 2006), *cert. denied*, 127 S.Ct. 2249 (2007).

It is beyond dispute that Defendants could not be placed in jeopardy again for an honest services wire fraud in this case. The current Indictment, redacted of the honest services charges, does not state any other discrete wire fraud offense for which Defendants can be prosecuted a second time. In light of the government's original trial and failure to prove conduct by the Defendants that established a violation of §§ 1343 and 1346, Brown, Bayly, and Furst may not be placed in jeopardy again on the empty wire fraud allegations remaining in this Indictment. *Green v. United States*, 355 U.S. 184, 187-88, 190-92, 78 S.Ct. 221, 223, 225-26 (1957).

Essential to a §1343 (traditional) wire fraud allegation standing alone is the defendant's fraudulent scheme to take for himself money or other property that rightfully belongs to the victim. Indeed, in *United States v. Ratcliff*, 488 F.3d 639, 641 (5th Cir. 2007), this Court dismissed a creative mail fraud indictment for failure to allege a scheme to defraud the victim of money or property. *See also United States v. Herron*, 825 F.2d 50, 54 (5th Cir. 1987) (reversing wire fraud convictions

for failure of indictment to allege property violation). The Indictment here does not even allege that any Defendant sought to obtain any specified money or property from any specified victim. In the absence of the honest services language, it does not, and cannot, allege any deprivation or any "taking away" of any property from any victim. There was none. It contains no allegation that any Merrill Defendant schemed for any personal gain or self-enrichment.

In rejecting Defendants' Motions to Dismiss, the district court engaged in an unconstitutional and impermissible constructive amendment of the Indictment. The Indictment does not contain any of the language or allegation the district court created to avoid the bar of Double Jeopardy. *See Stirone v. United States*, 361 U.S. 212, 217, 80 S.Ct. 270, 273 (1960); *United States v. Nunez*, 180 F.3d 227, 230-31 (5th Cir. 1999). Moreover, the district court itself conceded that: (1) the government's second prosecution of this case (even on a traditional wire fraud theory) has no precedent; and, (2) to reach its conclusion, the court had to adopt a theory of a "cognizable intangible property interest" that this Circuit has never accepted (RE2: 8, 10). At the same time, the district court failed even to acknowledge–much less distinguish–recent controlling precedent that requires reversal and forecloses a second prosecution of these Defendants on an indictment that only ever averred an "honest services" wire fraud. *Ratcliff*, 488 F.3d at 639.

ARGUMENTS AND AUTHORITIES

This Court must dismiss the charges of conspiracy to commit wire fraud (Count I) and two substantive counts of wire fraud (Counts II and III), in violation of 18 U.S.C. §§ 371 and 1343, because the indictment as redacted does not state a wire fraud offense any different from the one for which Defendants were originally placed in jeopardy, imprisoned, and necessarily exonerated of criminal culpability. The Third Superseding Indictment charged only an honest services wire fraud. Defendants cannot be tried on those charges again. *Abney*, 431 U.S. at 651, 660-61, 97 S.Ct. 2034, 2041; *Green*, 355 U.S. at 184, 187-88, 190-92, 78 S.Ct. 221, 223, 225-26.

I. STANDARD OF REVIEW

Whether a prosecution is barred by the Double Jeopardy Clause is reviewed *de novo*. *United States v. Delgado*, 256 F.3d 264, 270 (5th Cir. 2001). In reviewing a motion to dismiss the indictment, this Court must take the allegations of the indictment as true. *United States v. Kay*, 359 F.3d 738, 742 (5th Cir. 2004) (FCPA indictment for foreign bribery). However, "[s]ince the government controls the particularity of an indictment, it should bear the responsibility for any ambiguities resulting in its vagueness." *United States v. Stricklin*, 591 F.2d 1112, 1118-19 (5th Cir. 1979). Where the Defendant makes a prima facie double jeopardy claim, the

burden of establishing that the indictment charges a separate crime is on the government. *Delgado*, 256 F.3d at 270.

II. THE WIRE FRAUD CHARGES ALLEGED ONLY A SCHEME TO DEPRIVE ENRON OF HONEST SERVICES, AND DEFENDANTS CANNOT BE TRIED AGAIN ON THE WIRE FRAUD ALLEGATIONS IN THIS INDICTMENT.

The precise manner in which an indictment is drawn is crucial, and the government is bound by its allegations. "A court cannot permit a Defendant to be tried on charges not made in the indictment against him." *Stirone v. United States*, 361 U.S. 212, 217, 80 S.Ct. 270, 273 (1960); *accord United States v. Nunez*, 180 F.3d 227, 230-31(5th Cir. 1999); *see United States v. Griffin*, 324 F.3d 330, 355-56 (5th Cir. 2003); *United States v. Marcello*, 876 F.2d 1147, 1152 (5th Cir. 1989). This fundamental right exists to provide notice to the defendant, to serve as a bar for purposes of Double Jeopardy, and to protect the defendant's constitutional right to have the charges against him reviewed by a grand jury and to face trial only after the charges have withstood that review. *Stirone*, 361 U.S. at 216-17, 80 S.Ct. at 272-73.

Neither the government nor any court can broaden the terms or allegations of an indictment. *Russell v. United States*, 369 U.S. 749, 764-66, 82 S.Ct. 1038, 1047-48 (1962); *Griffin*, 324 F.3d at 355-56. *Cf. Stirone*, 361 U.S. at 215-16, 80 S.Ct. at 272; *Nunez*, 180 F.3d at 230-31; *Marcello*, 876 F.2d at 1152. Likewise, the Double

Jeopardy clause forecloses the government from availing itself of a second trial to remedy its own mistake when it prosecutes a defendant on a charge it is unable to prove. *Burks v. United States*, 437 U.S. 1, 11, 98 S.Ct. 2141, 2147 (1978) ("Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.").

To conform to constitutional standards, an indictment must apprise the accused of the charges "with sufficient clarity and certainty." *United States v. Kay*, 359 F.3d 738, 742 (5th Cir. 2004). The indictment must (1) contain the elements of the offenses charged and fairly inform defendant of the charge he must defend; and, (2) enable him to plead an acquittal or conviction in bar of future prosecution for the same offense. *Id*. As the Supreme Court has explained:

> It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species–it must descend to particulars.
>
> * * *
>
> A cryptic form of indictment in cases of this kind requires the defendant to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution a free hand on appeal to fill in the gaps by proof by surmise or conjecture.

Russell, 369 U.S. at 764-66, 82 S.Ct. at 1047-48; *United States v. Diecidue*, 603 F.2d 535, 547 (5th Cir. 1979) (indictment must descend to particulars and allege the subject and object of the alleged wrong), *cert. denied*, 445 U.S. 946, 100 S.Ct. 1345 (1980), *and cert. denied*, 446 U.S. 912, 100 S.Ct. 1842 (1980).

Upon redaction of an indictment, "the central inquiry is whether the *remaining* allegations sufficiently allege a viable, independent offense." *United States v. Bermingham*, 2007 WL 1052600, *2 (S.D. Tex. 2007) (emphasis in original).[9] Thus, once redacted of the government's failed honest services allegations, the remaining Indictment must allege a discrete wire fraud offense under §1343 alone to proceed a second time against Brown for wire fraud. *See United States v. Davis*, 841 F.2d 1127, *2 (6th Cir. 1988); *United States v. Slay*, 717 F. Supp. 689, 691 (E.D. Mo. 1989); *United States v. Gray*, 705 F. Supp. 1224, 1232 (E.D. Ky. 1988).[10] To do so,

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[9] *Bermingham* was a Task Force prosecution of a Fastow scheme pursuant to which Fastow's co-conspirators at Natwest pocketed millions. In direct contrast to this case, the facts remaining in the Task Force's redacted indictment in *Bermingham* alleged "conduct [that] was reasonably calculated, indeed *intended*, to deceive" and the defendants' "receipt of over $7 million in proceeds that might otherwise have gone to their employer." *Bermingham,* 2007 WL 1052600 at *1, 6. Multiple paragraphs of the indictment alleged defendants' scheme for self-enrichment. *Id.* at *3. The Natwest defendants recently entered guilty pleas.

[10] In both *Gray* and *Slay*, the district court found that re-prosecutions, in the wake of *McNally* and reversals based on intangible right theories, were barred by Double Jeopardy, where the only crimes charged involved the deprivation of honest services rejected in *McNally*, and, where, as here, the government did not bring new charges in a superseding indictment upon remand.

the Indictment must specifically identify a legally cognizable money or property interest–specific money or property–sought to be obtained by the Defendant from the victims–different from the honest services charge that the government failed to sustain in *Barge I. Brown*, 459 F.3d at 517; *Ratcliff*, 488 F.3d at 643. Because the Indictment fails to allege a scheme by Defendants to defraud any victim of that victim's specified money or property, as required for a violation of § 1343 standing alone, and because Defendants cannot be placed in jeopardy again for the only wire fraud offense the Indictment ever alleged (the failed honest services fraud), all wire fraud allegations must be dismissed. *Smalis v. Pennsylvania*, 476 U.S. 140, 142, 106 S.Ct. 1745, 1747 (1986) (judgment that the evidence is legally insufficient to sustain a guilty verdict constitutes an acquittal for purposes of the Double Jeopardy Clause); *see Ratcliff*, 488 F.3d at 647 (charged conduct posed no harm to any victim's property rights); *Marcello*, 876 F.2d at 1150 (No crime alleged where the wire fraud indictment "contains no property interest allegation whatsoever.").

A. The Indictment Only Alleged A Scheme To Deprive Enron And Its Shareholders Of The Honest Services Of Enron Employees.

The government must bring all "theories of liability" in a single trial. *Sanabria v. United States*, 437 U.S. 54, 72, 98 S.Ct. 2170, 2183 (1978). Brown's initial indictment was creatively crafted by the Enron Task Force, alleging an honest

services wire fraud based on 18 U.S.C. §§1343[11] and 1346.[12] Congress enacted §1346 in reaction to the Supreme Court's decision in *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875 (1987). Section 1346 makes the "intangible right to honest services" an interest protected by the wire and mail fraud statutes, §§1343 and 1341.[13] Section 1346, however, "by its terms, did not restore the application [disapproved in *McNally*] of the mail fraud statute to all 'intangible rights,'" but only to the deprivation of honest services. *United States v. Turner*, 465 F.3d 667, 673 (6th Cir. 2006).

While an indictment can allege a traditional wire fraud–a scheme to obtain money or property to enrich the defendant–based solely on §1343, an "honest

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[11] "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both." 18 U.S.C. § 1343.

[12] "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. Because Brown did not pay or receive any bribes or kickbacks, nor engage in any version of self-enrichment or secret self-dealing, the government overreached even to make that charge. *See Brown*, 459 F.3d at 527; *United States v. Rybicki*, 354 F.3d 124, 139 (2d Cir. 2003) (*en banc*).

[13] It is well settled that legal authority and analysis are equally applicable to the mail and wire fraud statutes. *United States v. Mills*, 199 F.3d 184, 188 (5th Cir. 1999).

services" fraud requires that the government allege both §§1343 and 1346. Thus, to allege that these Defendants fraudulently schemed with Fastow to deprive Enron of honest services, the government necessarily had to invoke both §§1343 and 1346. *United States v. Jain*, 93 F.3d 436 (8th Cir. 1996), *cert. denied*, 520 U.S. 1273, 117 S.Ct. 2452 (1997); *Turner*, 465 F.3d at 673. A simple comparison of the government's original and redacted Third Superseding Indictments makes clear that the only deprivation, or object, of the wire fraud scheme that the government ever alleged was the deprivation of "the intangible right of honest services of [Enron's] employees." (Dkt. 311; RE4). The entire indictment, factually and legally, rested on the premise that the Merrill Defendants joined Fastow's alleged scheme to deprive Enron and its shareholders of the "honest services" of Enron employees.

Specifically, the Third Superseding Indictment alleged, in pertinent part:

> <u>COUNT ONE</u>
> (Conspiracy to Commit Wire Fraud and Falsify Books and Records)
> * * *
> [T]he defendants . . . along with conspirators Andrew S. Fastow and Ben F. Glisan, Jr., and others conspired to: (a) knowingly and intentionally devise a scheme and artifice to defraud Enron and its shareholders, including to deprive them of the intangible right of honest services of its employees, and to obtain money and property by means of materially false and fraudulent pretenses. . . . all in violation of . . . Sections 1343, 1346; and (b) knowingly and willfully falsify books, records and accounts of Enron in violation of Title 15 . . . ." (Dkt. 311:9, RE3)

COUNTS TWO and THREE, substantive wire fraud counts, alleged:

> "(Wire Fraud): . . . a scheme and artifice to defraud Enron and its shareholders, including to deprive them of the intangible right of honest services of its employees, and to obtain money and property . . ." (Dkt. 311:12, RE3).

Accordingly, both factually and legally, the government only alleged a single wire fraud scheme–necessarily in violation of both §§1343 and 1346–in its conspiracy charge and in each of the two substantive counts. *See Central Tablet Mfg. Co. v. United States,* 417 U.S. 673, 690, 94 S.Ct. 2516, 2526 (1974) ("Legal consequences ordinarily flow from what has actually happened, not from what a party might have done from the vantage of hindsight."). As a matter of law, the government could not have separated the two statutes (§§ 1343 and 1346) and charged two distinct offenses (an honest services wire fraud and a traditional wire fraud), nor could it have obtained consecutive or even separate, concurrent sentences for the Defendants' alleged violations of §§1343 and 1346 in *Barge I. Brown v. Ohio*, 432 U.S. 161, 169, 97 S.Ct. 2221, 2227 (1977) ("The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units.").

The Third Superceding Indictment alleged only one conspiracy to commit wire fraud, with one scheme to "deprive [Enron and its shareholders] of the intangible right of honest services of its employees" (and the same in two substantive counts)–all completely dependent on the government's *only* theory of criminal

conduct and allegations of §1346 that it failed to sustain in *Barge I*. *See Ratcliff*, 488 F.3d at 649 (mail fraud statute and Supreme Court precedent "simply do not proscribe conduct for which [Defendant] was indicted"); *Davis*, 841 F.2d 1127 ("We shall not strain to construe this defective indictment as implicitly charging that the purpose of the scheme was to deprive someone of money, as opposed to depriving [someone of honest services]."); *Herron*, 825 F.2d at 58 ("We refuse to create a new strand in the bundle of property rights which gives the [alleged victim] an ownership interest in information it does not already possess and has not by law compelled an individual to divulge.").

B. The Indictment Has Never Alleged A Scheme To Obtain Or Deprive Anyone Of Money Or Property.

Without resort to §1346, an indictment must state an identifiable, cognizable object of money or property that Defendant schemed to take away from the specified victim–something that was property in the hands of the victim himself. *Cleveland v. United States*, 531 U.S. 12, 26, 121 S.Ct. 365, 374 (2000); *McNally*, 483 U.S. at 358-59, 107 S.Ct. at 2881; *Ratcliff*, 488 F.3d at 643-644 n. 5; *United States v. Males*, 459 F.3d 154, 157 (2d Cir. 2006); *Herron*, 825 F.2d at 57. Merely tracking the language of the statute with the generic statutory words "money or property," is not legally

sufficient. *Russell*, 369 U.S. at 764-66, 82 S.Ct. at 1047-48. If it were, an indictment would need only to state the name of the defendant, a date, and quote the statute. [14] The law requires more. An indictment must also allege the facts that satisfy the essential elements of the law which constitute an offense. Where, as here, the definition of the offense "includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition"; rather, the indictment "*must descend to particulars*." *Id.* at 765, 82 S.Ct. at 1047 (citations omitted) (emphasis added); *cf. Diecidue*, 603 F.2d at 547.

The money and property, or object of the defendant's alleged scheme to defraud a specific victim, lie at the very core of a traditional wire fraud charge, and these elements must be specifically alleged. *Russell*, 369 U.S. at 764-66, 82 S.Ct. at 1047-48. Unlike materiality or intent, money and property are not elements that can be inferred from the facts. *See Ratcliff*, 488 F.3d at 644 n. 4. *Ratcliff*, which the district court ignored, requires a direct connection between the defendant, the fraudulent scheme he allegedly joined, and a legally cognizable money or property

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[14] Even in the realm of civil procedure, where "notice" pleading is allowed, the Supreme Court has recently tightened the standard for giving notice to the defendant and the court. *See Bell Atlantic Corp. v. Twombly*, — U.S. —, 127 S.Ct. 1955, 1965 (2007)("[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.") (citations omitted).

interest that the defendant sought to obtain from the victim pursuant to his scheme. *Id*. at 644-45. *See also Russell*, 369 U.S. at 764-66, 82 S.Ct. at 1047-48; *Griffin*, 324 F.3d at 355-56.

As redacted, the Indictment now reads only that the Merrill Defendants, along with Fastow and others at Enron "conspired to (a) knowingly and intentionally devise a scheme and artifice to defraud Enron and its shareholders [] and to obtain money and property by means of materially false and fraudulent pretenses, representations and promises . . . " (Count I). Counts II and III are no more specific. They charge: ". . . Defendants, [ ] along with conspirators Andrew S. Fastow and Ben F. Glisan Jr., . . . having devised a scheme and artifice to defraud Enron and its shareholders, [ ] and to obtain money and property by means of materially false and fraudulent pretenses, representations and promises. . . ." No count (or overt act) charges that any Merrill Defendant sought or obtained actual money, or any tangible or intangible property from any victim, or sought to deprive anyone of any cognizable, intangible right. The Indictment does not identify any object of its boilerplate "scheme and artifice to defraud" and "to obtain money and property."

1. Brown Neither Sought Nor Obtained Money Or Property Cognizable Under The Wire Fraud Statute.

"It does not suffice, we clarify, that the object of the fraud may become property in the recipient's hands; for purposes of the [wire] fraud statute, the thing obtained must be property in the hands of the victim." *Cleveland v. United States*, 531 U.S. 12, 16, 121 S.Ct. 365, 368 (2000).[15] *Cf. Carpenter v. United States*, 484 U.S. 19, 25 108 S.Ct. 316, 320 (1987) (object of the scheme was to take the alleged victim's property). This Circuit recently reaffirmed this core requirement in *Ratcliff*, 488 F.3d at 648 (object must constitute property in the hands of the alleged victim prior to mail fraud scheme). Similarly, the Tenth Circuit, *en banc*, rejected an indictment that failed to "provide any notice that the transfer of money or property from the victim to the defendant is an essential element of mail fraud against which [defendant] had to prepare a defense." *United States v. Shelton*, 848 F.3d 1485, 1494 (10th Cir. 1988) (*en banc*); *see also McNally*, 483 U.S. at 360, 107 S.Ct. at 2882. The Sixth Circuit has also confirmed this fundamental predicate, dismissing an indictment that did not aver "that the purpose or result of the scheme was to obtain property or money for the defendant." *Davis*, 841 F.2d 1127, *2. *Accord Turner*, 465 F.3d at

[15] *United States v. Scheur*, — F. Supp.2d —, 2007 WL 1063301 (E.D. La. 2007) ("At trial, to survive the '*Cleveland* guillotine,' the Government would have to prove that specific victims . . . were defrauded of specific property. This was not set forth in the indictment. Thus, a conviction based on such proof would, in effect, result in a stretching or amending of the indictment by the Court, which is constitutionally forbidden.").

682 (dismissal where the object of the scheme does not constitute property in the hands of the victim).

The government's redacted Indictment does not allege that any Merrill Defendant *obtained* any object that was property in the hands of Enron or its shareholders. There is no allegation of conversion or skimming, bribery or kickbacks. The Indictment does not even allege a *scheme* by Brown to obtain anyone's money or property. It states no allegation that Brown schemed for self-enrichment or "naked self-interest." *Cf. Bermingham*, 2007 WL 1052600 at *6, n 8, *supra*.

Upon the redaction of the honest services charge, this *fifth* attempt by the government to craft an indictment simply fails to allege a discrete, traditional wire fraud offense for which Brown could be prosecuted a second time. Here, as in *United States v. Runnels*, 877 F.2d 481, 484-85 (6th Cir. 1989), "the only theory on which the government indicted and prosecuted [defendant] was the intangible rights theory. Since [] a prosecution on such a theory is no longer tenable," no prosecution may proceed. *See also United States v. Haga*, 821 F.2d 1036, 1045 n.18 (5th Cir. 1987) (rejection of felony theory argued by government at trial was "an implied acquittal of charges based on that theory").

The government's mantra, in the court below, that the "[i]ndictment sets forth a simple and straightforward scheme to defraud" begs the questions: What money or

property does the indictment allege that the Defendants schemed to *obtain* and from what victim? Whom did the Defendants *deprive*, and what did they "take away" from anyone? Contrary to the government's assertion discussed below, nowhere does the redacted indictment state that Brown schemed "to defraud investor property" (whatever that means) (Dkt. 935: 13). As in this Court's recent opinion in *Ratcliff*, which the court below did not even mention, this "indictment d[oes] not allege a scheme to defraud anyone of money or property." *Ratcliff*, 488 F.3d at 641 (affirming dismissal of a creative fourteen count mail fraud indictment.).

The fact that this redacted Indictment alleges no wire fraud distinct from its original honest services allegations is self-evident from the government's own Motion to Strike Surplusage (Dkt. 935; RE7). There, the government wrote, "the United States will proceed to trial against Defendants solely on the ground that they deprived Enron and its shareholders [of what?] and to obtain money and property [What money? What property? From whom?] by means or [sic] materially false pretenses, representations and promises." (Dkt. 935:4; RE7). The government did not specify the nature of any deprivation, the money or property involved, or where such money or property came from in its Motion to Strike. It did not point to the requisite specific allegations to identify any object that Defendants obtained or took

away from a victim because, in the absence of its failed honest services allegation, the Indictment does not contain one.[16]

Here, much like in *United States v. Davis*, 841 F.2d 1127 (6th Cir. 1988), "[t]he indictment in the case at bar does not properly allege a violation of the mail fraud statute. In its initial paragraph the indictment defines the scheme to defraud as one directed at [honest services]. [] [N]owhere is there an averment that the purpose or result of the scheme was to obtain property or money for the defendant....We shall not strain to construe this defective indictment as implicitly charging that the purpose of the scheme was to deprive someone of money, as opposed to depriving [someone of honest services]."[17]

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[16] Indeed, when the AUSA was pressed by the district court to identify a money or property allegation, even he could not find one. After minutes of silent fumbling, the prosecutor pointed only to ¶ 31 of the indictment, which quotes from a memo discussing a "proposed" $250,000 fee. (Dkt. 1010:38). Nowhere does the indictment aver that Defendants schemed to defraud anyone of that fee–nor could it. The fee was documented, authorized, fully disclosed to lawyers and accountants, and paid to Merrill Lynch–not to any Defendant.

[17] *Accord United States v. Zauber*, 857 F.2d 137, 143 (3d Cir. 1988), *cert. denied*, 489 U.S. 1066, 109 S.Ct. 1340 (1989). While in *Davis*, after remand, the government obtained a new indictment and convicted defendant on a permissible money and property theory, the government here is foreclosed from re-indicting the Defendants. It can only proceed on the Third Superceding Indictment, albeit redacted. *Compare United States v. Davis*, 873 F.2d 900, 903 (6th Cir. 1989) (superseding indictment was returned after reversal); *see also United States v. Runnels*, 16 F.3d 1223, *1 (6th Cir. 1994) (new indictment after reversal "was based on theory that the defendant had used the mails to defraud his victims of money").

This Court's recent decision in *Ratcliff* rejected a similarly defective indictment for its failure to allege a mail fraud scheme. In *Ratcliff*, the creative indictment alleged election law violations as a mail fraud, contending that the salary and employment benefits of elected office constituted money or property under the mail fraud statute, and that Ratcliff obtained public office with illegal funding and by concealing his violations from the Board of Ethics. *Ratcliff*, 488 F.3d at 644. Specifically, the indictment charged Ratcliff with "a scheme to defraud Livingston Parish of the money and property represented by 'the powers, privileges, salary, and other benefits' of his elected office." *Ratcliff*, 488 F.3d at 644. This Court affirmed the dismissal of the indictment because "[Defendant's] charged conduct posed no harm to any of [the alleged victim's] property rights. ... [the alleged victim] does not have control over [the alleged property] such that [Defendant's] misrepresentations deprived it of that control." *Id*. at 647.

Brown's Indictment does not even allege as much as did the indictment rejected by this Court in *Ratcliff*. Nowhere in this fifth attempt to indict Brown does the government explain or identify the "money or property" object of its § 1343 allegations–not even with a weak "represented by" allegation like the one presented in *Ratcliff*. The indictment of the Merrill Defendants is tantamount to an indictment

that made no money or property allegation at all, and, thus requires dismissal, as in *Marcello*. 876 F.2d at 1150 (only an intangible rights theory was alleged).

Further, nothing in the plain text of the wire fraud statute even applies to Brown's conduct. As the Supreme Court explained in *McNally*, "§ 1341 [and § 1343] does not cover the waterfront of deceit." *United States v. Walters*, 997 F.2d 1219, 1224 (7th Cir. 1993) (reversing fraud conviction of a sports agent who violated NCAA Rules but did not obtain property) (referring to *McNally*). While the language of the statute "proscribes 'any scheme or artifice to defraud,' this is not to suggest the wire fraud statute is limitless." *Herron*, 825 F.2d at 54.[18] Here, as in *Runnels*, 877 F.2d at 484-85, "the only theory on which the government indicted and prosecuted [Defendants] was the intangible rights theory. Since [the intervening appellate decision] makes a prosecution on such a theory no longer tenable," no prosecution may proceed. *Cf. Shelton*, 848 F.2d at 1493 (no prosecution of mail fraud statute viable when "Indictment contains no language which can be construed to allege that

[18] In *Herron*, much like here, and before amendment of the currency transaction reporting laws, the government overreached. It tried to prosecute bank *customers* for scheming to defraud the government of information on the CTR forms by structuring deposits to avoid triggering the banks' reporting requirements. Noting that the wire fraud statute is not "limitless," and the indictment did not allege that defendants sought a tangible or economic advantage to themselves, this Court held that "deprivation of CTR information from financial institutions fails to satisfy the 'money or property' requirement . . . ." *Herron*, 825 F.2d. at 56-57. This Court further stated that even though the defendants in *Herron* "were clearly aware of the CTR reporting requirements, [] neither defendant could reasonably expect that his conduct constituted wire fraud." *Id*. at 57.

the victims of the fraud were deprived of money or property"). *See also Haga*, 821 F.2d at 1045 n.18 (implied acquittal bars re-prosecution).

2. The Redacted Indictment Does Not Allege The Deprivation Of A Legally Cognizable Property Interest For Which Brown Could Be Placed In Jeopardy A Second Time.

a. The redacted Indictment does not allege that these Merrill Defendants *deprived* Enron and its shareholders of any "intangible right" or property.

In *Ratcliff*, the government conceded that "to deprive" means "to take something away from," and this Court added that it must involve "a wronging of the victim's property rights." *Ratcliff*, 488 F.3d at 645 n.8. The redacted Indictment does not allege that any Merrill Defendant "deprived" or took anything "away from" Enron or its shareholders that wronged them in their rights to property that was in their hands. *Id*. at 648. It states no scheme to *deprive* at all.

b. As a matter of law, after *McNally*, honest services is the only cognizable and protected intangible *right*.

Honest services, as codified in §1346, is the only intangible right to which Congress restored protection under §§1343 and 1341after *McNally*. *Cleveland*, 531 U.S. at 16, 121 S.Ct. at 368; *Ratcliff*, 488 F.3d at 646; *Turner*, 465 F.3d at 673; *United States v. Gray*, 96 F.3d 769, 773-74 (5th Cir. 1996), *cert. denied*, 520 U.S. 1129, 117 S.Ct. 1275 (1997). Section 1346 "modifies the definition of 'scheme or artifice to defraud' in § 1341 [and § 1343]." *United States v. Jain*, 93 F.3d 436, 442

(8th Cir. 1996), *cert. denied*, 520 U.S. 1273, 117 S.Ct. 2452 (1997); *United States v. Ervasti*, 201 F.3d 1029, 1036 (8th Cir. 2000) (§ 1346 "enlarged the definition of 'scheme or artifice to defraud' under §1341 [and §1343].""). "Section 1346, by its terms, did not restore the application of the mail fraud statute to all 'intangible rights,'" but only to the deprivation of honest services. *Turner*, 465 F.3d at 673.

As this Court held in *Gray*, it is only "in light of" and through application of § 1346, that the wire fraud statute can be extended to reach allegations beyond deprivation of identifiable (tangible) property or identifiable harm to an identifiable victim. *See Gray*, 96 F.3d at 773-74; *see also Griffin*, 324 F.3d at 355-56 (prohibiting end run around wire fraud statute–through resort to § 1346–where intangible rights theory was not charged in the indictment).[19] In other words, § 1346 was the only, even

[19] Protection of an intangible right, as contrasted with tangible or intangible property, requires the existence of a duty flowing from the defendant to the victim. *Carpenter*, 484 U.S. at 25, 27-28, 108 S.Ct. at 320-22; *Griffin*, 324 F.3d at 355-56; *Gray*, 96 F.3d at 773-74; *Herron*, 825 F.2d at 54, 57-58; *United States v. Ballard*, 663 F.2d 534, 540-41(5th Cir. 1981). *Cf. Turner*, 465 F.3d at 671 (Pre-§ 1346 applications of mail fraud premised on "intangible" property theories, and brought against "private persons," required the government to demonstrate a "clear fiduciary dut[y]."). *See also Chiarella v. United States*, 445 U.S. 222, 228-29, 100 S.Ct. 1108, 1114-15 (1980) (no fraud absent a duty to speak). Since *Barge I*, this Court has decided in related litigation that only Enron owed a duty to its shareholders. The Merrill Defendants had no duty to Enron or its shareholders. *Regents of University of California v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 393 (5th Cir. 2007) (banks including Merrill Lynch owed no duty to disclose to Enron's shareholders the nature of the transactions). Brown owed no duty to Enron. Therefore, no criminal culpability for wire fraud based on an intangible *right* can be imposed. Ironically, were this merely a civil case, it would have been dismissed on summary judgment as soon as this Court decided *Regents*.

remotely possible vehicle for the government to allege criminal fraud in the attenuated circumstances alleged in the instant case. Indeed, the (new) application of § 1346 was the *only* basis upon which this Circuit in *Gray* could distinguish the holding in *United States v. Walters*, 997 F.2d 1219, 1224 (7th Cir. 1993) (vacating conviction because § 1343 "contemplates a transfer of some kind" without the applicability of § 1346). *Gray*, 96 F.3d at 773-74.

To resuscitate the prosecution's fifth iteration of the Indictment, the district court wrongly invented a new intangible right. This remarkable, new intangible *right*–to (undefined, unspecified, and unalleged) "accurate corporate information"–has not been recognized in any decision, by any other federal court, in any jurisdiction, in any mail or wire fraud case. It is not a cognizable intangible right–pre- or post-*McNally*. It does not fall within any traditionally recognized property interest; and, it certainly was not protected by Congress in §§ 1341, 1343, or 1346 of Title 18. The district court is prohibited from creating a new intangible right or property interest in "accurate corporate information" and protecting this new right when Congress has not done so. *Ratcliff* requires reversal and rejection of any attempt to stretch the wire fraud statute. As this Court has previously held, to hold otherwise would "approve a sweeping expansion of federal criminal jurisdiction in

the absence of a clear statement by Congress." *Ratcliff*, 488 F.3d at 639 (quoting *Cleveland*, 531 U.S. at 24, 121 S.Ct. at 373).[20]

3. Neither The Government Nor Any Court Can Rewrite The Indictment Now To Include A New Allegation That Brown Deprived Anyone Of An Intangible Right to "Accurate Corporate Information."

Contrary to the district court's opinion, neither the government nor the court can reconstruct or read into the indictment an allegation that the Merrill Defendants schemed to deprive Enron shareholders of money or property in the form of a "right to accurate corporate information." (RE5:8).[21] The Fifth Amendment prohibits any

[20] There are ample laws that do protect a shareholder's right to information under specific, carefully proscribed circumstances. Congress enacted the securities laws to regulate this industry as it deemed necessary. *See Credit Suisse Securities (USA) LLC v. Billing*, — U.S. —, 127 S.Ct. 2383, 2397 (2007) (holding that an antitrust suit was precluded by the securities laws); *id*. at 2400 (Thomas, J., dissenting) (noting that the majority opinion effectively holds that the Securities Act precludes wire fraud charges in like circumstances). Brown, like Fuhs who was acquitted, was not even charged in the civil action brought by the SEC in this case. Further, branding Merrill Lynch investment bankers as criminals for what is only Enron's accounting responsibilities would more than "give rise to confusion about the extent of secondary actors' obligations and invite vague and conflicting standards of proof in diverse courts." *Regents*, 482 F.3d at 386. It would violate Due Process, the Rule of Lenity, and the requisites of fair warning.

[21] Contrary to the district court's opinion, Brown did not and does not concede that the "property alleged" was "Enron shareholder's (sic) right to information." To the contrary, neither that allegation nor any other specific (or cognizable) property allegation appears anywhere on the face of this indictment, and it cannot be inserted now. *Stirone*, 361 U.S. at 217, 80 S.Ct. at 273; *accord United States v. Flores*, 404 F.3d 320, 325 n.8 (5th Cir. 2005). Brown's Motion to Dismiss Indictment, Dkt. 952, Brown's Reply in Support of Motion to Dismiss Indictment, Dkt. 994.

constructive amendment of an indictment. *Dunn v. United States*, 442 U.S. 100, 106, 99 S.Ct. 2190, 2194 (1979).

A defendant may be tried only on charges presented to a grand jury. *Stirone v. United States*, 361 U.S. 212, 217, 80 S.Ct. 270, 273 (1960). No court can sanction a second prosecution on allegations for which Brown and his co-defendants were never indicted. *Id.; United States v. Hughey*, 147 F.3d 423, 436 (5th Cir. 1998) ("If an indictment does not charge a cognizable federal offense, then a federal court lacks jurisdiction to try a defendant for violation of the offense."). Such a procedure would "offend[] the most basic notions of due process." *Haga*, 821 F.2d at 1046 (quoting *Dunn*, 442 U.S. at 106, 99 S.Ct. at 2194). Similarly, the core element of an offense cannot be inferred from the facts of the indictment. *See Ratcliff*, 488 F.3d at 644, n.4. Contrary to the district court's decision, the Indictment does not allege that Brown deprived Enron shareholders of "material economic information" or "accurate corporate information." None of these words appear anywhere in the Indictment.

Furthermore, "accurate corporate information" is not "property within the hands of Enron or its shareholders," and, hence, it was not (and could not be) taken away from Enron or its shareholders by any Merrill Defendant. *Ratcliff,* 488 F.3d at 648. Brown and his co-Defendants did not approach Enron, or any Enron shareholder, and "take away" any confidential or proprietary information (accurate

or inaccurate) and use it for their own gain. *Compare Carpenter v. United States*, 484 U.S. 19, 27-28, 108 S.Ct. 316, 321-22 (1987) (Defendant reporter schemed "to take the [Wall Street] Journal confidential business information" "for his own use."). The Merrill Defendants did not misuse any trade secret, patent, intellectual property, or business information that belonged to Enron or to any shareholder. *Compare id.* at 28, 108 S.Ct. at 321 (employee acted to "trade on the Journal's confidential information," which was its property). They did not solicit or pay bribes or kickbacks in return for confidential business information. *See United States v. Poirier*, 321 F.3d 1024, 1029-30 (11th Cir. 2003) (requiring gain or profit to defendant and contemplated loss to victim of wire fraud). Enron's shareholders held and owned, as cognizable "property," only their shares–not "accurate corporate information."

Even assuming that the Indictment clearly alleged the district court's newly-created *intangible right* of shareholders to "accurate corporate information," this Court has never recognized such an intangible right or declared it to be a property interest–much less protected it by the mail or wire fraud statutes. When this Circuit has used language like "material economic information,"the facts involved actual money or cognizable property in the form of bribery, kickbacks or self-dealing. The "material economic information" was the employee's concealment of the bribes, self-dealing or kickbacks. The company, the victim of the scheme, would have acted

differently had it known of its employees' breaches of their fiduciary duties and their secret self-enrichment at the company's expense. *United States v. Ballard*, 663 F2d. 534, 541-42 (5th Cir. 1981), *modified on other grounds*, 680 F.2d 352 (5th Cir. 1982) (where there is no allegation that any alleged concealment or misrepresentation could or would have made the putative victim change its conduct, there can be no fraud). As the Eighth Circuit wrote, and this Court quoted: "[M]oney is money, and '*money*' is specifically mentioned in the statutory words." *Ratcliff*, 488 F.3d at 644, *quoting United States v. Granberry*, 908 F.2d 278, 280 (8th Cir. 1990) (emphasis in original), *cert. denied*, 500 U.S. 921, 111 S.Ct. 2024 (1991).

The district court's *sua sponte* creation of this new "intangible right," which it elevated to a cognizable "property interest," rests on its misinterpretation of the three cases on which it relied: *Carpenter*, *United States v. Little*, 889 F.2d 1367 (5th Cir. 1989), and *United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991). Contrary to the district court's application of *Carpenter*, that case did not involve a new intangible right. In *Carpenter*, the Supreme Court held that confidential, proprietary business information–news–the actual product of the newspaper–was newspaper property protected by the mail fraud statute. Carpenter was an employee of the newspaper who took that information from the newspaper ahead of publication and used it for his own personal gain. *Carpenter*, 484 U.S. at 27-28, 108 S.Ct. at 321-22.

Carpenter protected intangible property (much like intellectual property–but property nonetheless). It did not create a new intangible right. *Carpenter* does not stand for the proposition that information about a corporation or its business transactions is a protected property interest or an "intangible right" of the shareholders.

The district court's reliance on *United States v. Little*, 889 F.2d 1367 (5th Cir. 1989), is equally misplaced. In *Little*, this Court affirmed the conviction of a defendant who paid kickbacks to a county official in exchange for municipal contracts. The county was the clear victim of this secret kickback scheme, and the prosecution was simply a standard use of the mail fraud statute–as Congress originally intended. Unlike the charges against the Merrill Defendants, *Little* involved actual money used in the corruption of public officials–a classic use of the statute.

United States v. Wallach, on which the court below relied primarily, is both factually distinguishable and legally inapposite.[22] In fact, the Second Circuit itself

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[22] *United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991), was primarily a racketeering, stolen property and securities fraud case, involving more than $1 million in kickbacks, bribery and self-dealing by a director and officer of the corporation and "consultants" it employed. The *Wallach* defendants obtained money for their own enrichment from the corporation under false pretenses, and in violation of their fiduciary duties. The indictment alleged that Wedtech and its shareholders were defrauded of the $1.14 million in payments to the defendants. It was a pure "money" fraud. *Id*. at 461-62. Wallach himself was soon to become an employee of the United States when he received some payments. He was convicted of conspiracy to deprive the United States of his own honest services and violation of the federal conflict of interest statute, 18 U.S.C. § 203.

has narrowed its holding in *Wallach* to its facts. *United States v. D'Amato*, 39 F.3d 1249 (2d Cir. 1994) (limiting *Wallach* to cases involving bribery and self-dealing). Meanwhile, no other circuit or district court in the country has ever recognized or protected the intangible "right to accurate corporate information" which the district court created here.

C. Double Jeopardy Bars Retrial Of The Merrill Defendants For The Same (And Only) Wire Fraud Offense Charged In The Third Superseding Indictment.

"There has never been any doubt of [the Double Jeopardy Clause's] entire and complete protection of the party when a second punishment [or second trial] is proposed in the same court, on the same facts, for the same statutory offence." *Ex Parte Lange*, 85 U.S. 163, 168-69, 173 (1873). The "principle [is] that no man shall more than once be placed in peril of legal penalties upon the same accusation." *Id*. at 173. *Accord United States v. Oppenheimer*, 242 U.S. 85, 87-88, 37 S.Ct. 68, 69 (1916). "The underlying idea [of the Double Jeopardy Clause], one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to

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Because the government obtained the convictions through the perjured testimony of a government witness, all the convictions were reversed. *Id.* at 473. The language on which the government and the court below relied is pure *dicta*, legally and factually irrelevant, and has never been adopted by this Circuit or by any other Circuit. Further, *Wallach* predates the Second Circuit's en banc decision in *Rybicki* by twelve years. *United States v. Rybicki*. 354 F.3d 124 (2d Cir. 2003) (*en banc*). *Wallach* has no legal or factual application here.

convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 187-88, 192, 78 S.Ct. 221, 223, 226 (1957).

The Double Jeopardy bar is absolute when the government seeks to re-try a defendant for the same offense of which he has been acquitted. *Green*, 355 U.S. at 187-88, 78 S.Ct. at 223. An implied acquittal (or functional equivalent of an acquittal) of a charge similarly bars a second prosecution. *Id*. at 190-91, 78 S.Ct. at 225; *United States v. Haga*, 821 F.2d 1036, 1045 n.18 (5th Cir. 1987). The question of what constitutes an "acquittal" is not governed by the form of the court's ruling or its characterization of it. *United States v. Scott*, 437 U.S. 82, 96, 98 S.Ct. 2187 (1978). Rather, a reviewing court must determine whether the court's ruling, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 97 S.Ct. 1349, 1355 (1977).

In this case, however the outcome is characterized or labeled, the government failed to prove that the Merrill Defendants violated the honest services wire fraud statutes. *See Scott*, 437 U.S. at 96, 98 S.Ct. 2187 (1978). The wire fraud statutes

the Enron Task Force selected for the prosecution of this case did not criminalize the conduct the government alleged. As in *Martin Linen*, this Court held that Brown's "criminal culpability" on that theory of conviction "had not been established." *Id*. at 10, 98 S.Ct. at 2147. *See Brown*, 459 F.3d at 517, 522-23 (addressing challenge to "legal sufficiency of the Government's assertion of criminal liability" and determining that "the scheme as alleged falls outside the scope of honest-services fraud").[23] A judgment that the evidence is legally insufficient to sustain a guilty verdict constitutes an acquittal for purposes of the Double Jeopardy Clause. *Smalis v. Pennsylvania*, 476 U.S. 140, 142, 106 S.Ct. 1745, 1747 (1986).

A second trial of these Merrill businessmen on the wire fraud allegations in this Indictment is barred by the Double Jeopardy Clause of the Fifth Amendment because the only wire fraud offense the Indictment alleged has already been rejected by this Court. The government seeks to retry Brown on the same offense, the same facts, the same theory, and the same indictment (the wire fraud charges which were facially

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[23] This Court's opinion ultimately held that Brown "simply cannot be convicted of the offense charged." *Lee v. United States*, 432 U.S. 23, 30, 97 S.Ct. 2141, 2146 (1977) ("The critical question is whether the order contemplates an end to all prosecution of the defendant on the offense charged."). *See Sanabria*, 437 U.S. at 64, 98 S.Ct. at 2178 ("Even if the government were correct that the District Court 'dismissed' the numbers allegation, in our view a retrial on that theory would subject petitioner to a second trial on the 'same offense' of which he has been acquitted."); *Martin Linen*, 430 U.S. at 575, 97 S.Ct. at 1357 (acquittal as "a legal determination on the basis of facts adduced at the trial relating to the general issue of the case").

viable only by inclusion of the now-redacted, honest services statute). Double Jeopardy precludes this. The "*words* in the *body* of the indictment" charged a single deprivation offense, and the government cannot now proceed on that same indictment in an attempt to convict Defendant of obtaining or depriving someone of money and/or property–an offense never alleged in the indictment. *Haga*, 821 F.2d at 1045-46 (emphasis in original).

The charging decision and the iteration of the offense in the charging instrument must be imputed to the government for Double Jeopardy purposes, especially where those decisions are susceptible of manipulation. *Saylor v. Cornelius*, 845 F.2d 1401, 1403-04 (6th Cir. 1988); *cf. Downum v. United States*, 372 U.S. 734, 737, 83 S.Ct. 1033, 1035 (1963). "Legal consequences ordinarily flow from what has actually happened, not from what a party might have done from the vantage of hindsight." *Sanabria v. United States*, 437 U.S. 54, 65-66, 98 S.Ct. 2170, 2179 (1978). *Cf. Scott*, 437 U.S. at 95-96, 98 S.Ct. at 2196 (drawing distinction for Double Jeopardy purposes between "situations where the defendant is responsible for the second prosecution," and Double Jeopardy is not implicated, and cases where the "Government has failed to make out their case," and Double Jeopardy erects an absolute bar to a second prosecution). *See United States v. Tateo*, 377 U.S. 463, 468

n.3, 84 S.Ct. 1587, 1590 n.3 (1964) (Double Jeopardy inquiry considers prosecutorial overreaching in the necessity for second prosecution).

The government is not entitled to a second opportunity to convict these Defendants when the Enron Task Force failed to prove, on its strategically crafted and repeatedly re-drafted Indictment, that the Defendants engaged in any conduct that violated the wire fraud statutes. *Brown*, 459 F.3d at 517, 522-23; *Smalis*, 476 U.S. at 142; 106 S.Ct. at 1747. The government cannot meet its burden of establishing that the Indictment alleges a wire fraud offense separate from that which it failed to sustain in *Barge I*. *United States v. Delgado*, 256 F.3d 264, 270 (5th Cir. 2001).

Here, as in *United States v. Runnels*, 877 F.2d 481, 484-85 (6th Cir. 1989), this Court should "conclude that the only theory on which the government indicted and prosecuted [Defendant] was the intangible rights theory. Since [this Court's intervening appellate decision] makes a prosecution on such a theory no longer tenable," no prosecution may proceed. The only wire fraud alleged in the Indictment, that of honest services, was rejected by this Court and cannot be retried under another guise on this Indictment. To subject the Merrill Defendants to another trial on the charges for which they were legally acquitted violates the fundamental constitutional proscription against Double Jeopardy. *Haga*, 821 F.2d at 1045-46.

CONCLUSION

For these reasons, the order of the district court must be reversed. Double Jeopardy bars a second trial of the Merrill Defendants on any allegations of wire fraud. Counts II and III must be dismissed in their entirety. Count I must be redacted of all wire fraud allegations and the case remanded to the district court for proceedings consistent with this Court's decision.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true and complete copies, and an electronic copy in PDF version, of the Brief of Appellant, James A. Brown have been served via First Class, United States mail, on counsel of record as listed below, on this 1st day of May, 2008.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

The undersigned counsel certifies that this brief of Defendant-Appellee James A. Brown complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) because it contains 10,695 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

The undersigned counsel further certifies that this brief complies with the typeface requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word Perfect 12.0 for Windows in Times New Roman typeface and 14-point font size.

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