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

REPLY BRIEF OF APPELLANT JAMES A. BROWN

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SUMMARY OF THE ARGUMENTS IN REPLY

Double Jeopardy protects the right not to be "twice put to trial for the same offense." *Abney v. United States*, 431 U.S. 651, 660-61, 97 S.Ct. 2034, 2041 (1977). That right would be violated and irreparably lost "if the accused were forced to 'run the gauntlet' a second time before an appeal could be taken." *Id*. Here, the Merrill Defendants cannot be subjected again to the wire fraud charges in Counts I(a), II, and III of the redacted Indictment. Because this Court terminated Defendants' jeopardy on the *only* wire fraud offense the Indictment alleged, Double Jeopardy protects these Defendants against a second trial for the same offense.

This Court's controlling precedent provides that a defendant "can establish a *prima facie* non-frivolous double jeopardy claim through [a comparison of] the indictments." *United States v. Delgado*, 256 F.3d 264, 270 (5th Cir. 2001). The burden then shifts to the government to "establish[] that the indictments charge separate crimes." *Id*. The government is bound by "the precise manner" in which its indictment is drawn. *Sanabria v. United States*, 437 U.S. 54, 65-66, 98 S.Ct. 2170, 2179 (1978) (citations omitted).

The assessment of Double Jeopardy turns on a textual comparison of the two Indictments in this case: the Indictment on which the government convicted

Defendants in *Brown*,[1] and, the government's redacted version of the same Indictment upon which it seeks to prosecute Defendants a second time. Count I alleges a conspiracy to (a) commit wire fraud and (b) falsify Enron's books and records. Counts II and III allege matching substantive wire fraud offenses. A textual comparison of the two Indictments reveals that the wire fraud charges in Counts I-III depend solely on the same alleged conduct and "honest services" fraud that this Court rejected. Despite being bound by the precise language of its Indictment, however, the government fails to grapple with its own handiwork at every turn.

The government ignores the *Delgado* standard, fails to quote or compare the language of its Indictments, and it does not meaningfully address Brown's Double Jeopardy challenge–because it cannot do so. It has not cited a single case authorizing it to retry a defendant under similar circumstances. Significantly, even the government concedes that it can retry the Defendants only on "an indictment that [does] not rely on an honest services theory." (G Br. at 34, 36).[2] Yet, up on remand, the government did not obtain a new indictment to allege a different wire fraud.

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[1] *United States v. Brown*, 459 F.3d 509 (5th Cir. 2006), *cert. denied*, 127 S.Ct. 2249 (2007).

[2] For this reason, this appeal does not challenge the separate and separable charge of conspiracy to violate the books and records provision. The books and records charge is subject to other fatal infirmities, but those issues are not the subject of this appeal.

Contrary to the government's assertions, Count I(a)'s wire fraud allegations must also be dismissed for the same reasons as Counts II and III: The Indictment does not allege a wire fraud independent of the impermissible "honest services." Because Count I(a) contains a discrete allegation, separate from the books and records violation alleged in Count I(b), and each could have been indicted alone, this Court should parse Count I to eliminate the wire fraud allegations for which jeopardy was terminated, but leave the claim in Count I(b).

Finally, this Court has jurisdiction because this appeal presents a pure Double Jeopardy issue appealable under *Abney*, 431 U.S. at 659, 97 S.Ct. at 2040; *see United States v. Rey*, 641 F.2d 222, 225-26 (5th Cir.), *cert. denied*, 454 U.S. 861, 102 S.Ct. 318 (1981) (finding jurisdiction); *United States v. Ginyard*, 511 F.3d 203, 208 (D.C. Cir. 2008)(finding jurisdiction over Double Jeopardy challenge to single count of multi-count indictment); *United States v. Slay*, 717 F. Supp. 689 (E.D. Mo. 1989) (dismissing indictment after government merely redacted "good government" fraud allegations). Brown never waived this issue, but repeatedly raised it in the district court which found it "a colorable, non-frivolous contention." *United States v. Bayly*, — F. Supp.2d —, 2008 WL 89624, *9 (S.D. Tex. 2008); (RE2:24).

ARGUMENTS AND AUTHORITIES IN REPLY

I. THIS COURT TERMINATED DEFENDANTS' JEOPARDY ON THE HONEST SERVICES WIRE FRAUD CHARGES IN COUNTS I(a), II AND III, AND THE GOVERNMENT CANNOT MEET ITS BURDEN OF PROVING THAT ITS REDACTED INDICTMENT STATES A SEPARATE WIRE FRAUD OFFENSE.

The first relevant inquiry is whether a court's decision has terminated jeopardy for defendants on a specific charge. *See United States v. Richardson*, 468 U.S. 317, 325, 104 S.Ct. 3081, 3086 (1984); *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."). Where, as here, jeopardy was terminated, this Court must determine the scope of the Double Jeopardy bar. It is beyond dispute that Brown cannot be tried again on the same honest services allegations. As explained below, Brown cannot be tried on any of the wire fraud counts in the redacted Indictment.

A. The Government Concedes That Jeopardy Terminated On All Honest Services Wire Fraud Charges.

The government repeatedly concedes that Defendants can be retried only on "an indictment that [does] not rely on an honest services theory"(G.Br. 34, 36). That is why the government redacted the honest services language from its fifth iteration of the Indictment and acknowledges that it must proceed on independent charges.

This recognition that this Court's prior decision terminated Defendants' jeopardy on the honest services wire fraud charges renders legally irrelevant most of the government's brief.

Fundamentally, the government fails to recognize that addressing the precise language of its Indictment is the cornerstone of the Double Jeopardy analysis. Indeed, the Supreme Court has said that "[t]he precise manner in which an indictment is drawn cannot be ignored" for double jeopardy purposes because it will clarify the extent to which the defendant "may plead a former acquittal or conviction." *Sanabria*, 437 U.S. at 65-66, 98 S.Ct. at 2179. This Court has squarely held that the government must establish that its "new" Indictment charges a separate crime. *Delgado*, 256 F.3d at 270. As instructed by *Delgado*, the determination of the jeopardy turns on the text of the Indictment itself. *Id*.

Remarkably, however, the government does not even cite this Court's decision in *Delgado*, and it studiously avoids the text of its own Indictment. Instead, the government has written forty pages that avoid any discussion of the "precise manner" in which it drew, re-drew, and redacted its Indictment. *Sanabria*, 437 U.S. at 65-66, 98 S.Ct. at 2179. Although this redacted Indictment represents the government's *fifth* attempt to "criminalize" this transaction, it still does not charge a wire fraud offense any different from the one this Court rejected two years ago.

The government may wish that it had charged two distinct wire fraud offenses, but "[l]egal consequences flow from what has actually happened, not from what a party might have done from the vantage of hindsight." *Id*. at 65, 98 S.Ct. at 2179. And, "[s]ince the government controls the particularity of an indictment, it should bear the responsibility" for any constitutional deficiencies. *United States v. Stricklin*, 591 F.2d 1112, 1119 (5th Cir.), *cert. denied*, 444 U.S. 963, 100 S.Ct. 449 (1979). Controlling precedent requires dismissal of the wire fraud allegations in this Indictment on Double Jeopardy grounds, where, as here, the government has failed to offer any different wire fraud offense for which it can prosecute these Defendants. *Id*. *United States v. Haga*, 821 F.2d 1036, 1045-46 (5th Cir. 1987).

B. This Court Found That Defendants' Conduct "Is Not A Federal Crime Under The Honest Services Theory Of Fraud Specifically."

This Court conclusively terminated Defendants' jeopardy for honest services wire fraud in the first appeal, writing: "Because 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." *Brown*, 459 F.3d at 517. This Court "conclude[d] that the scheme as alleged falls outside the scope of honest-services fraud," *id*. at 522, and further explained that "the alleged conduct is not a federal crime *under the honest services theory of fraud specifically*." *Id*. at 523.

See also United States v. Turner, 465 F.3d 667, 669 (6th Cir. 2006) ("We reverse the judgment of the district court [and dismiss] because [Defendant's] conduct, as alleged in the indictment, may not be prosecuted under the mail fraud statute using [] the honest services theory.").

The label or "form of [this Court's] action" does not matter so long as this Court's prior decision represented a "resolution" "of 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, 1354-55 (1977). Unlike the cases on which the government relies,[3] Brown's convictions were not reversed for "trial error" such as faulty jury instructions. Rather, this Court vacated the convictions because the Defendants' conduct, even as alleged, did not constitute the wire fraud crime for which the government indicted, prosecuted, convicted, and imprisoned them.[4]

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[3] *See, e.g., United States v. Miller*, 952 F.2d 866 (5th Cir.), *cert. denied sub nom*., *Huls v. United States*, 505 U.S. 1220, 112 S.Ct. 3029 (1992). In *Miller*, "this Court reversed 'because the indictment and jury instructions [at the first trial] did not require the jury to find all the elements of the crime.'") (*citing United States v. Huls*, 841 F.2d 109, 112 (5th Cir. 1988), *cert. denied*, 505 U.S. 1220, 112 S.Ct. 3029 (1992)). Because the jury instructions constituted a judicial or trial error that could be remedied, and the government could re-indict, *Miller* could be retried on a new indictment.

[4] Likewise, this Court did not hold that the Indictment on which Defendants were tried was "facially" invalid. The Indictment originally stated the elements of an offense under the combination of §§1343 and 1346. *Contrast*, *United States v. Bobo*, 419 F.3d 1264, 1267-68 (11th Cir. 2005) (on which the government relies). The Enron Task Force made a calculated charging decision in a highly publicized and literally unprecedented attempt to criminalize business conduct brought against Defendants who, as the district court found,

C. A Comparison Of The Indictments Reveals No Wire Fraud Offense Different From The Failed Honest Services Charge.

A simple comparison of the Indictments demonstrates that the government is attempting to retry Brown for the same crime. The initial Indictment never alleged an object of an independent, traditional "money or property" scheme to defraud. Both the Count (I) (a) conspiracy to commit wire fraud, and the two substantive counts of wire fraud (II and III), relied entirely on the "honest services" statute, § 1346, to state an offense factually and legally. Deprivation of the "honest services" of Enron employees was the only object of the alleged fraud. Stripped of this crucial statutory object, the redacted Indictment states no new or different wire fraud offense and specifies no new or different object of any alleged scheme to defraud.

Count I alleges what could have been two separate counts: (a) conspiracy to commit wire fraud, and (b) conspiracy to falsify Enron's books and records:

> . . . 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,

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were just performing their jobs and sought no personal gain. At bottom, even assuming the truth of all of the government's allegations, this Court held that the government failed to establish that the conduct of these Merrill Defendants' violated the wire fraud statutes the government had so creatively charged. The government's contention that there is no Double Jeopardy violation in the face of its utter failure to prove the Merrill Defendants committed the alleged crime cannot be sustained in light of settled Double Jeopardy jurisprudence. *Burks v. United States*, 437 U.S. 1, 11, 98 S.Ct. 2141, 2147 (1978) ("The 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.").

> [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, representations, and promises, and for the purpose of executing such scheme and artifice . .. all in violation of Title 18, United States Code, Sections 1343, 1346 [sic]; and (b) . . . falsify books and records and accounts of Enron . . .in violation of Title 15 . . .

(Dkt.311; RE4)(bracketed language was redacted in the "new" Indictment).[5] Counts II and III charge only the substantive offense of wire fraud:

> Counts Two and Three (Wire Fraud): 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 or property. . .

(Dkt.311; RE4) (bracketed language was redacted).

It does not matter that the redacted Indictment still contains the bald statutory "money and property" language of §1343 (traditional wire fraud). As a matter of statutory design, the government was required to allege §1343 initially to allege a wire fraud at all, and the generic words "money and property," without identifying the particular money or property that the Defendants schemed to obtain from the victims, do not state a separate offense. See Brown Opening Brief, pp. 12-15, 19-21. Section 1346 (honest services) cannot be charged alone. Enacted in response to

[5] The government misleadingly asserts that the conspiracy count alleged three subparts: charging conspiracy to (a) commit an honest services wire fraud; (b) a money or property wire fraud; and (c) falsify Enron's books and records. As is evident from the face of the Indictment, however, Count I does not contain a (c), but rather, only an (a) and (b) which charged a conspiracy to commit (a) wire fraud and (b) falsify Enron's books and records. (Gbr. 6, 11; RE4, 7).

McNally,[6] § 1346 merely makes deprivation of "honest services" a permissible object of the frauds criminalized by §§ 1341(mail fraud) and 1343(wire fraud).[7] The government, while referring to both § 1343 and §1346, charged a *single* wire fraud offense and specified *only* the deprivation of "honest services" as the object of the wire fraud scheme. Therefore, Counts II and III, *and* Count I(a)'s conspiracy to commit wire fraud in the Indictment on which Defendants were convicted, depended entirely on the alleged deprivation of honest services.

Upon redaction, this fact that the Indictment alleges no different wire fraud becomes self-evident. The government has not even attempted to argue that its Third Superseding Indictment specified any other object, nor can it quote one in the redacted Indictment. The government's entire wire fraud "case" and all the wire fraud allegations in its Indictment required and rested upon the allegation of a scheme to deprive Enron and its shareholders of the honest services of Enron employees. *Brown*, 459 F.3d at 517 ("Defendants' broadest attack ... [is that] there was no deprivation of Enron's intangible right to the honest services of its employees.").

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[6] *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875 (1987), *superceded by statute*, 18 U.S.C. §§ 1341, 1343.

[7] 18 U.S.C. §1346: "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."

Without the "honest services" object, the Indictment alleges no scheme by these Defendants to defraud anyone to obtain their money or property.

The government's recognition that these Defendants can be retried only on "an indictment that [does] not rely on an honest services theory" (G.Br. 34, 36), defeats its other arguments. The government did not obtain a new Indictment on remand–a fundamental and irrefutable fact which distinguishes this case. For example, in *United States v. Miller*, on which the government repeatedly and mistakenly relies, the conviction was reversed for an indictment invalid in light of *McNally* (prior to the enactment of §1346), coupled with erroneous jury instructions that omitted an essential element of the offense. *Id*. at 871. In *Miller*, the court specifically held that "there is no apparent obstacle to retrial, *should the Government seek a new indictment*." The government did, in fact, procure a new indictment–charging a new and valid wire fraud offense. *Miller*, 952 F.2d at 869. The government took no such action in this case.

To proceed again on the same Indictment is quite different from returning to the grand jury for a new, and presumably valid, indictment actually charging a different, valid offense. *Accord* (G.Br. at 26-27) ("*Runnels* does not mention the Double Jeopardy Clause, and the court expressly left open the possibility that the defendants could be '*re-indicted* under some alternative theory.'") (*quoting United*

States v. Runnels, 877 F.2d 481, 490 n.12 (6th Cir. 1989) (*en banc*)) (emphasis added). This crucial distinction between the instant case and *Miller* renders *Miller* inapposite.

D. *Dicta* From The *Brown* Panel Does Not Prevent Double Jeopardy Review.

The government misreads this Court's holding when it contends that this Court's prior opinion authorizes this wire fraud prosecution against these Defendants. After rejecting the honest services offenses completely, the Panel specifically declined to reach the defects in the remaining Indictment. *Brown*, 459 F.3d at 523. As the district court noted, "[e]ven the [Fifth] Circuit Court's conclusion that the 'Government must turn to other statutes, or even the wire fraud statutes absent the component of honest services, to punish this character of wrongdoing,' seems to be written more in the abstract rather than as specific approval for retrying *these* Defendants on *this* Third Superseding Indictment as now redacted." *Bayly*, 2008 WL 89624, *7; RE2:19 (emphasis in original) (citing *Brown*, 459 F.3d at 523.).

Indeed, this Court never considered the redacted Indictment–nor did the parties. There was no charging instrument at all upon reversal, and Defendants did not know if or how the government would proceed until the day of the pretrial hearing on April 4, 2007, when the government finally presented its Motion to Strike

Surplusage from The Indictment and moved to redact it accordingly. The district court granted that motion seven months later–on November 16, 2007. (Dkt. 1009).

This Court's passing *dicta* may have flowed from its belief that it lacked any reason to review the remaining charges once it reversed the wire fraud charges. *Bayly*, 2008 WL 89624, *7; RE2:19. Given the posture of the case and the focus of Court, however, it is hard to place much significance on the prior panel's description of the evidence as "sufficient," especially because the panel did not have a valid indictment against which to measure the government's unprecedented attempt to criminalize this business transaction.[8] The panel may have simply "said too much." *United States v. Bass*, 104 Fed. Appx. 997, 1000, 2004 WL 1719484, *3 (5th Cir. 2004) (*per curiam*).

The government's overbroad argument that this Court's *dicta* deprives the Court of jurisdiction and hence forecloses Double Jeopardy review under *Richardson* is wrong and simply distracts from the real issue: the failure of the redacted

[8] The panel also wrote that given the circumstances of this case, there was no reason "that the Defendants should have recognized . . . that the 'employee services' taken to achieve [Enron's] corporate goals constituted a *criminal* breach of duty to Enron." *Brown*, 459 F.3d at 522 (emphasis in original). Judge DeMoss was quite clear: "If there is any criminal wrong arising from the facts in this record, and I have serious doubts on that score, it would be in Enron's employees' reporting of the transaction described in the Engagement Letter, not in the manner in which Merrill's employees negotiated the deal." (DeMoss, J., concurring in part and dissenting in part). *Brown*, 459 F.3d at 536.

Indictment to state a separate offense.[9] Even if the government were correct in its analysis of this Court's *dicta,* and other criminal charges might be viable, the government did not re-indict these Defendants on any such charges.

II. THE COUNT I CONSPIRACY ALLEGED TWO DISTINCT OFFENSES, AND TWO DISCRETE BASES FOR CONVICTION. THEREFORE, COUNT I CAN BE PARSED TO ELIMINATE COUNT I(a), FOR WHICH JEOPARDY HAS ATTACHED.

The fact that Defendants conceivably face a trial on Count I(b) (conspiracy to falsify Enron's books and records) does not deprive this Court of jurisdiction or release the government from the bar of Double Jeopardy on separate allegations for which Defendants' jeopardy has been terminated. Jurisdiction lies to address issues of whether Double Jeopardy precludes retrial on charges that could have been alleged as a separate count. *See Ginyard*, 511 F.3d at 208; *United States v. Tom*, 787 F.2d 65, 70 (2d Cir. 1986) (cases cited by the government). The wire fraud conspiracy allegations of Count I(a) must be dismissed for the same reasons as Counts II and III. Because they are separate and discrete from the books and records offense alleged in

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[9] Indeed, in *Richardson*, the court did not terminate jeopardy, compared to the instant case where this Court disposed of all honest services wire fraud charges. *Cf. Richardson,* 468 U.S. at 323, 104 S.Ct. at 3085; *Brown*, 459 F.3d at 517. Even assuming as true every fact alleged in the Indictment, the government failed to prove that Brown, Bayly or Furst committed an honest services wire fraud.

Count I (b), this Court has jurisdiction and should dismiss Count I(a) conspiracy to commit wire fraud.

A. Count I(a) Of The Redacted Indictment Alleges A Conspiracy To Commit Wire Fraud Discrete From The Books And Records Allegations Of I(b).

In maintaining that this Court lacks jurisdiction to entertain Brown's Double Jeopardy argument as to Count I, the government ignores the unique circumstances of this case, its burden to demonstrate a different wire fraud offense, and the plain text of its own Indictment. The Supreme Court has held that appellate jurisdiction exists when the portion of a count is a "discrete" basis of liability, *i.e.* capable of being framed as a separate count–even if not sufficient to support a separate punishment. *Sanabria*, 437 U.S. at 72 & n. 30, 98 S.Ct. at 2183; *see United States v. Tom*, 787 F.2d at 68, 70(rejecting government's appeal of dismissal of mere predicate acts that could not stand alone); *Ginyard*, 511 F.3d at 208 (taking jurisdiction of interlocutory appeal to address Double Jeopardy issue as to one count of a multi-count indictment); *see also United States v. Larkin*, 605 F.2d 1360 (5th Cir. 1979), *withdrawn in part and modified,* 611 F.2d 585, 586 (5th Cir. 1980) (accepting jurisdiction and applying collateral estoppel to bar retrial on multiple overt acts and two objects and means alleged in a single conspiracy count).

The conspiracy to commit wire fraud charge in Count I (a) represents a distinct offense from the books and records charge in Count I (b). In addition, the conspiracy to commit wire fraud in Count I(a) is inextricably bound to the two substantive wire fraud counts (for which the government obtained a *Pinkerton* charge at trial). It does not matter that this discrete offense is buried in the same conspiracy count as the separate books and records allegation. The purported conspiracy to commit wire fraud is not merely a separate "theory of liability." Even in a single conspiracy count, the Defendants could have been separately convicted or acquitted of Count I(a) (wire fraud) on a special verdict. It can therefore be disentangled under a Double Jeopardy challenge–which erects an absolute bar against being put to trial again on the same wire fraud allegations. The government does not address or even seem to apprehend the fact that the wire fraud conspiracy states what could have been a separate offense.[10] Where, as here, a conspiracy charge in the Indictment employs two different statutory sections, "[t]his separation creates two risks addressed by the Double Jeopardy Clause." *See United States v. Lanier*, 920 F.2d 887, 893 (11th Cir.),

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[10] In urging this Court to affirm the district court, the government cites several cases that rejected Double Jeopardy challenges to mere separate "theories" or superfluous allegations of selected predicate acts under RICO. These cases are inapposite and do not support the result the government urges here. *See Ginyard,* 511 F.3d at 208; *Tom*, 787 F.2d at 70-71; *United States v. Witten*, 965 F.2d 774 (9th Cir. 1992), and section II.B. *infra*. Moreover, Defendants cannot be prosecuted a second time for conspiring to accomplish an object that this Court has already found was not a federal crime. 18 U.S.C. § 371.

cert. denied, 502 U.S. 872, 112 S.Ct. 208 (1991) (affirming convictions on a general and a specific conspiracy count).

B. The Government's Own Authorities Support This Court's Jurisdiction To Review The Discrete Wire Fraud Charge In Count I(a) For Violation Of Defendants' Rights Against Double Jeopardy.

The authorities on which the government relies support this *Abney* appeal, this Court's exercise of its jurisdiction, and the determination that Double Jeopardy protects the Defendants in this case. *Tom*, one of the primary cases relied on by the government, specifically held that "appellate jurisdiction is available where the dismissed portion of the count is 'a discrete' basis of liability, *i.e.* capable of being framed as a separate count ." 787 F.2d at 70; *see United States v. Woolard*, 981 F.2d 756, 757 (5th Cir. 1993).

In *Tom*, the Second Circuit dismissed defendants' interlocutory appeal to strike an isolated predicate act from the indictment under the doctrine of collateral estoppel. 787 F.2d at 67-68. Because each defendant would still be charged with more than enough predicate acts as required under the RICO statute (in fact, eighty-four remained) and could be convicted of conspiracy to commit RICO even if each prevailed on his interlocutory appeal, the Second Circuit found that it lacked jurisdiction to entertain defendants' appeals–which would not "vindicate that aspect of the Double Jeopardy Clause that provides 'a guarantee against being twice put to

trial for the same offense.'" *Tom*, 787 F.2d at 68 (quoting *Abney*, 431 U.S. at 661, 97 S.Ct. at 2041) (emphasis in original). *See also Witten*, 965 F.2d at 774 (order denying motion to dismiss predicate act in RICO prosecution not appealable under *Abney*). Unlike *Tom*, the Merrill Defendants could not be convicted of conspiracy to commit wire fraud upon their successful conclusion of this appeal.

Significantly, in *Tom*, in ruling on the government's cross-appeal, the court explained a crucial distinction: under settled Supreme Court and Circuit precedent, interlocutory "appellate jurisdiction is available where the dismissed portion of the count is a 'discrete' basis of liability, *i.e.* capable of being framed as a separate count, even though it would not be an 'independent' basis of liability, *i.e.* sufficient to support a separate punishment."[11] *Tom*, 787 F.2d at 70 (citing *Sanabria v. United States*, 437 U.S. 54, 98 S.Ct. 2170, (1978); *United States v. Martin*, 733 F.2d 1309 (8th Cir. 1984) (*en banc*), *cert. denied*, 471 U.S. 1003, 105 S.Ct. 1864 (1985); *United States v. Alberti*, 568 F.2d 617 (2d Cir. 1977), *United States v. Margiotta*, 646 F.2d

[11] Although this discussion occurred in the context of the government's ability to appeal under 18 U.S.C. § 3731, the holding of jurisdiction is equally applicable to an *Abney* appeal. It informs a determination whether Double Jeopardy permits an interlocutory appeal, in that § 3731 was intended "to allow appeals whenever the Constitution would permit." *United States v. Wilson*, 420 U.S. 332, 337, 95 S.Ct. 1013, 1019 (1975). *Accord Woolard*, 981 F.2d at 757. *See also Arizona v. Manypenny*, 451 U.S. 232, 248-50, 101 S.Ct. 1657, 1667-68 (1981) (discussing constitutional parameters and transferability of § 1291 and § 3731 to government appeal). Although § 3731 permits various interlocutory appeals in discrete contexts, where the challenge occurs in the Double Jeopardy context, equity dictates that its parameters are coextensive with the *Abney* doctrine.

729 (2d Cir. 1981) (*Margiotta I*); *United States v. Margiotta*, 662 F.2d 131 (2d Cir. 1981) (*Margiotta II*), *cert. denied*, 461 U.S. 913, 103 S.Ct. 1891 (1983). This Court also has jurisdiction, pursuant to its own decision in *Larkin*, to order the redaction of specific objects of a single conspiracy count. *Larkin*, 611 F.2d at 586 (ordering redaction of indictment to strike two of five objects and means of a conspiracy).

Additionally, the existence of two substantive counts that mirror and, in relevant part, "are coextensive with," the same wire fraud conspiracy charge distinguishes this case from all of those cited by the government. For instance, *United States v. Head*, 697 F.2d 1200, 1202-03 (4th Cir. 1982), *cert. denied*, 462 U.S. 1132, 103 S.Ct. 3113 (1983), involved a two count indictment charging (1) conspiracy to (a) bribe, and, (b) evade taxes; and, (2) a substantive illegal gratuity offense (which Head agreed to have added against him in a new indictment on remand).[12] *Head* is distinguishable on *several* grounds. First, in *Head*, there was no direct overlap of the conspiracy and substantive counts. Second, as in *Richardson*,

[12] *Head* is the only case cited by the government for its proposition that Double Jeopardy will not bar re-prosecution where only one prong of a conspiracy was defective. *Head* is a twenty-five year old Fourth Circuit case that has not been followed in any other circuit and is distinguishable–factually and legally. *Head*, 697 F.2d at 1200. In *Head*, the government redacted the entire defective prong (disapproved on appeal) from the indictment. *Id*. Here, the ultimate, but defective, offense/prong remains in the Indictment and violates Double Jeopardy principles. In other words, if the government had left the defective honest services offense in the Indictment, Double Jeopardy would certainly have applied to preclude pursuit of a conspiracy count on that offense–yet it is the only offense the Indictment has ever alleged as a wire fraud, both now and then.

there was no termination of jeopardy in the first proceeding. Rather, the first case was reversed only for instructional error–not because the defendant's conduct did not constitute the crime alleged. Third, Head was tried the second time on a new indictment that alleged a new offense to which the defendant had agreed. By contrast, this Court has already disposed of all honest services wire fraud charges against these Defendants. As the Court noted in *Head*, "[t]he true distinction occurs . . . at the point where the preclusion would run to reprosecution [sic] of a discrete criminal 'offense.'" *Head*, 697 F.2d at 1206 n. 9.

It is well-settled that the objects, if there are more than one, of a conspiracy need not be set forth in a single count of Indictment. *United States v. Lentz*, 624 F.2d 1280, 1289 (5th Cir. 1980), *cert. denied*, 450 U.S. 995, 101 S.Ct. 1696 (1981); *see generally Braverman v. United States*, 317 U.S. 49, 63 S.Ct. 99 (1942). This crucial fact further distinguishes this case from *Ginyard*, *Tom* and *Witten*, wherein the various allegations that the defendants requested stricken were not separately chargeable as a distinct offense. Consequently, even if the defendants in those cases had prevailed on their Double Jeopardy claims, not a single count against any of them would have been dismissed. By contrast, Count I(a) of the redacted Indictment here alleges a separate and discrete offense, rendering it susceptible to the bar of Double Jeopardy.

In sum, because Brown challenges a basis of alleged liability discrete from the books and records charge;[13] this purported wire fraud alleges no crime independent of the failed honest services charge; and, because it correlates directly to two substantive counts, this Court has appellate jurisdiction to review and dismiss all aspects of the wire fraud charges remaining in Counts I-III. *Ginyard*, 511 F.3d at 208 (accepting jurisdiction where defendant challenged entire count on grounds of Double Jeopardy); *Larkin*, 611 F.2d at 586 (asserting jurisdiction to dismiss certain overt acts, objects and means alleged in one conspiracy).

III. DOUBLE JEOPARDY BARS PROSECUTION ON THE SAME WIRE FRAUD CHARGES, AND BROWN'S DOUBLE JEOPARDY CLAIM WOULD BE IRREPARABLY LOST IF NOT VINDICATED NOW.

A. Brown Waived Nothing, And The District Court Determined That Brown's Double Jeopardy Argument Was Colorable And Non-Frivolous.

The government insinuates, though not quite argues, that Brown waived his Double Jeopardy claim. To the contrary, Brown repeatedly raised this claim in the district court–asserting consistently and from the first, that the redacted Indictment alleged an honest services wire fraud and conspiracy only and, that Defendants could not be tried again on the same wire fraud allegations. *Bayly*, 2008 WL 89624, *9; RE2:24 (Dkt. 952, 954, 964, 994, 998, 1011, 1012, 1022, 1025). *See*, *e.g.*, Transcript

[13] *Lentz*, 624 F.2d at 1289; *see generally Braverman*, 317 U.S. 49, 63 S.Ct. 99.

of Hearing on Motion to Dismiss, November 16, 2007, Dkt. 1010, at 10 ("And to proceed to a trial on this Indictment would also violate double jeopardy because, again, it has never alleged an offense other than a deprivation of honest services."); *id*. at 16 ("This Indictment has never alleged anything except an 'honest services' charge. To try these defendants again for a wire fraud violation would violate double jeopardy.").[14] The government did not argue waiver in the court below or move to dismiss any of Brown's pleadings. If it is trying to make a waiver argument now, it has waived that claim by not making it in the court below.

The district court found Brown's arguments colorable and non-frivolous, explicitly stating:

> [*United States v.*] *Brown* does not discuss the inter-relationship of the underlying theories of wire fraud all based on the same alleged scheme and set of facts. ... Moreover, neither side has cited any authority, and the Court has found none, 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 employee's honest services, let alone a case examining the interplay between these theories in the context of a factually similar indictment.

Bayly, 2008 WL 89624, *7; RE2:19. The district court noted that the wire fraud was based on only one scheme and set of facts and the "underlying conduct" has been held

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[14] For this reason, the government's entire discussion at pages 23-27 is simply irrelevant.

not to constitute a scheme to defraud of honest services.[15] The government has neither Indictment text stating a different crime, nor a new Indictment or legal authority to proceed to a second trial against these Defendants in the face of its admission that its Indictment must be independent of any honest services offense.

B. Brown's Appeal Presents A Double Jeopardy Argument Only And Does Not Require Review Of The Sufficiency Of The Evidence.

The government contends that this appeal is simply a reformulated attack on the insufficiency of the Indictment, which would not be appealable at this juncture under §1291 and *Abney*. Either misapprehending or ignoring Brown's Double Jeopardy argument, the government baldly asserts that Brown "argues only that the conspiracy and fraud charges in the Indictment fail to state on [sic] offense." Gov't at 12, 14, 21-28. Of course, Brown argued before the district court that the redacted Indictment is now facially insufficient–because it is, but Brown does not ask this Court to hold that the Indictment is facially insufficient. (RE8). Rather, this appeal raises the pure Double Jeopardy argument that Brown cannot be tried twice for the same offense.

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[15] Furthermore, in the last paragraph of its order, immediately after referring to both Brown and Bayly's Motions to Dismiss (Dkt. 952 and 964), the district court wrote: "Defendants' contention that the Double Jeopardy Clause will be violated if they are retried for wire fraud on the money and property theory is found to be a colorable, non-frivolous contention." (RE2:24). The court clearly intended this finding to apply to all Defendants. Even though the district court granted Brown's Motion for severance, it has taken no action in either case pending this appeal.

Furthermore, the sufficiency of the evidence is legally irrelevant to this appeal which requires this Court to look no further than the text of the Indictments. *Delgado*, 256 F.3d at 270. Brown does not seek review of a denial of a motion to acquit or a sufficiency ruling. Therefore, the government's reliance on *Rey*, 641 F.2d 222, and *United States v. Becton*, 632 F.2d 1294 (5th Cir. 1980), *cert. denied*, 454 U.S. 837, 102 S.Ct. 141 (1981), is off-point. Furthermore, the Double Jeopardy claim presented here is distinct from the *McNally* problem partially responsible for the reversal in *Miller*, on which the government erroneously relies. Nor does Brown seek "plenary review" of the first trial, as in *Becton*, 632 F.2d 1294.

Instead, as required by this Court's decision in *Delgado*, Brown seeks this Court's review of the Indictment upon which the government now seeks to re-try Brown, as compared to its earlier, fatally-flawed Indictment. That the redacted Indictment is *also* defective because it now fails to state *any* wire fraud offense on its face does not transmogrify Brown's Double Jeopardy argument into a claim of mere facial invalidity not cognizable on interlocutory appeal.

C. The Policies Underlying Double Jeopardy Apply With Particular Force To This Case.

The central premise of the Double Jeopardy Clause "is that the State with all its resources and power should not be allowed to make repeated attempts to 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, 78 S.Ct. 221, 223 (1957). *See also Abney*, 431 U.S. at 662, 97 S.Ct. at 2041 (Even if a defendant "has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit."). Brown is entitled to that protection here. *Id*. at 658, 97 S.Ct. at 2039, 2040.

Another policy of the Double Jeopardy Clause is its implicit concern for the high monetary and human cost of repeated prosecutions. The cost to the taxpayers of the Enron Task Force's repeated prosecutions of companies and persons on the fringes of Enron's wrongs has been enormous. The numerous reversals and acquittals (*Andersen, Brown*, *Howard, other Broadband* defendants), and other evidence of Task Force misconduct (in *Broadband*, *Brown*, *Skilling* alone),[16] prompt serious consideration of the human cost in these prosecutions, as well as the cost to the rule of law. Indeed, every major trial in this Task Force saga has been riddled with government errors. For example, the government does not seem to recognize–much

[16] Defendants also have a Motion for New Trial and a Motion to Dismiss for Egregious Prosecutorial Misconduct, *Brady* Violations and Double Jeopardy pending in the district court. (Dkt. 1004, 1020, 1067).

less demonstrate concern for–its own overreaching in its charging decisions. Its brief does not even directly address the merits of this appeal. The government has distanced itself from–and will not quote–its own Indictment. Not once does it even cite this Court's decision in *Delgado*.[17]

The policy against piecemeal review (and associated benefits) contained within 28 U.S.C. § 1291 (1976) is simply not appropriate or relevant where, as here, the Double Jeopardy challenge flows directly from the government's novel indictment of conduct that was not criminal. The Task Force has pursued these Defendants relentlessly for more than six years, but it failed to establish that Defendants' conduct constituted a federal crime under the statutes it cobbled together to convict and imprison them without bail pending their original appeal. It now seeks to prosecute them again on the same, empty allegations.

Far more is at stake in this case than the "slight increment of strain, embarrassment, or expense that might have to arise" from having to defend against these charges again. *Abney*, 431 U.S. at 661, 97 S.Ct. at 2041. Defendants' careers, reputations and lives, and those of their families, have been devastated. "The right

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[17] At the same time, it argues here that Defendants seek delay, the government has not responded to the *Brady* and Prosecutorial Misconduct motion pending before the district court since March 24, 2008, but instead, *it* has repeatedly sought delay, making the same unpersuasive procedural argument there as here–that the district court has no jurisdiction because of Brown's appeal.

not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society .... If such great constitutional protections are given a narrow, grudging application they are deprived of much of their significance." *Green*, 355 U.S. at 198, 78 S.Ct. at 229.

CONCLUSION

For these reasons, the district court's decision must be reversed, and this Court should order the dismissal with prejudice of all wire fraud counts and allegations from this Indictment. Counts II and III must be dismissed in their entirety, and Count I(a) must be dismissed to the extent it alleges a conspiracy to commit wire fraud.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify two true and complete copies, and an electronic copy in PDF version, of the Reply Brief of Appellant, James A. Brown have been served via First Class, United States mail, on counsel of record as listed below, on this 10th day of July, 2008.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

The undersigned counsel certifies that this Reply Brief of Defendant-Appellant James A. Brown complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) because it contains 6,915 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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