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

UNITED STATES OF AMERICA,	§	
Plaintiff,	§	
	§	
v.	§	**CR. NO. H-03-363 (Werlein, J.)**
	§	
DANIEL BAYLY,	§	
JAMES A. BROWN, and	§	
ROBERT S. FURST,	§	
Defendants	§	

BROWN'S OPPOSITION
TO GOVERNMENT'S MOTION TO REVOKE BOND

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BROWN'S OPPOSITION
TO GOVERNMENT'S MOTION TO REVOKE BOND

Three days after the Fifth Circuit issued its judgment reversing three out of five counts of conviction against Brown, and *one day* after Brown filed his Motion for Release *Instanter*, the Assistant Attorney General for the Criminal Division of the United States Department of Justice[1] filed with the Fifth Circuit a response agreeing to Brown's Release *Instanter*, stating in relevant part: "**The Government agrees . . . Brown is entitled to be resentenced on his convictions on Counts 4 and 5 of the superseding indictment.**" (Ex. 1). Within four days, the Fifth Circuit immediately ordered Brown's release, consistent with the calculations provided by Brown *and* with agreement of the Department of Justice (Ex. 2).

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win the case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor–indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935).

Admittedly contrary to the government's prior agreement, itself a binding judicial admission that "Brown is entitled to be resentenced" because of the reversal of Counts I-III, AUSA Spencer has moved to revoke Brown's bond and remand him to custody to serve a 46 month term of imprisonment that was imposed based on three counts of conviction that have been *vacated*. The

[1] Alice S. Fisher, Assistant Attorney General, signed by Stephan E. Oestreicher, Jr.

legally invalid sentence Mr. Spencer would have Brown serve *exceeds by 30 months* the maximum sentence available under the relevant Sentencing Guidelines for Brown's perjury and obstruction convictions. Mr. Spencer's new-found position, and this abrupt "about-face" of the sovereign, are utterly baseless. What little authority AUSA Spencer now cites is either factually inapposite or legally irrelevant. In violation of Due Process, AUSA Spencer would imprison Brown for crimes for which Brown has not been convicted and usurp Brown's constitutional and agreed right to be resentenced to "time served."

I. BACKGROUND

On July 22, 2004, the Enron grand jury returned a third superseding indictment charging two Enron employees and four Merrill Lynch employees with conspiracy and wire fraud, and James Brown with the additional offenses of perjury and obstruction of the Enron Grand Jury (Dkt.311).[2] The jury convicted Merrill employees James Brown, Daniel Bayly, William Fuhs, and Robert Furst, and Enron employee Daniel Boyle (Dkt.628). Brown's five offenses were grouped: the base offense level was calculated on his conviction for *wire fraud*; and, Brown was sentenced to imprisonment for 46 months, restitution in the amount of $368,750, and a fine of $250,000 (Dkt.769).[3]

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[2] Pleadings are referred to by Docket number [Dkt.].

[3] *See United States v. Campbell*, 106 F.3d 64, 68 (5th Cir. 1997). *Cf.* U.S.S.G. §5G1.2 (directing the court to sentence multiple counts of conviction as a single, interdependent package). Here, the PreSentence Report and this Court did just that.

The Revised Presentence Investigation Report (PSR) in this case makes clear that the sentence imposed on Brown was determined by "[t]he grouping of these [five] counts result[ing] in a combined offense level." Revised PSR, excerpts attached hereto as Ex. 3 at p. 23, ¶ 91. Further, the "base offense level" was premised on Brown's conviction for wire fraud (the highest offense level), *Id. at* ¶ 94 – a conviction which has been vacated by the Fifth Circuit. *United States v. Brown*, 459 F.3d 509 (5th Cir. 2006). Finally, all of the adjustments adding to the base offense level were premised on the "specific offense characteristics" founded on Brown's convictions for Counts

Brown, Bayly, Furst, and Fuhs all appealed their convictions to the United States Court of Appeals for the Fifth Circuit. Of the fourteen convictions challenged, twelve were reversed on August 1, 2006. The Fifth Circuit acquitted Fuhs. *Brown*, 459 F.3d at 509. It vacated the conspiracy and wire fraud convictions against Brown, Bayly and Furst because the indictment was flawed. *Id*. Only Brown's convictions for perjury and obstruction were affirmed, albeit by a divided panel. Judge DeMoss wrote separately and urged Brown's acquittal. The Supreme Court recently denied certiorari.

The Fifth Circuit's judgment read: "The convictions of each of the Defendants for conspiracy and wire fraud are VACATED; . . . and the conviction and sentences of Brown on charges of perjury and obstruction of justice are AFFIRMED." Two days after the Fifth Circuit vacated three of Brown's five counts of conviction, Brown filed a Motion for Release *Instanter*, on August 3, 2006. Brown asserted that, at the time of the motion, he had already completed service of the term of imprisonment that could have been imposed on him for the only two convictions the majority opinion had affirmed. With full knowledge of the language in the Fifth Circuit's judgment, to which Mr. Spencer now points, the Assistant Attorney General for the Criminal Division of the United States Department of Justice *immediately* (within one day) and *expressly agreed* to Brown's immediate release *and* filed a judicial admission stating: "Brown is entitled to be resentenced on Counts IV and V." (Ex. 1); *See* Section IV, *infra*. Agreeing with the government and Brown's calculations, the Fifth Circuit ordered Brown's release *instanter* on August 8, 2006–only *seven days* after the Fifth Circuit's judgment (Ex. 2).

I-III– convictions now vacated by the Fifth Circuit. Revised PSR at p. 24, ¶¶ 95-100 (Ex. 3).

As we have explained to Mr. Spencer, this is not an issue of jurisdiction or mandate, and Brown is not requesting a "modification" of his sentence. *See* Exs. 4-13 [Correspondence]. Rather, in the very words of the Assistant Attorney General: "Brown is entitled to be resentenced" on the only two counts for which he stands convicted. It is an issue of fundamental Due Process and double jeopardy. No doubt the government immediately made this judicial admission–and the Fifth Circuit agreed to Brown's release–because the law requires it. *United States v. Bass*, 104 Fed.Appx. 997, 2004 WL 1719484 (5th Cir. 2004) (*per curiam*) (Ex.14). Brown is entitled to be resentenced to "time served."

II. Brown Has Served A Full Sentence For The Only Two Counts Of Conviction The Fifth Circuit Affirmed.

Brown was sentenced by this Court on April 21, 2005, and he voluntarily reported to federal prison on August 12, 2005. Brown served twelve (12) months in prison, and he was released on August 9, 2006. Brown is entitled to good time credits of 54 days. 18 U.S.C. §3264(b).

Under the relevant Federal Sentencing Guidelines, U.S.S.G. § 1B1.11(b)(3)(2001); *see also* Brown Sentencing Tr. 20-21, 26, perjury and obstruction would be grouped, U.S.S.G. § 3D1.2,[4] and Brown would be at Base Offense Level **12**. U.S.S.G. §§ 2J1.2, 2J1.3, 3D 1.3, 4A1.1, 4A1.3. None of the upward departures articulated in USSG §§ 2J1.2, 2J1.3 apply to Brown's case.[5] A Base

[4] Indeed, although legally distinct offenses, perjury and obstruction in this case represent the same type of wrongful conduct with the same ultimate harm, and it is therefore appropriate to treat them as a single offense for the purposes of sentencing. *See* U.S.S.G. § 3D1.2. In Brown's case, there was literally no difference in the proof offered as to the two offenses, and in Brown's Revised PSR, they were grouped. ¶ 91, p. 23 (grouping Counts 4 and 5 because they involve the same act or transaction) (Ex. 3).

[5] The jury and this Court already found that Brown did not substantially interfere with the administration of justice. Furthermore, any increases in the offense level contemplated in the PSR report and/or by this Court at sentencing were predicated on convictions for Counts I-III, and no

Offense Level **12** would mean a term of imprisonment of at most 10-16 months. U.S.S.G. § 5A. Even without good time credit of almost two months, **at the time of his release *instanter*, Brown had far exceeded service of a full term of incarceration had he received a sentence for perjury and obstruction at the lower end of the applicable guidelines**.

A level **12** offense qualifies as a Zone C offense which means that a sentence can be served by half in prison and the other half on a form of supervised release. U.S.S.G. § 5C1.1(d)(2). Brown has no criminal history, has been an exemplary citizen, is not a flight risk,[6] and would have been eligible for supervised release at the 8-month mark, even were he given the maximum sentence for a level **12** offense. U.S.S.G. § 5C1.1(d)(2). In any event, when this Court originally imposed sentence on **all five counts**, it sentenced Brown at the minimum level provided by the guidelines.[7]

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longer apply to Brown. *See* Revised PSR ¶ 94-100 (Ex. 3); Brown Sentencing Tr. 28-29, *passim*. This Court rejected the government's request for an upward departure. Brown Sentencing Tr. 39, 44.

[6] *See*, *e.g.* Brown Sentencing Tr. 66 ("I'm satisfied from clear and convincing evidence that Mr. Brown is not likely to flee or pose a danger to the safety of any other person in the community.").

[7] This Court imposed this original sentence in substantial part upon the government's misrepresentation to this Court that the self-enriched architect of Enron's downfall, Andrew Fastow, would receive a term of imprisonment of "no less than 10 years" (Katherine Ruemmler at Bayly Sentencing, Tr.71). *See* Brown Sentencing Tr. 39 (imposing sentence of 46 months for Base Offense 23 which provides for a range between 46 and 57 months). *See* U.S.S.G. § 5A. However, since that time, Fastow was sentenced to only six years, *with the agreement of the government*, and will in reality only serve approximately four years, having also obtained participation in a "substance abuse program." Meanwhile, Glisan, another mastermind, self-enriched in Enron's downfall, is already back home with his family–having negotiated benefits for himself that were not disclosed when he testified in Barge I, and further reduced his sentence–despite Ms. Ruemmler's representation to this Court that "He will serve no less than 60 months" (Bayly Sentencing Tr. 71). This information was undisclosed to Brown in violation of *Brady*. *See*, *e.g. Barnes v. Estelle*, 518 F.2d 182, 183 (5th Cir. 1975) (Resentencing is required "whenever sentence was based in part upon misinformation of a constitutional magnitude.") (internal citations omitted).

Thus, at the time of his release, Brown had already *far exceeded* service of the minimum or likely term of incarceration for the affirmed counts.

Furthermore, as of August 11, 2007, Brown effectively has served the full term of "supervised release" ordered by this Court as part of the original sentence,[8] and he has fulfilled all terms and conditions that have been imposed on him. Brown has already "resumed his place with family and society." He has moved his family to Santa Fe, New Mexico, reconnected with longstanding friends, bought a new house, placed his home in Darien, Connecticut, on the market for sale, and started a new business with his son Matt. This Court returned his passport to him *with the agreement of the government*, and he has traveled abroad to visit his daughter for her 21st birthday and returned. Accordingly, Brown has effectively fulfilled all terms of a full sentence for perjury and obstruction and resumed his place in his family and in society.

III. As A Matter of Law, The Original Sentence Imposed By This Court, Predicated On Five Convictions, Was Part Of An Integrated "Sentencing Package." This Package Must Be Unbundled And Brown Resentenced To "Time Served" For The Only Two Remaining Convictions.

Even without (i) the Assistant Attorney General's judicial admission that "Brown is entitled to be resentenced," and (ii) the Fifth Circuit's Order granting Brown's release *instanter,* Brown is entitled to be resentenced under the law. When a defendant is convicted of more than one count of a multi-count indictment, offenses are grouped, and the district court is likely to fashion a sentencing package in which sentences are interdependent, as happened with Brown. *See* U.S.S.G. §5G1.2 (directing court to sentence multiple counts as a single package)*;* Brown Revised PSR ¶ 91 (grouping

[8] This Court made a downward departure from the suggested range for Brown's term of supervised release based on that term's "adequacy" and this Court's determination that Brown "will be readily able to resume his place with family and society without further offense." Brown Sentencing Tr. 39. Brown has already proved this Court's decision was correct.

offenses for a combined offense level) (Ex.3, *infra*). On appeal, when some but not all of defendant's convictions are vacated, and the sentence handed down to that defendant in the first instance was premised on *all* of the original convictions, the case must be remanded for resentencing. *United States v. Jones*, 484 F.3d 783 (5th Cir. 2007).

It is axiomatic that a new sentencing hearing is required where vacatur of a conviction "unbundles" a defendant's sentencing package for multiple convictions. *Bass*, 104, 2004 WL 1719484 (Ex. 14). The Fifth Circuit spoke directly to this issue in *Bass*:

> When a defendant is convicted of more than one count of a multicount indictment, the district court is likely [as here] to fashion a sentencing package in which sentences on individual counts are interdependent. When, on appeal, one or more counts of a multicount conviction are reversed and one or more counts are affirmed, the result is an 'unbundled' sentencing package. Because the sentences are interdependent, the reversal of the convictions underlying some, but not all, of the sentences renders the sentencing package ineffective in carrying out the district court's sentencing intent as to any one of the sentences on the affirmed convictions.

Bass, 2004 WL 1719484. In such case, remand for resentencing is required as a matter of law. *Id*.

Indeed, the principle is so fundamental that the Fifth Circuit had to recognize its own error in its original decision in *Bass*.[9] "**Our failure to acknowledge this principle was error, and because our vacatur of Bass's CCE conviction *could* result in a reduced total sentence for Bass, it would be unjust for Bass not to be resentenced.** *Id*. Here, as in *Bass*, Brown's original sentence was "part of an integrated 'sentencing package,'" and "Brown is entitled to be resentenced"–if for

[9] In *Bass I*, the Fifth Circuit noted that Bass was serving all of his sentences concurrently. It actually (and mistakenly) wrote in its original decision: "Bass's total time of incarceration will not be shortened as a result of our decision today to vacate his CCE conviction." On Bass's *pro se* appeal from the denial of a new sentencing hearing, the government argued, as Mr. Spencer does here, that the mandate foreclosed resentencing. The Fifth Circuit flatly rejected this argument and acknowledged its own error in *Bass I*. The Fifth Circuit confessed that it had "said too much" in *Bass I*, and resentencing was required. 2004 WL 17179484, *3.

no other reason than to declare all terms of his original sentence fulfilled. *Id*. In other words, Brown's original sentence must be "unbundled," and a new sentence imposed under the relevant guidelines based upon the only counts for which Brown stands convicted. *Id.*

Necessarily implied in the Fifth Circuit's *instanter* release of Brown for "further proceedings" and remand to this Court upon vacatur of three convictions is the authority to re-sentence Brown according to the only counts for which he stands convicted. *See id.*[10] The Assistant Attorney General for the Criminal Division, through Mr. Oestriecher, clearly understood the necessity of "unbundling" the original sentencing package and resentencing Brown for the only two convictions affirmed on appeal, when he signed the government's judicial admission and effectively agreed that Brown had served a full sentence for the only two counts that were affirmed.[11] The Fifth

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[10] *If* the Fifth Circuit's mandate is interpreted as AUSA Spencer urges, it is both "clearly erroneous and would work a manifest injustice." This Court must resentence Brown in accordance with the law and the government's prior agreement. Under Circuit precedent, this Court may even "exceed the mandate" were it necessary to do so. *Bass*, 2004 WL 1719484.

It has long been the law across the circuits that sentences must be "unbundled" when counts are reversed on appeal. *United States v. Shue*, 825 F.2d 1111, 1113 (7th Cir. 1987) (district court correctly determined that, despite the "unfortunate language of our earlier remand order, it had authority to resentence Mr. Shue."); *United States v. Thomas*, 788 F.2d 1250, 1260 (7th Cir. 1986) (Reversal of some but not all counts disrupts the district court's "bundled" sentencing scheme, and resentencing is required as a matter of law). *Accord United States v. Radmall*, 340 F.2d 798, 801 (9th Cir. 2003). Further, it would be consistent with the law to interpret the Fifth Circuit's mandate, issued four months later, as affirming the sentence that the government agreed Brown had fulfilled when he was released *instanter*.

[11] If the government believed that Brown had not served his full term of imprisonment for perjury and obstruction, it *would have* and *should have opposed* Brown's motion for release *instanter*–as it opposed his release on each prior occasion, and as it opposed Skilling's release when he sought bail pending appeal. *United States v. Skilling*, — F.Supp.2d —, 2006 WL 3030721 (S.D.Tex. 2006). Instead, upon the reversal of Brown's convictions, the Assistant Attorney General knew Brown was entitled to be released after serving a year in prison (pending appeal), a full guidelines sentence, when his only convictions were for perjury and obstruction. *Bass*, 2004 WL 17179484, *3.

Circuit agreed and ordered Brown's immediate release. No doubt, in both instances, this is because the law requires it. *Bass*, 2004 WL 1719484.

IV. The Department of Justice's Judicial Admission Must Be Enforced.

Because the law independently required Brown's release and resentencing, *the very day after* Brown filed his motion, the Assistant Attorney General agreed to Brown's Release *Instanter* and advised the Fifth Circuit: "**The Government agrees, however, that if the Court does not grant rehearing of the panel decision, Brown is entitled to be resentenced on his convictions on Counts 4 and 5 of the superseding indictment.**"[12] (Ex 1). The Fifth Circuit did not grant the government's requested rehearing of the panel decision, and Brown is entitled to be resentenced.

It is well settled that "factual assertions in pleadings ... are considered to be judicial admissions conclusively binding on the party who made them." *White v. ARCO/Polymers, Inc.*, 720

Not only has the government made a binding judicial admission to Brown's release and resentencing to time served, but it has waived any argument to the contrary by agreeing to his release, agreeing to his resentencing, agreeing to the refund of restitution, and agreeing to the return of his passport. It is well-settled that the government may forfeit an argument by failing to raise an issue at the appropriate time. *Steagald v. United States*, 451 U.S. 204, 209, 101 S.Ct. 1642, 1646 (1981) ("The Government [] may lose its right to raise factual issues … when it has made contrary assertions in the courts below, when it has acquiesced in contrary findings by those courts, or when it has failed to raise such questions in a timely fashion during the litigation."). *Accord United States v. Amuny,* 767 F.2d 1113, 1121-22, 1121 n. 5 (5th Cir.1985) (government forfeited opportunity to challenge standing on appeal where it not only failed to raise the issue in district court, but expressly conceded standing, thereby inducing the defendants to forego an opportunity to establish it.).

Such a proposition stands equally firm under the doctrine of judicial estoppel. "Where a party has taken a position under oath in [a] judicial proceeding, he is estopped to make a contrary assertion in a later proceeding." *Colonial Refrigerated Transportation, Inc. v. Mitchell*, 403 F.2d 541, 550 (5th Cir. 1968). *See also Stinnett v. Colorado Interstate Gas Co.*, 227 F.3d 247, 258 (5th Cir. 2000) ("The doctrine [of quasi-estoppel] applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced.").

[12] Counts 4 and 5 refer to Brown's only remaining convictions, for perjury and obstruction.

F.2d 1391, 1396 (5th Cir. 1983). *Cf. Martinez v. Bally's Louisiana, Inc.*, 244 F.3d 474, 476-77 (5th Cir. 2001) ("A judicial admission is a formal concession in the pleadings or stipulations by a party or counsel that is binding on the party making them."); *see Burdis v. Texas & P. Ry. Co.*, 569 F.2d 320, 324 (5th Cir. 1978) ("How far is it necessary to connect the pleading with the party against whom it is sought to be used in evidence as an admission? Certainly if it be shown to have been sworn to, or signed by the party himself that would be sufficient."). The government in its pleadings, and particularly in the making of judicial admissions, should be held in the same manner that the private person or corporation is held. *United States v. Continental-American Bank & Trust Co.*, 79 F.Supp. 450, 452 (W.D.La. 1948); *Daitz Flying Corp. v. United States,* 4 F.R.D. 372, 373 (E.D.N.Y. 1945) (same); *accord Bradley v. United States*, 866 F.2d 120, 126-27 (5th Cir. 1989). "Facts that are admitted in the pleadings *are no longer at issue*." *Davis v. A.G. Edwards & Sons, Inc.*, 823 F.2d 105, 108 (5th Cir. 1987) (emphasis added) (citations omitted).

The government's statements were a clear and unequivocal judicial admission, repudiation of which is legally untenable and would otherwise prejudice how this case has been litigated. Indeed, the Fifth Circuit has long recognized: **"Unequivocally, the Government has an obligation to fully comply with any and all agreements and promises it makes with and to defendants, and we would interpret any noncompliance as a serious breach of the Government's duty, as well as a possible violation of a defendant's constitutional due process rights."** *United States v. Millet*, 559 F.2d 253, 256-57 (5th Cir. 1977) (emphasis added); *see United States v. Voccola*, 600 F.Supp. 1534, 1537 (D. R.I. 1985) ("*Santobello* [*v. New York*, 404 U.S. 257, 92 S.Ct. 495 (1971)] and its progeny proscribe not only explicit repudiation of the government's assurance, but must, in the interests of fairness, be read to forbid end-runs around them."), *quoted with approval* in *United*

States v. Badaracco, 954 F.2d 928, 941 (3d Cir. 1992); *United States v. Frazier*, 340 F.3d 5, 10 (1st Cir. 2003). *See also United States v. Story*, 439 F.3d 226, 231 (5th Cir. 2006) (Government waived right to challenge sentencing appeal by failure to object).

Furthermore, a stipulation made by previous counsel "does not evaporate upon the appearance of new counsel." *Marden v. International Association of Machinists and Aerospace Workers*, 576 F.2d 576 (5th Cir. 1978). Like a stipulation of fact, the government's agreement and judicial admission here are "controlling and conclusive and courts are bound to enforce them. . . ." *Quest Med., Inc. v. Apprill*, 90 F. 3d 1080, 1087 (5th Cir. 1996) (discussing a stipulation); *see A. Duda & Sons Coop. Ass'n v. United States*, 504 F.2d 970, 975 (5th Cir. 1974) (this proposition is "well settled … even if the government is the party bound"); *Mobil Exploration & Producing U.S., Inc. v. NLRB,* 200 F.3d 230, 234 & n.1 (5th Cir. 1999). The rule applies with equal force in criminal trials. *See, e.g., United States v. Technic Servs., Inc*., 314 F.3d 1031, 1045 (9th Cir. 2002).

In breach of the government's admission and his ministerial duty as an officer of the court, on July 10, 2007, Mr. Spencer advised our co-counsel, Paul Coggins, that Brown was "his number one priority" and that he had "tremendous leverage" over Brown. "Only a person blinded by ambition or ignorance of the law and ethics would have proceeded down this dangerous path." *United States v. Ramming*, 915 F.Supp. 854, 868 (S.D. Tex. 1996) (dismissing indictment because of prosecutorial misconduct). However, AUSA Spencer cannot claim ignorance of the government's agreement, the law, *or* ethics. To the contrary, he deliberately defies the government's agreement. We have both explained the law to him repeatedly *and* put him on written notice of his prosecutorial

misconduct if he carried out his baseless and punitive threats.[13] In correspondence, dated July 3, 2007, AUSA Spencer even acknowledged: "**I realize this position is not consistent with the Government's concession in its response to your client's motion for release on conditions instanter**." Jurisdiction returned to this Court upon issuance of mandate, and resentencing is required–even though it should be for "time served." *Bass*, 2004 WL 1717484. AUSA Spencer's recent assertions of lack of jurisdiction are frivolous, and the cases he cites are utterly inapposite.[14]

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[13] We have repeatedly explained the errors and injustice of his position to Mr. Spencer in person on March 20, 2007; and by letters dated March 2, 2007, March 22, 2007, July 16, 2007, and July 30, 2007. We specifically identified the misconduct and ethical issues raised and have cited authority to him that renders his position baseless (Exs. 7, 9, 11, 13).

We have explained the sentencing guidelines calculations, that the sentences must be unbundled, and that this is not an issue of jurisdiction, mandate or sentence "modification." Correspondence from Sidney Powell and Dan Cogdell to Arnold Spencer, attached hereto as Exs. 9, 11, 13. *See* MODEL RULES OF PROFESSIONAL CONDUCT R. 3.8, 4.4 (2007); MODEL CODE OF PROFESSIONAL RESPONSIBILITY CANONS 1, 6, 7, 9 (1980); Restatement (Third) of the Law Governing Lawyers, §§ 31, 49, 97 (2000); G. Hazard & W. Hodes, The Law of Lawyering § 3.8:101 (2d ed. 1990); C. Wolfram, Modern Legal Ethics § 13.10, at 759-70 (1986).

First, in his letter of March 9 (Ex. 8), and in our initial conversation, Mr. Spencer did not even know of the government's judicial admission that "Brown is entitled to be resentenced." We identified it for him in person and in writing (Ex. 9). When, in his letter of July 3, 2007 (four months later), AUSA Spencer finally acknowledged the government's prior agreement that Brown is entitled to be resentenced, he nonetheless repudiated it (Ex. 10). Instead, as we know from his comments to our co-counsel, he is exercising his self-proclaimed "tremendous leverage" against Mr. Brown.

[14] The cases cited by AUSA Spencer are factually inapposite and legally irrelevant. Not one of the cases he cites as depriving this Court of jurisdiction involved a successful, substantive appeal of convictions, thereby mandating unbundling and resentencing. All, instead, involved *plea agreements* followed by challenges to sentencing considerations at the district court level.

In addition, two of the cases cited by Mr. Spencer have been overruled (albeit on other grounds) – *United States v. Beccera*, 155 F.3d 740 (5th Cir. 1998); *In re United States*, 900 F.2d 800 (5th Cir. 1979) – and he has failed to alert this Court to that fact, by parenthetical or otherwise, in disregard of his role as a minister of this Court. *See*, *e.g. McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 440, 108 S.Ct. 1895, 1903 (1988) ("Attorneys are obligated to act with candor in presenting claims for judicial resolution. The rules of ethics [] prescribe circumstances in which an

Indeed, the government, including Mr. Spencer, has agreed in several ways and at several times that Brown's original sentence must be unwound. Mr. Spencer's co-counsel Leo Wise, agreed that Brown was entitled to a refund of the restitution (and assessment) he had paid because Counts I-III (for which restitution was ordered *as part of his sentence*) were vacated. On November 27, 2006, this Court then granted Brown's Unopposed Motion for Return of Payments (Dkt. 905; Ex. 15). After writing that he "cannot realistically envision agreeing to foreign travel" on February 23, and receiving our response on February 26, Mr. Spencer himself agreed to the return of Brown's passport the same day (Exs. 4, 5). This Court entered the agreed order and returned the passport to Mr. Brown on February 27 (Dkt. 924; Ex. 16). Then, after a string of correspondence on these issues in March, which fully informed Mr. Spencer of the government's prior agreement, itself a judicial admission that Brown was entitled to be resentenced, *and*, after receiving a full explanation of the correct sentencing guidelines calculation (Ex. 9), Mr. Spencer made no objection when Mr. Brown traveled abroad in late May.

AUSA Spencer's unilateral repudiation of the government's judicial admission(s) and his specious Motion to Revoke Brown's Bail are unsupported by *any relevant* legal authority and completely disregard his prosecutorial obligation, which arises from the *trust* and *power* placed in him as an Assistant United States Attorney, to see "that justice shall be done." *Berger*, 295 U.S. at 88, 55 S.Ct. at 633. As Mr. Spencer knows, Brown repeatedly opposed Merrill Lynch's participation in the barge transaction. Brown has flatly refused to plead guilty to allegations of a crime he did not

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attorney must disclose facts and law contrary" to their own.); *United States v. Edwards*, 777 F.2d 364, 365 (7th Cir. 1985) ("A lawyer, after all, has no duty, indeed no right, to pester a court with frivolous arguments, which is to say arguments that cannot conceivably persuade the court."); MODEL RULES OF PROFESSIONAL CONDUCT R. 3.3 (2007) ("Candor to the Tribunal").

commit and conduct for which he had no consciousness of wrongdoing. He has refused to "cooperate" within the government's definition of that term, and he *could not do so* as he has no evidence that Mr. Bayly or Mr. Furst committed any crime either. Avowedly having made Brown his "number one priority," Mr. Spencer is purposely maximizing his self-proclaimed "tremendous leverage" to punish Brown's refusal to "cooperate." And, he has timed this transparently retaliatory tactic (exactly one year after Brown's release) both to terrorize Brown and his family for his refusal to plead and "cooperate," and to disrupt the defense's preparation of its motions, due in three weeks–all in a desperate effort to concoct a case where there is no crime. This Court has every reason to consider sanctions for this egregious prosecutorial misconduct, breach of the government's prior agreement, and abuse of the prosecutor's self-proclaimed "tremendous leverage" over Mr. Brown.[15]

V. Further, Remanding Brown to Custody Would Violate The Double Jeopardy Clause And Due Process By Reimposing Sentences That Have Already Been Fully Served Or By Imposition Of A Sentence For Crimes Which Brown Has Not Committed.

Not only did the government agree, but the Court of Appeals also effectively approved Brown's calculation that, notwithstanding the ultimate disposition of the perjury and obstruction convictions, Brown had fully served the sentence which would have been imposed had he been convicted on those two counts alone. In fact, although the Fifth Circuit's orders granting the release of Bayly and Fuhs recited that they were "pending appeal," the Fifth Circuit's order granting Brown's *instanter* release recites that it is "pending further proceedings." (Ex. 2, *infra*). An order

[15] Mr. Spencer's tactics and rank abuse of the trust of the people and the power of the sovereign warrant this Court's consideration of referral for a full investigation and disciplinary review by the Department of Justice Office of Professional Responsibility (28 C.F.R. § 0.39a) and the Chief Judge of this District (Appendix A, S.D. TX Local Rules).

from this Court revoking Brown's bond and remanding him to custody for the balance of the entire 46 month sentence would be a reimposition of sentences that have been fully served or imposition of a sentence for crimes for which he has not been convicted.

Such additional imprisonment would violate the Double Jeopardy Clause, the Due Process Clause, or both. The primary thrust of the Double Jeopardy Clause is to protect a defendant from multiple punishments or successive prosecutions for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076 (1969). The Double Jeopardy Clause represents an absolute bar to the district court reimposing sentences for convictions upon which the defendant has already served his entire sentence. *United States v. Silvers*, 90 F.3d 95, 101 (4th Cir. 1996). *Cf. United States v. DiFrancesco*, 449 U.S. 117, 133, 101 S.Ct. 426, 435 (1980). In other words, "once a defendant fully serves a sentence for a particular crime, the Double Jeopardy Clause's bar on multiple punishments prevents any attempt to increase thereafter a sentence for that crime." *Silvers*, 90 F.3d at 101.

In addition, the Due Process clause prohibits incarcerating individuals for crimes for which they have not been convicted. *Narren v. Livingston Police Department*, 86 F.3d 469, 474 (5th Cir. 1996) (Due Process clause forbids punishment of person held in custody awaiting trial but not yet adjudged guilty of any crime); *Van Cleave v. United States*, 854 F.2d 82, 84 (5th Cir. 1988) (Due Process prohibits punishment of person prior to adjudication of guilt). Brown's convictions for Counts I-III having been vacated, he cannot be imprisoned for them now.

CONCLUSION

For these reasons, Mr. Spencer should withdraw his motion immediately. If he does not, the Government's Motion to Revoke Bond must be denied, and this Court should award Brown such other and further relief to which he may be entitled.

Dated: August 13, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served upon Arnold Spencer, counsel for the United States, via the ECF system on August 13, 2007.

/s/ Sidney Powell
Sidney Powell

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
Plaintiff,	§	
	§	
v.	§	**CR. NO. H-03-363 (Werlein, J.)**
	§	
DANIEL BAYLY,	§	
JAMES A. BROWN, and	§	
ROBERT S. FURST,	§	
Defendants	§	

O R D E R

The Court has carefully considered Defendant's James A. Brown's Opposition to Government's Motion To Revoke Bond, and it is hereby ORDERED that the government's Motion to Revoke Bond is DENIED.

SO ORDERED this the _____ day of _____, 2007.

_____
HONORABLE EWING WERLEIN, JR
UNITED STATES DISTRICT JUDGE