IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS EL PASO DIVISION

UNITED STATES OF AMERICA §

§

v. §

§ FRANCISCO "FRANK" APODACA, JR.; MARC §

SCHWARTZ; LUTHER EDWARD JONES; § EP-10-CR-2284-FM GILBERT SANCHEZ; DAVID ESCOBAR; §

LINDA CHAVEZ; MILTON "MICKEY" § DUNTLEY; GUILLERMO "WILLIE" § GANDARA, SR.; CHARLES "CHARLIE" § GARCIA; RAYMUNDO "RAY" RODRIGUEZ; § and LARRY MEDINA §

# MOTION TO DISMISS INDICTMENT AND BAR PROSECUTION ON DOUBLE JEOPARDY GROUNDS

Defendant Luther Jones, through undersigned counsel, moves the Court for an order dismissing Counts 1 and 7 of the indictment and barring further prosecution under the Fifth Amendment Double Jeopardy Clause. Jones' trial, conviction, and sentence in his first case bar prosecution for the same offenses in this case.

# ARGUMENT

In a previous, separate prosecution in this district,1 a jury convicted Jones for two conspiracies that substantially overlap the conspiracies charged in Counts 1 and 7 of this case. The second prosecution of Jones for the same offenses violates his rights under the Fifth Amendment Double Jeopardy Clause and requires dsmissal of the indictment and a bar to further prosecution of the charges in this case. *See, e.g., United States v. Rabhan*, 628 F.3d 200 (5th Cir. 2010); *United States v. Delgado*, 256 F.3d 264, 270 (5th Cir. 2001); *United States v. Deshaw*,

974 F.2d 667, 669 (5th Cir. 1992); *United States v. Levy*, 803 F.2d 1390, 1394-97 (5th Cir.

1 *United States v. Luther Jones*, No. EP-09-CR-1567-FM ("the first case"). The indictment in the first case is attached as Exhibit A. The verdict form and judgment are attached as Exhibits B and C.

1986); *United States v. Nichols*, 741 F.2d 767, 770-72 (5th Cir. 1984); *United States v. Moncivais*, 213 F. Supp. 2d 704, 706-10 (S.D. Tex. 2001); *United States v. Ramos-Hernandez*, 178 F. Supp. 2d 713, 717-22 (W.D. Tex. 2002).

# APPLICABLE LEGAL PRINCIPLES.

The Fifth Amendment Double Jeopardy Clause "guarantees that the government, '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 confining state of anxiety and insecurity.'" *Nichols*, 741 F.2d at 771 (quoting *Green v. United States,* 355 U.S. 184, 187 (1955)). Among other protections, the Clause bars "a second prosecution for the same offense after conviction." *Brown v. Ohio*, 432

U.S. 161, 165 (1977) (quotation omitted); *see, e.g., Rabhan*, 628 F.3d at 204.

When both prosecutions are for conspiracy, the Fifth Circuit considers five factors to determine if the offenses are "the same" for double jeopardy purposes: (1) time; (2) persons acting as co-conspirators; (3) the statutory offenses charged in the indictments; (4) "the overt acts charged by the government or any other description of the offense charged that indicates the nature and scope of the activity that the government sought to punish in each case"; and (5) "places where the events alleged as part of the conspiracy took place." *Delgado*, 256 F.3d at 272; *see, e.g., Rabhan*, 628 F.3d at 205; *Nichols*, 741 F.2d at 770-72; *United States v. Marable*,

578 F.2d 151, 154 (5th Cir. 1978). "If a defendant comes forward with a prima facie nonfrivolous double jeopardy claim, then the burden of establishing that the indictments charge separate crimes is on the government." *Delgado*, 256 F.3d at 270; *see, e.g., Rabhan*, 628 F.3d at 204-05; *Deshaw*, 974 F.2d at 670; *Levy*, 803 F.2d at 1393-94; *Ramos-Hernandez*, 178 F. Supp. 2d at 718.

Under this five factor standard, prosecution of Jones on Count 7 is clearly barred. Although the analysis of Count 1 is less clear because of the multilayered nature of the RICO conspiracy offense, prosecution on that count should be barred as well.

# UNDER THE FIVE FACTORS THE FIFTH CIRCUIT CONSIDERS, THE CONSPIRACY CHARGED IN COUNT 7 IS THE SAME AS THE CONSPIRACIES IN THE FIRST CASE.

Analysis of the factors the Fifth Circuit considers establishes that the mail and wire fraud conspiracies on which Jones was convicted in his first trial are the same offenses for double jeopardy purposes as the mail and wire fraud conspiracy charged in Count 7 of this case.

# Time.

The Fifth Circuit has held that "[a]n overlap in time periods between two alleged conspiracies favors a finding of a single conspiracy, *especially when that overlap is substantial*." *Rabhan*, 628 F.3d at 205 (emphasis added). Here, the overlap in time periods is indisputably "substantial"; the conspiracies alleged in this case *entirely subsume* the time period of the conspiracies in the first case.

The mail and wire fraud conspiracy charged in Count 7 of this case allegedly ran from "on or about September of 2003" until "through and including on or about 2007." Doc. 1 at 24. The conspiracies charged in the first case allegedly ran from "on or about October 2003" until "through and including on or about July 11, 2004,"--a time period that falls squarely in the middle of the conspiracy charged in Count 7. Exhibit A at 3, 10. This factor thus weighs heavily in favor of finding that the Count 7 conspiracy is the same as the conspiracies in the first case. *See, e.g., Moncivais*, 213 F. Supp. 2d at 708; *Ramos-Hernandez*, 178 F. Supp. 2d at 719.

# Co-Conspirators.

*Rabhan* declares that "[a]n overlap in personnel participating in the conspiracy, particularly in key personnel, indicates a single conspiracy." 628 F.3d at 205; *see, e.g., Deshaw*,

974 F.2d at 674; *Levy*, 803 F.2d at 1395. There is unquestionably an "overlap" in "key personnel" between the conspiracies charged in the two cases. Jones and Gilbert Sanchez both were charged as conspirators in the first case, and they are charged as conspirators in Count 7. Elizabeth Flores and Fernando Parra were alleged to be co-conspirators in the first case, Exhibit A at 3, and the indictment in this case identifies them as co-conspirators in the RICO conspiracy and Parra (at least) in the Count 7 conspiracy as well. Doc. 1 at 7-10, 24 (incorporating portions of Count 1 by reference). Thus, all or almost all of the key alleged conspirators in the first case are either charged or named as co-conspirators in this case. Although not all of the alleged co- conspirators in this case were alleged to be Jones' co-conspirators in the first case, "the fact that there are fewer parties named in [the prior] indictment does not weigh in favor of multiple agreements"; what matters is that several of the "central characters"--including Jones, Sanchez, Parra, and possibly Flores--are the same in the two cases. *Moncivais*, 213 F. Supp. 2d at 709; *see, e.g., Deshaw*, 974 F.2d at 674; *Levy*, 803 F.2d at 1395. This factor weighs in favor of finding that the conspiracy charged in Count 7 is the same as the conspiracies in the first case.

# Statutory Offenses Charged.

Jones was convicted in the first case of conspiracies to violate the wire and mail fraud statutes, in violation of 18 U.S.C. §§ 1343, 1346, and 1349 (Count 1) and 18 U.S.C. §§ 1341, 1346, and 1349 (Count 2). Exhibit A at 9, 11; Exhibits B, C. Count 7 of this case charges a mail and wire fraud conspiracy under the identical statutes. Doc. 1 at 27. Thus, Jones prevails on this factor with respect to Count 7.

# Overt Acts Or Other Description of the Offense.

The overt acts charged in this case (Doc. 1 at 9-16, 24) do not overlap with the overt acts charged in the first case (Exhibit A at 6-9). But that does not end the analysis of this factor.

*Rabhan*, for example, found a single conspiracy (and thus a double jeopardy bar) where, as here, "there [we]re no overlapping overt acts in the indictments." *Rabhan*, 628 F.3d at 207.

*Rabhan* and other Fifth Circuit decisions have found it "telling" when the government introduces evidence of one conspiracy at the trial of the other under Fed. R. Evid. 404(b). *Rabhan*, 628 F.3d at 207; *see, e.g., Levy*, 803 F.2d 1395-96; *Nichols*, 741 F.2d at 772. Here, the government introduced extensive Rule 404(b) evidence in the first case about the YISD contracts with Access and with the Mounce, Green and Delgado Acosta law firms. *E.g.*, T.4-12-11 (Vol. 8) at 102-14; T.4-14-11 (Vol. 10) at 51-102, 133-34; GX 42, 43, 44, 45, 46, 47, 137, 160, 162,

165.2 The government's rebuttal case at the first trial dealt exclusively with the YISD law firm

contract. T.4-18-11 (Vol. 11) at 122-33. The YISD contracts with Access and with the Mounce, Green and Delgado Acosta law firms form the core of the charges against Jones in Count 7 of this case. *E.g.*, Doc. 1 at 8-9, 11-15, 24-27.3

The tight factual connection between the conspiracies of which Jones was convicted in the first case and the conspiracy charged in Count 7 of this case appears as well from the Rule 404(b) evidence common to both cases. In the first trial, the government introduced Rule 404(b) evidence concerning the Catalina land deal4 and a lawsuit Marjorie Jobe brought on behalf of employees of the Sheriff's Department.5 The government has announced its intention to

2 The portions of the first trial transcript cited in this motion are attached as Exhibits D through H. The first trial exhibits cited in this motion are attached as Exhibits I through V.

3 It appears likely as well that the government will attempt to introduce evidence of the conspiracies charged in the first case--to obtain the digitization contract for Altep through alleged bribery--as Rule 404(b) evidence in this case. *See* Government's Notice of Rule 404(b) and Other "Bad Acts" Evidence at 16 n.16 (Feb. 14, 2011) (under seal).

4 *E.g.*, T.4-4-11 (Vol. 3) at 112-21; T.4-5-11 (Vol. 4) at 14-15; T.4-12-11 (Vol. 8) at 94-95; T.4-14-11 (Vol. 10) at

23-32; GX 22, 172.

5 *E.g.*, T.4-14-11 (Vol. 10) at 41-50; GX 169, 171.

introduce this same Rule 404(b) evidence in this trial. *See* Government's Notice of Rule 404(b) and Other "Bad Acts" Evidence at 10-12 (Feb. 14, 2011) (under seal).

*Levy* is instructive. There, as here, the prior conspiracy (the "A" conspiracy) shared no overt acts with the second conspiracy (the "K" conspiracy). The Fifth Circuit observed that "[t]he disparity between the overt acts would, at first blush, indicate the existence of two separate conspiracies." 803 F.2d at 1395. But the court of appeals made clear that such a superficial comparison of the two conspiracies would not suffice: "In assessing a motion to dismiss on double jeopardy grounds . . . a court must look not only at the acts alleged in the two indictments, but also at the acts admitted into evidence at the trial or at any hearing. The court must review the entire record and take a commonsense approach in determining the substance of each alleged conspiracy." *Id*.

Upon such "commonsense" review, the *Levy* court found that at the trial on the "A" conspiracy, the government "introduced evidence concerning virtually all the overt acts charged in the 'K' indictment." *Id*. Although the government contended that the overt acts from the "K" indictment had been introduced under Fed. R. Evid. 404(b) at the "A" trial, the Fifth Circuit found that the relationship between the acts alleged in the two conspiracy charges "raises an inference that only one agreement existed" and thus that the conspiracy counts charged the same offense for double jeopardy purposes. 803 F.2d at 1396; *see Nichols*, 741 F.2d at 772 (introduction under Rule 404(b) of acts underlying one conspiracy charge at trial of another conspiracy charge "tends to prove the existence of one conspiracy").

The *Levy* analysis is directly on point here. At trial in the first case, the government introduced--just as it did in *Levy*--evidence of many of the transactions that make up the overt acts alleged in Count 7 in this case. Under *Levy*--as well as *Rabhan* and *Nichols*--this factor

weighs heavily in favor of finding that the conspiracies in the first case are the same offenses as the conspiracy charged in Count 7 of this case.

# Places.

The conspiracies in the first case are alleged to have occurred "in the Western District of Texas and elsewhere." Exhibit A at 10, 11. Count 7 charges that the conspiracy occurred "in the Western District of Texas, the Northern District of Texas, and elsewhere." Doc. 1 at 24. The evidence in the first case showed that virtually all of the conduct at issue occurred in El Paso. The overwhelming majority of the alleged overt acts in the first case took place in El Paso. Exhibit A at 6-9. The alleged bribe recipients in that case (Sanchez, Flores, and Parra) held office in the El Paso area, and they received their alleged bribes in this area. This case shares all of these features. *E.g.*, Doc. 1 at 9-16 (overt acts), 24 (incorporating overt acts in Count 7).

The indictments and the evidence thus show that El Paso is the base of operations of the conspiracies alleged in the first case and of the conspiracy charged in Count 7 in this case. As the Fifth Circuit has observed, "When two alleged conspiracies overlap geographically, it is appropriate to consider where they are based as an indicator of whether the geographic overlap is significant." *Rabhan*, 628 F.3d at 208. When "the geographic overlap between the bases of operation of the two schemes is significant"--as it plainly is here--that factor "favors a finding of a single conspiracy." *Id*.; *see, e.g., Ramos-Hernandez*, 178 F. Supp. 2d at 720-21.

Thus, each of the five factors on which the Fifth Circuit relies weighs in favor of finding that the conspiracy charged in Count 7 of this case is the same offense for double jeopardy purposes as the conspiracies of which Jones stands convicted in the first case.

# THE COURT SHOULD FIND THE RICO CONSPIRACY BARRED AS WELL.

Application of the five-factor test shows that the RICO conspiracy charged in Count 1 is the same offense as the conspiracies of which Jones was convicted in the first case. As we discuss below, however, the Fifth Circuit appears to take the view that a RICO conspiracy can never be the same offense for double jeopardy purposes as a conspiracy charged under a different statute. To the extent that is the rule in the Fifth Circuit, we respectfully disagree and intend to contest the issue on appeal.

# The Five-Factor Test.

Four of the five factors the Fifth Circuit considers to determine if two conspiracies are the same offense for double jeopardy purposes weigh heavily in favor of dismissing Count 1. The fifth factor--the statutory offenses involved--is either neutral or in Jones' favor.

Count 1 charges a conspiracy "[b]eginning on or about late 1998, and continuing through and including on or about 2007." Doc. 1 at 7. That time period entirely subsumes the conspiracies on which Jones was convicted in the first case. Similarly, for the reasons described above, the co-conspirators, the description of the offenses, and the places where the offenses occurred substantially overlap.

The only factor at issue is the statutory offenses charged in the indictments. The RICO conspiracy charge in this case (Count 1) does not have a precise analog in the previous case. But as *Rabhan* observes, "[a]dditional charges in one case may still lead to a finding that there is only one conspiracy, particularly when 'the statutes that do not overlap are related.'" *Rabhan*, 628 F.3d at 207 (quoting *Levy*, 803 F.2d at 1392); *see, e.g., Moncivais*, 213 F. Supp. 2d at 709; *Ramos-Hernandez*, 178 F. Supp. 2d at 721-22. The RICO conspiracy statute at issue in Count 1 of this case is plainly "related" to the mail and wire fraud statutes at issue in the first case. The

"pattern of racketeering activity" through which the defendants in this case allegedly agreed to conduct the affairs of the alleged enterprise consists in part of mail and wire fraud in violation of 18 U.S.C. §§ 1341, 1343, and 1346--the very statutes that were the objects of the conspiracies in the first case. Doc. 1 at 7. As in *Rabhan*, therefore, Jones "prevails on this factor because the

. . . statutes that do not overlap are related." 628 F.3d at 20.

Thus, a straightforward application of the Fifth Circuit's five-factor standard requires the conclusion that the Count 1 RICO conspiracy is the same offense for double jeopardy purposes as the mail and wire fraud conspiracies on which Jones was convicted in the first case.

* 1. **The *Deshaw* Analysis.**

Several Fifth Circuit cases--of which *Deshaw* is the principal exemplar--suggest that a RICO conspiracy can never be the same offense as a conspiracy charged under another statute. To the extent that is the court of appeals' view, we respectfully disagree and urge application of the five-factor double jeopardy test to RICO conspiracies just as to other conspiracies.

In *Deshaw*, an indictment in Alabama charged the defendant with drug offenses, including conspiracies to import cocaine and marijuana. He was acquitted on all charges. *See* 974 F.2d at 668-69. The government then obtained an indictment in Louisiana charging Deshaw with RICO conspiracy and with drug offenses, including conspiracies to import marijuana and to possess marijuana with intent to distribute it. Deshaw moved to dismiss the Louisiana indictment on double jeopardy grounds. When the trial court denied his motion, he took an interlocutory appeal under *Abney v. United States*, 431 U.S. 651 (1977). *See Deshaw*, 974 F.2d at 669 & n.1.

Applying the usual five-factor test, the Fifth Circuit agreed with Deshaw that his acquittal on the conspiracy charges in the Alabama case barred his prosecution on the Louisiana drug

conspiracy charges. *See id*. at 673-75. That holding squarely supports Jones' motion to dismiss Count 7 here. On the RICO conspiracy charge, however, the court of appeals reached a different conclusion. Relying heavily on *Garrett v. United States*, 471 U.S. 773 (1985), the court concluded that Congress intended to permit previous convictions to serve as predicate acts for later RICO prosecutions and that the Double Jeopardy Clause permits prosecution for RICO conspiracy after a previous prosecution for a predicate conspiracy offense. The court thus affirmed the district court's denial of Deshaw's motion to dismiss the RICO conspiracy count. *See Deshaw*, 974 F.2d at 670-73.

In our view, the *Deshaw* analysis of RICO conspiracies stands at odds with the approach the Fifth Circuit takes to the "same offense" issue in the context of other conspiracies. The *Deshaw* RICO conspiracy analysis encourages the very evil that the Double Jeopardy Clause serves to prevent: it allows "the government, with all its resources and power . . . 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 confining state of anxiety and insecurity." *Nichols*, 741 F.2d at 771 (quotation omitted). That is, indeed, exactly what Jones now faces: having been convicted and imprisoned on conspiracies to commit mail and wire fraud, he now faces the anxiety and the expense of a second trial on a RICO conspiracy charge based in part on the same offenses (as we demonstrate above). By contrast, application of the usual five-factor "same offense" test to RICO conspiracies--as we urge--would afford the full protection of the Double Jeopardy Clause. *See, e.g., Marable*, 578 F.2d at 153 (determining whether two conspiracies are the same offense requires "an inquiry into the record more detailed than that required with respect to other offenses," because "the precise bounds of a single conspiracy will seldom be clear from the indictment alone").

# THE CHARGES AGAINST JONES IN THIS CASE MUST BE DISMISSED.

The five factors that the Fifth Circuit has identified require a finding that the RICO conspiracy (Count 1) and the mail and wire fraud conspiracy (Count 7) in this case are the same for double jeopardy purposes as the wire and mail fraud conspiracies in the first case. Jones has, at a minimum, "establish[ed] a prima facie non-frivolous case" that the conspiracies are the same. *Rabhan*, 628 F.3d at 204. The government must now "show by a preponderance of the evidence that [Jones] has been charged in separate conspiracies." *Id*. If the government "fail[s] to carry its burden of persuasion to establish by a preponderance of the evidence" that the conspiracies are separate, Counts 1 and 7 against Jones must be dismissed as barred by the Double Jeopardy Clause. *Id*. at 208.

Respectfully submitted,

 /s/ John D. Cline

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# CERTIFICATE OF SERVICE

I certify that on November 1, 2011, I caused a true and correct copy of the foregoing instrument to be filed using the Court's electronic filing system, as a result of which, copies of this motion will be sent to the U.S. Attorney, and to counsel for the co-defendants.

 /s/ John D. Cline