

**ORIGINAL**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA**

**FILED**

**04 JAN 26 PM 12:12  
U.S. DISTRICT COURT  
N.D. OF ALABAMA**

*SPW*

**UNITED STATES OF AMERICA,** )  
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 )  
 **v.** )  
 )  
 )  
 **RICHARD M. SCRUSHY,** )  
 )  
 )  
 **Defendant.** )  
 )  
 )

**CR-03-BE-0530-S**

**RICHARD M. SCRUSHY'S MOTION FOR  
DISCLOSURE OF GRAND JURY INFORMATION**

(Authorities Included)

**INTRODUCTION**

Defendant Richard M. Scrushy, through his undersigned counsel, moves for an order directing the government to disclose the process by which grand jurors were chosen to hear evidence in this case and information confirming that the grand jurors who served were not so affiliated with HealthSouth or affected by its economic problems that they could not have served as unbiased arbiters of probable cause in this matter as required by the Fifth Amendment.

**FACTS**

By 2003 when a grand jury in this case began investigating allegations of wrongdoing, HealthSouth had grown to be a Fortune 500 company. It employed 50,000 employees in 1800 facilities in all 50 states and abroad. In Alabama, over time, it employed tens of thousands of people. These individuals often had their income and savings and healthcare and retirement benefits linked to the success of HealthSouth. Countless others received treatment at, or brought relatives to receive treatment at, HealthSouth's numerous facilities throughout the state. And

many local residents, both employees and otherwise, invested their savings in the biggest home grown corporate success story in a generation. Indeed, it would be hard to find a person in and around Birmingham who did not have some connection to HealthSouth by no more than two degrees of separation.

Grand jurors are chosen from voter registration records in the counties in the judicial district. Ordinarily, they are summoned to the courthouse, given general information about their roles as grand jurors, sworn into service, and proceed to hear evidence presented to them by an assistant United States Attorney. Rarely, does the court clerk or anyone else delve into whether a grand juror has such a personal or family stake in the matter under investigation that it would make the small protection the modern grand jury provides even more ineffective. However, given the nature of the company and defendant involved this case, such a careful screening process should have been done. If it was, Mr. Scrushy and the public can have at least some confidence that the grand jury deck, while heavily stacked in favor of the government already, see, e.g., United States v. Hurtado, 779 F.2d 1467, 1485 (11th Cir. 1985) (dissenting) (“[a]ny experienced prosecutor will admit that he can indict anybody at any time for almost anything before any grand jury”) (citation omitted), was not a complete rubber stamp for a prosecutor’s goals.

### **ARGUMENT**

Mr. Scrushy, as does any accused, has the constitutional due process right to criminal process that is fundamentally fair. See Bank of Nova Scotia v. United States, 487 U.S. 250, 257 (1988). Preservation of the “structural protections of the grand jury” is foremost among such fundamental rights. Id. An integral part of insuring the “structural protections” of a grand jury is the Fifth Amendment requirement that an indictment be returned by a legally constituted and

unbiased grand jury. See Lawn v. United States, 355 U.S. 339, 349-50 (1958) (“An indictment returned by a legally constituted and *unbiased grand jury*, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.” (citing Costello v. United States, 350 U.S. 359, 409 (1956) (emphasis added))). “This guarantee is important to a person under a federal criminal investigation because the purposes of the grand jury are ‘to provide a fair method for instituting criminal proceedings,’ (citing Costello v. United States, 350 U.S. at 362), to serve as ‘as a protector of citizens against arbitrary and oppressive governmental action,’ (citing United States v. Calandra, 414 U.S. 338, 343 (1974)), and to assure the ‘protecting of citizens against unfounded criminal prosecutions.’ (citing Branzburg v. Hayes, 408 U.S. 665, 686 (1972)).” United States v. Gold, 470 F.Supp. 1136, 1345-46 (N.D. Ill. 1979). Consequently, “a prosecutor who presents a case to a grand jury has the obligation of preserving the fairness, impartiality, and lack of bias of this important governmental investigative body.” Id. at 1346.<sup>1</sup>

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<sup>1</sup> A model charge to a grand jury includes the following language: “If a member of the Grand Jury is related by blood or marriage or knows or socializes to such an extent as to find himself or herself in a biased state of mind as to a person under investigation, or is biased for any reason, he or she should not participate in that investigation or in the return of the indictment. ... [I]t does mean that if you have a fixed opinion before you hear any evidence, either on a basis of friendship or hatred or some other similar motivation you should not participate in that investigation or in voting on the indictment.” Sara Sun Beale et al., Grand Jury Law & Practice § 4.5 (2d ed. 2002).

While the federal government does not have a statute that discusses potential juror bias, many states provide statutory authority which serves to limit grand juror bias.<sup>2</sup> Nevertheless, federal courts have emphasized the basic requirement of an unbiased grand jury. In Porter v. Wainwright, 805 F.2d 930, 941 (11th Cir. 1986), the court of appeals considered the claim of a defendant that a grand juror was related to the victims of the crime for which the defendant had been indicted (and by then convicted). The court held the error to be harmless because, under United States v. Mechanik, 475 U.S. 66 (1986), the finding of guilt beyond reasonable doubt by a petit juror *a fortiori* indicates that there was probable cause (a lesser standard of proof) in the grand jury. Here, there has been no trial or conviction and the flaw addressed in Porter -- biased grand jurors -- is the issue being raised at the only proper time to do so -- after indictment and before trial.<sup>3</sup>

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<sup>2</sup> In Alabama, individuals directly related to the offense are prohibited from participating in deliberations relating to the investigation and indictment. Ala. Code § 12-16-207(a) (2001) ("A grand juror must not be present at or take any part in the deliberations of his fellow jurors respecting any public offense . . . which was committed against his person or property. . ."). State courts also have recognized the responsibility of the prosecutor to make a threshold determination regarding whether the facts as presented by a grand juror have the potential for bias or interest. "Once a grand juror makes known a basis for questioning his or her ability to proceed due to bias, financial, proprietary or personal interest, the prosecutor must explore whether the situation has the potential for warranting excusal and determine the juror's position on the issue." State of New Jersey v. Brown, 673 A.2d 834, 837 (N.J. Super. Ct. App. Div. 1996); see also State of New Jersey v. Schenkolewski, 693 A.2d 1173, 1190-91 (N.J. Super. Ct. App. Div. 1997) (affirming dismissal of indictment based upon prosecutor's failure to ensure the impartiality of the grand jurors and noting "the potential for tainting the other jurors" where one juror sat on a bank board with the bribery defendant and another juror was employed by one of the alleged bribers).

<sup>3</sup> Courts have held that a putative defendant does not have the right to make "peremptory" challenges to a grand jury and also held that a claim of bias arising from pre-indictment publicity does not create disqualifying bias in a grand jury. Estes v. United States, 335 F.2d

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In order to preclude biased individuals from participating in and tainting the indictment process, notwithstanding the duties of the prosecutor to screen these potential grand jurors, the court has the authority to oversee the grand jury process. To this end, the trial judge, in her discretion, may release grand jury material prior to trial. See United States v. Byoir, 147 F.2d 336, 336 (5th Cir. 1945)<sup>4</sup> (“the judge had discretionary authority to permit disclosure of what happened before the grand jury when necessary to advance the cause of justice”). In order for such a disclosure of grand jury materials to be ordered by the Court and to overcome the presumption of secrecy of grand jury proceedings, Mr. Scruschy must make a showing that there exists a “particularized need” for such disclosure. See Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 400 (1959). To meet the “particularized need” test, a defendant must show: (1) that the need for the disclosure outweighs the need for secrecy; (2) that the materials are necessary to avoid injustice; and (3) that the request is structured to cover only those materials that are needed. United States v. Bertucci, 333 F.2d 292, 297 (3rd Cir. 1964). According to the Ninth Circuit, a “particularized and compelling need for the production of the minutes of the Grand Jury” included “to show bias on the part of the Grand Jury in returning the

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609 (5th Cir. 1964); see also In re Grand Jury of the Southern District of Alabama, 508 F.Supp. 1210 (S.D. Ala. 1980) (citing Estes and also concerned with pre-indictment publicity). Here, however, Mr. Scruschy is not seeking to strike a grand juror before the return of a charge and is not claiming publicity as a basis for his motion. Instead he is directing the Court to the very real possibility that grand jurors may have had *economic* interests in the case on which they were sitting to render them biased in a material manner.

<sup>4</sup> The Eleventh Circuit held, in Bonner v. City of Prichard that decisions of the Fifth Circuit, handed down prior to September 30, 1981, are binding as precedent in the Eleventh Circuit. 661 F.2d 1206, 1207 (11th Cir. 1981).

indictment [and] for any other reason required by the ends of justice.” Martin v. United States, 335 F.2d 945, 949 (9th Cir. 1964).

It is settled that the proper procedure is to ask the district judge to determine whether there is evidence showing that the government did not ask the proper questions of the potential grand jurors to ensure an unbiased grand jury. See United States v. Edelson, 581 F.2d 1290, 1292 (7th Cir. 1978) (stating that the defendant should have requested the court “to examine the minutes In camera [sic] and report on the record whether they contained such inconsistent information” where the defendant wished to determine whether there was inconsistent evidence in the grand jury minutes).

In the instant case, the disclosure of the requested grand jury materials outweighs the need for secrecy of the grand jury proceedings. HealthSouth has been described as the nation's largest provider of outpatient surgery, diagnostic imaging, and rehabilitative healthcare services. Thousands and thousands of its employees are located in Alabama and, more specifically, in the greater Birmingham area from which the pool of potential grand jurors was selected. These HealthSouth employees have significant financial and personal interests in HealthSouth. Their livelihood, their retirement funds, and their family members' interests are directly tied to the viability of the company. For these reasons, these employees and relatives of employees of HealthSouth could not and were not able to serve as unbiased grand jurors in the investigation and indictment of Mr. Scrushy.

Mr. Scrushy is charged with serious crimes carrying serious penalties. He should not have to answer to those charges if they were filed in a manner which violates in constitutional rights. Moreover, the only time for a defendant to effectively raise these types of grand jury flaws is before there is a trial of the matter. See United States v. Mechanik, supra, 475 U.S. at

71. Therefore, it is essential that Mr. Scrusby be provided the disclosure requested so that he may seek a remedy for any abuse or defect of the grand jury that he may uncover.

Based upon the Fifth Amendment's guarantee of the return of an indictment by a legally constituted and unbiased jury, the role of the prosecutor in drawing the grand jury and ensuring its lack of bias, and the analogous caselaw providing for the procedures for review of grand jury minutes, see United States v. Test, 420 U.S. 28 (1975) (Jury Selection and Service Act gave defendant unqualified right to obtain lists of grand jurors and petit juror to be able to mount a challenge to the methods of election), Mr. Scrusby respectfully requests that the Court require the government to provide the following information:<sup>5</sup>

- (1) A list of the names, addresses, and other information that was compiled of each person who was summoned to possibly serve as a member of the grand jury;
- (2) A list of the names, addresses, and other information that was compiled of each grand juror actually selected;
- (3) A list of any and all grand jurors who were released after being empanelled and the reason(s) for their release; and
- (4) An explanation of whether the grand jurors actually impaneled were questioned about their personal, family and/or other relationship, including financial relationship, with HealthSouth or Mr. Scrusby.

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<sup>5</sup> While Mr. Scrusby believes he would have the most incentive to explore the possible biases of grand jurors who reviewed the evidence in his case, he understands that the Court may want to conduct this review, at least preliminarily, *in camera*, with additional proceedings to be determined based on that review. See, e.g., See United States v. Edelson, 581 F.2d at 1292.

**CONCLUSION**

A fundamental requirement of due process in a criminal case is to insure that charges which by themselves change a person's life are not filed unless the process from which they resulted was fair, unbiased, and impartial. There is enough cause to insure that requirement was followed in this case to support the release of information and review requested. Accordingly, Mr. Scrusy requests that this Motion be granted and the Court order the government to respond accordingly.

Dated: January 26, 2004

Respectfully submitted,



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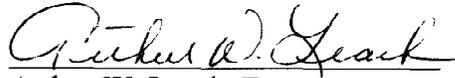
Attorneys for Defendant  
Richard M. Scrusy

**CERTIFICATE OF SERVICE**

I hereby certify that on January 26, 2004, a copy of the foregoing Richard M. Scrushy's Motion for Disclosure of Grand Jury Information was served by facsimile and overnight mail to:

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