

government in its investigation of HealthSouth.¹ Of course, Owens only could provide value to the government if he could catch a bigger fish. And there was no bigger fish at HealthSouth than Mr. Scrushy. So, at the government's behest, on March 14, 17 and 18, 2003, Owens strapped a recording device of some sort on his body or clothing in an effort to goad or dupe Mr. Scrushy into making what the government hoped would be incriminating statements.² Although in a typical case there is nothing improper about the government using an admitted felon to obtain incriminating statements from a purported co-conspirator, this is not a typical case.

While Owens, as an agent of the government, was surreptitiously recording conversations with Mr. Scrushy, Mr. Scrushy was represented by counsel in connection with an SEC investigation into insider trading at HealthSouth. That investigation, of which Mr. Scrushy was a target, commenced in September 2002. In fact, on the very same day that Owens made his first tape recording, Mr. Scrushy gave testimony, under oath, before the SEC. The subject matter of that testimony and the SEC investigation that engendered it -- Transmittal 1753 -- also forms the basis of various allegations in the Indictment. Indictment at p. 15, ¶ 61 and p. 17, ¶ 68.

On March 19, 2003, on the heels of Owens' surreptitious recordings, the SEC filed an action against Mr. Scrushy alleging, *inter alia*, that Mr. Scrushy orchestrated a

¹ Indeed, Owens "entered a plea as part of a plea bargain by which he . . . agreed to provide the government with 'substantial assistance in the investigation or prosecution of another person who has committed an offense' in exchange for a motion pursuant to United States Sentencing Guidelines § 5K1.1 and 18 U.S.C. § 3553(e) which would permit the Court, in its discretion, to impose a sentence below the applicable Sentencing Guidelines range and also below any applicable mandatory minimum sentence." SEC v. HealthSouth Corp., 261 F. Supp. 2d 1298, 1309 n.15 (N.D. Ala. 2003) (citing Plea Agreement and Conditions in United States v. Owens, CR 03-B-131-S).

² The fact that this attempt was unsuccessful does not diminish its impropriety.

broad-based conspiracy to inflate the operating results and financial condition of HealthSouth. See SEC v. HealthSouth Corporation, 261 F. Supp. 2d 1298, 1301-02 (N.D. Ala. 2003). The SEC also sought an emergency freeze of all of Mr. Scrushy's assets. Id. at 1301. The SEC complaint and the SEC's proof in support of a continued asset freeze, was predicated, almost exclusively, on evidence collected as the result of the government's criminal investigation. Id. at 1305, 1307.

Indeed, the SEC's use of the fruits of the criminal investigation was so endemic that it led Judge Johnson to "question[] the SEC, a civil investigatory body, for its use of the FBI to undertake discovery for this civil action, when the consequence of such methods is that the product of the FBI's labor is undiscoverable to the defendant in this civil proceeding." Id. at 1305. The most obvious example of the SEC's use of the fruits of the criminal investigation was its proffer of a portion of the March 18 recording by Owens.³

ARGUMENT

As part of what Mr. Scrushy will show was its overzealous effort to bring criminal charges against him, the government utilized the services of Owens to record conversations with Mr. Scrushy. Owens, by then an admitted felon, apparently was all too pleased to be of assistance to the government. By surreptitiously recording Mr. Scrushy, the government violated well-established ethical principles by instigating a

³ Incredibly, counsel for the SEC claimed that he had not even heard the conversation until it was played in open court by Agent Gauger. Id. And, the SEC even claimed that it needed permission from the FBI to provide a copy of the CD Rom to Mr. Scrushy's counsel because it was, at all times, in the custody of the FBI. Id. at 1306, 1312. The SEC's collaboration with the DOJ and the USA's office became so disturbing that, after several days, Judge Johnson prohibited further contact between the SEC and the government until completion of the proceeding.

communication with Mr. Scrushy, an individual represented by counsel with regard to the subject matter about which the government sought information and was conducting a criminal investigation. If these ethical violations are determined to be sufficiently egregious, the evidence garnered as the result of those violations must be suppressed. Accordingly, Mr. Scrushy is entitled to a hearing to determine the precise nature and scope of the government's conduct in order that this Court may consider whether the Owens tape recording should be suppressed.

A. The Government Is Bound By Alabama's Ethical Rules

Pursuant to 28 U.S.C. § 530B ("Section 530B" or the "McDade Amendment"), entitled "Ethical Standards for Attorneys for the Government," the government is required to abide by Alabama's Rules of Professional Conduct. The McDade Amendment provides:

- (a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.
- (b) The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section.
- (c) As used in this section, the term "attorney for the Government" includes any attorney described in section 77.2(a) of part 77 of title 28 of the Code of Federal Regulations and also includes any independent counsel, or employee of such a counsel, appointed under chapter 40.

Accordingly, at the time that its agent, Owens, was tape recording conversations with Mr. Scrushy, the government was bound by Rule 4.2 of the Alabama Rules of Professional Conduct ("Rule 4.2"). Rule 4.2 provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

The Comment to Rule 4.2 states that “[t]his rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.” Mr. Scrusby, as a person represented by counsel in connection with the issues raised by Transmittal 1753, was protected by Rule 4.2.

Here, it is plain that the subject matter of the recordings overlapped with the subject matter of the SEC investigation. As Judge Johnson found:

The testimony elicited at [Scrusby’s] March 14, 2003 deposition concerning the SEC’s investigation into allegations of insider trading involving Transmittal 1753 is as likely, if not more likely, the topic of discussion between Owens and Scrusby on the CD on which the SEC relies so heavily as evidence of the scheme to inflate assets to meet Wall Street expectations.

HealthSouth Corporation, 261 F. Supp. 2d at 1315.⁴

**B. The McDade Amendment Compels
The Conclusion That The Government Violated Rule 4.2**

Because the government necessarily knew that the SEC investigation into Mr. Scrusby’s alleged conduct overlapped with its own investigation, and that Mr. Scrusby was represented by counsel with regard to the SEC investigation, the government violated Rule 4.2 by instigating a communication -- through Owens -- with Mr. Scrusby, a person known “to be represented by another lawyer in the matter.” Predictably, the

⁴ The government, of course, cannot deny that it was aware of the SEC investigation and the SEC’s interest in Transmittal 1753. Judge Johnson went so far as to state that “this is a case where the government has undoubtedly manipulated simultaneous criminal and civil proceedings, both of which it controls” HealthSouth Corporation, 261 F. Supp. 2d at 1326.

government will argue that its use of Owens to surreptitiously record conversations with Mr. Scrushy is an investigative technique that is “authorized by law” and, therefore, is not a violation of ethical Rule 4.2. Such an argument, however, would run counter to Chief Judge Clemon’s recent decision in U.S. v. Bowman, 277 F. Supp. 2d 1239 (N.D. Ala. 2003), in which Chief Judge Clemon described that very argument as, “at best, disingenuous.” Bowman, 277 F. Supp. 2d at 1243.⁵

In Bowman, the government filed forfeiture actions against the Bowmans on May 17, 2001 and May 24, 2001. Id. at 1241. Thereafter, on January 31, 2003, the government indicted the Bowmans. See id. at 1242. In the interim, and “[d]espite its knowledge that the Bowmans were represented by counsel, and without notice to their counsel, the Government arranged with [a cooperating witness] to obtain incriminating statements from the Bowmans.” Id.⁶

The Bowmans moved to suppress the “evidence obtained by [the cooperating witness] in her Government-engineered recorded conversation with the Bowmans” Id. at 1242. Chief Judge Clemon granted the motion, see id. at 1244, while emphasizing that “[t]he McDade Amendment was enacted in response to DOJ regulations which interpreted American Bar Association (“ABA”) Model Rule 4.2 as not prohibiting

⁵ The government should be well aware of the Bowman decision, as it involved an ethical violation by an Assistant United States Attorney within this District, and the Hon. Alice H. Martin, the current United States Attorney for the Northern District of Alabama, appeared for the government in that case.

⁶ Like Owens, the cooperating witness in Bowman, one Ms. Pensara, cooperated at the behest of the Government in order to save her own skin. “Pensara had previously perjured herself before the grand jury investigating the Platinum Club and the Bowmans. Without the assistance of the Government, Pensara faced the virtual certainty of a federal prison term. The Government thus secured Pensara’s agreement, and at its direction, she was wired with a taping device and dispatched to interrogate the Bowmans along the lines suggested by the Government.” Bowman, 277 F. Supp. 2d at 1242.

‘contact with a *represented* individual in the course of authorized law enforcement activity.’” *Id.* at 1242 (citation omitted) (emphasis in original). Chief Judge Clemon continued: “The McDade Amendment was enacted ‘[t]o restrain the perceived overzealousness of federal prosecutors and to prevent the DOJ from exempting its prosecutors from ethics rules’” *Id.* Thus, the McDade Amendment “has been described as ‘the most significant change in the ethics regulation of federal prosecutors in more than twenty years.’” *Id.*

Because, on its face, Rule 4.2 prohibited the government’s use of the cooperating witness surreptitiously to record the Bowmans, Chief Judge Clemon ascertained that “[t]he only question is whether the prohibited communication is otherwise ‘authorized by law.’” *Id.* at 1243. Chief Judge Clemon answered this “question” with an emphatic no:

Considering that the McDade Amendment was principally designed to dismantle the DOJ’s policy of authorizing pre-indictment *ex parte* interrogation by federal prosecutors and their agents of represented criminal suspects, *the argument that such post-McDade Amendment interrogations in the course of legitimate criminal investigations are ‘authorized by law’ is, at best, disingenuous. To the extent that such interrogations were at one time authorized by the regulations of the DOJ, the McDade Amendments vitiate those regulations.*

Id. (emphasis added). Thus, Chief Judge Clemon concluded that the “statements made by the Bowmans were [] procured in derogation of the Rule” and, as a consequence, Chief Judge Clemon suppressed the improperly procured statements in order to “deter similar violations of the Rule in the future.” *Id.*⁷

⁷ In addition to holding that the statements should be excluded because they were procured in violation of Rule 4.2, Chief Judge Bowman also held that the statements must be excluded on Sixth Amendment grounds. *See Bowman*, 277 F.Supp.2d. at 1243-1244.

Similarly here, the government caused Owens to attempt to procure incriminating statements from Mr. Scrusby, who, as demonstrated above, the government must have known was represented by counsel with regard to the issues about which the government sought information. Additionally, “Owens stated he met with FBI Agents Gauger and Kelly, and George Martin from the U.S. Attorney’s office. Owens wore the wire knowing that FBI agents were monitoring the conversation.” HealthSouth Corporation, 261 F. Supp. 2d at 1305-06 (citations omitted). Accordingly, just as Chief Judge Clemon concluded in Bowman, the recording undoubtedly was “procured in derogation of the Rule.”

The same conclusion must obtain here. Indeed, the government, which had a full and fair opportunity to litigate this issue before Chief Judge Clemon -- specifically, whether, as part of a criminal investigation, it violates Rule 4.2 to surreptitiously record an individual represented by counsel with regard to the subject matter being investigated -- should be collaterally estopped from arguing here that the recording was not procured in violation of Rule 4.2. Barger v. City of Cartersville Georgia, 2003 WL 22434723, *3 (11th Cir. Oct. 28, 2003) (citing In re McWhorter, 887 F.2d 1564 (11th Cir. 1989)).

C. Mr. Scrusby Is Entitled To A Hearing On The Government’s Conduct

Mr. Scrusby acknowledges that the procurement of evidence in violation of the ethical rules does not *per se* require the exclusion of such evidence. Indeed, the Eleventh Circuit has spoken to this very issue with regard to the McDade Amendment.

In U.S. v. Lowery, 166 F.3d 1119, 1125 (11th Cir. 1999), the court stated:

When it comes to the admissibility of evidence in federal court, the federal interest in enforcement of federal law, including federal

evidentiary rules, is paramount. State rules of professional conduct, or state rules on any subject, cannot trump the Federal Rules of Evidence . . . Federal Rule of Evidence 402 provides:

'All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority.'

That is an exclusive list of the sources of authority for exclusion of evidence in federal court. State rules of professional conduct are not included in the list.

The Lowery court then queried whether the McDade Amendment was the type of Act of Congress that required the exclusion of evidence tainted by violations of ethical rules. "In other words, did Congress intend by that enactment to turn over to state supreme courts in every state -- and state legislatures, too, assuming they can also enact codes of professional conduct for attorneys -- the authority to decide that otherwise admissible evidence cannot be used in federal court?" Id. The court concluded that exclusion of evidence tainted by the Government's unethical conduct was not automatically required.

There is nothing in the language or legislative history of the Act that would support such a radical notion. Making state prescribed professional conduct rules applicable to federal attorneys is one thing. Letting those rules govern the admission of evidence in federal court is another. If Congress wants to give state courts and legislatures veto power over the admission of evidence in federal court, it will have to tell us that in plain language using clear terms.

Id.

Nonetheless, as demonstrated by Bowman, which was decided several years after Lowery, this Court has the power to exclude such evidence. See Bowman, 277 F. Supp. 2d at 1243 ("The statements made by the Bowmans were thus procured in derogation of the Rule. The suppression of those statements will deter similar violations of the Rule in the future."). The refusal to do so here would undermine the very deterrent

effect that Chief Judge Clemon sought to achieve in Bowman by suppressing evidence that was similarly procured in violation of Rule 4.2. As such, this Court should hold an evidentiary hearing to determine whether the circumstances surrounding the government's use of Owens to instigate a communication with Mr. Scrushy, while Mr. Scrushy was represented by counsel with regard to the subject matter being investigated, is sufficiently egregious to warrant that the tape recordings obtained through that exercise be suppressed.

CONCLUSION

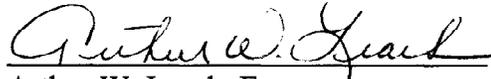
For the foregoing reasons, this Court should order a hearing to address the issues raised herein.

Dated: January 26, 2004

Respectfully submitted,



Abbe David Lowell, Esq.
Thomas V. Sjoblom, Esq.
Chadbourne & Parke, LLP
1200 New Hampshire, Ave. NW
Washington, D.C. 20036
(202) 974-5600



Arthur W. Leach, Esq.
c/o Thomas, Means, Gillis & Seay
1035 Financial Center
505 20th Street North
Birmingham, Alabama 35203
(205) 328-7915

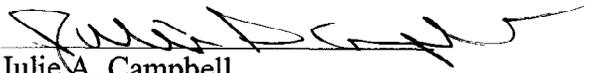
Attorneys for Defendant
Richard M. Scrushy

CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2004, a copy of the foregoing Richard M. Scrushy's Motion for a Hearing to Determine Whether Certain Recorded Conversations Should be Suppressed was served by facsimile and overnight mail to:

Alice Martin, Esquire
United States Attorney for the
Northern District of Alabama
U.S. Department of Justice
1801 4th Avenue North
Birmingham, Alabama 35203

Richard C. Smith, Esquire
Deputy Chief
Fraud Section
U.S. Department of Justice
10th and Constitution Avenue, N.W.
Washington, D.C. 20530


Julie A. Campbell
Chadbourne & Parke, LLP
1200 New Hampshire, Ave. NW
Washington, D.C. 20036
(202) 974-5600