**ORIGINAL**

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



UNITED STATES OF AMERICA,

v.

Case No. CR-03-BE-0530-S

RICHARD M. SCRUSHY,

Defendant.

**DEFENDANT SCRUSHY'S MOTION TO DISMISS**
**COUNTS 48-50 OF THE INDICTMENT**

Pursuant to Rule 12(b)(3)(B) of the Federal Rules of Criminal Procedure, Defendant Richard M. Scrushy respectfully submits the following Motion To Dismiss Counts 48, 49 and 50 of the Indictment.

## I. INTRODUCTION

In a rush to assuage public outrage over corporate scandals, Congress enacted the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley") with the goal of holding Chief Executive Officers and Chief Financial Officers of publicly-traded companies criminally responsible for financial fraud committed on their watch. While the objective was laudable, the implementation was hopelessly flawed. Rather than imposing severe criminal penalties on corporate officers who engaged in wrongdoing, Congress sought to cast a wider net to ensnare corporate officers who act innocently as well as those who act intentionally, and thus passed legislation that cannot withstand constitutional muster.

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Section 906 of Sarbanes-Oxley imposes criminal liability on a corporate officer who certifies that his company's periodic reports comply with certain specific reporting regulations imposed by the federal securities laws, regardless of whether violations of those very regulations would give rise to criminal liability in their own right. And to make matters worse, corporate officers face liability for inaction, i.e., for not signing the required certification, even if the underlying financials are precisely accurate.

But the most profound flaw in the criminal provision of the statute is that it is so vague as to defy comprehension. Even the most well-intentioned chief executive officer would be hard pressed to determine what constitutes "willful" certification, the heart and soul of the statute's bifurcated sentencing scheme, as opposed to plain old certification, and whether or not a particular periodic report "fairly presents, in all material respects, the financial condition and results of operations of the issuer."

For these reasons, the Sarbanes-Oxley charges against Scrushy in Counts 48, 49 and 50 of the Indictment should be dismissed.

## II. BACKGROUND

### A. The Sarbanes-Oxley Act Of 2002 Was Enacted With Careless Haste

Section 906 of Sarbanes-Oxley is the product of what has been accurately described as a congressional "stampede." See 148 Cong. Rec. H5462, H5465 (July 25, 2002) (statement of Rep. Boehner). First introduced in the United States Senate on July

10, 2002 in response to a call for action in the wake of various corporate accounting scandals, the legislation that eventually became Section 906 was whisked through the legislative process in a span of only twenty one days.[1] The legislative history of Sarbanes-Oxley contains no contemporaneous analysis of Section 906, highlighting the careless haste with which it was drafted and the lack of meaningful consideration given to it by its drafters, on an issue as important as the most significant restructuring of criminal liability under the federal securities laws since their original adoption in 1933 and 1934. See H.R. Conf. Rep. No. 107-610 (July 24, 2002). Thus, corporate officers are now subject to severe criminal sanctions based not on a deliberate, carefully conceived statutory scheme, but rather based on a desire to assuage public outrage and to give federal prosecutors a potent (but unfettered) weapon to fight corporate wrongdoing.

Section 906 is divided into three subsections. Subsections 906(a) establishes the certification requirement and subsection 906(b) describes its required contents:

> **(a) Certification of periodic financial reports.** - Each periodic report containing financial statements filed by an issuer with the Securities and Exchange Commission pursuant to section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a) or 78o(d)) shall be accompanied by a written statement by the chief executive officer and chief financial officer (or equivalent thereof) of the issuer.

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1 On July 10, 2002, the legislation that became Section 906 was adopted by the Senate as a floor amendment to Senate Bill 2673. See 148 Cong. Rec. S6546 (July 10, 2002). On July 15, 2002, the Senate unanimously approved S.2673, as amended, and submitted it to a Conference Committee comprised of members of the House and Senate. See 148 Cong. Rec. S6735, S6779 (July 15, 2002). The Conference Committee modified Section 906 into its final form that became law on July 31, 2002. See H.R. Conf. Rep. No. 107-610, at 63 (July 24, 2002).

> **(b) Content.** - The statement required under subsection (a) shall certify that the periodic report containing the financial statements fully complies with the requirements of section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a) or 78o(d)) and that information contained in the periodic report fairly presents, in all material respects, the financial condition and results of operations of the issuer.

Sarbanes-Oxley § 906(a)-(b) (codified at 18 U.S.C. § 1350(a)-(b)).

Section 906's bifurcated criminal penalty provisions appear in subsection (c):

> **(c) Criminal penalties.** - Whoever -
>
> > **(1)** certifies any statement as set forth in subsections (a) and (b) of this section knowing that the periodic report accompanying the statement does not comport with all the requirements set forth in this section shall be fined not more than $1,000,000 or imprisoned not more than 10 years, or both; or -
> >
> > **(2)** willfully certifies any statement as set forth in subsections (a) and (b) of this section knowing that the periodic report accompanying the statement does not comport with all the requirements set forth in this section shall be fined not more than $5,000,000, or imprisoned not more than 20 years, or both.

Id. § 906(c)(1)-(c)(2) (codified at 18 U.S.C. § 1350(c)(1)-(c)(2)).

Sarbanes-Oxley also criminalizes *the failure* to file a certification required by Section 906. Specifically, Section 3(b)(1) makes any violation of Sarbanes-Oxley a violation of the Securities Exchange Act of 1934 ("Exchange Act") as well. See Sarbanes-Oxley § 3(b)(1) (codified at 15 U.S.C. § 7202(b)(1)). Because Section 906 affirmatively requires certification, willful failure to certify in accordance with Section 906 can be prosecuted as a criminal violation under Section 32(a) of the Exchange Act, punishable by up to a $5 million fine and/or up to twenty-years imprisonment. See 15 U.S.C. § 78ff(a).

## B. Scrushy Is Indicted As A Sarbanes-Oxley Test Case

On November 4, 2003, the United States Attorney's Office for the Northern District of Alabama released an indictment against Scrushy (the "Indictment") charging him in counts 48, 49 and 50 therein with separate violations of Section 906(c)(2). Specifically, count 48 alleges that Defendant Scrushy "did willfully certify and cause to be certified" HealthSouth's August 14, 2002 Form 10-Q for second quarter 2002. Count 49 alleges that Defendant Scrushy caused HealthSouth's then-Chief Executive Officer (Owens) and then-Chief Financial Officer (McVay) to willfully certify HealthSouth's November 14, 2002 Form 10-Q for the third quarter of 2002. Count 50 alleges that on March 18, 2003, Defendant Scrushy, also in violation of 18 U.S.C. § 1349, "attempted to" (but did not) cause HealthSouth's Chief Financial Officer (Owens) "to willfully certify" a HealthSouth Amended Form 10-Q.

This case represents the first application of Sarbanes-Oxley's management certification requirement under Section 906 and, therefore, the constitutionality of the statute is an issue of first impression.

# III. ARGUMENT

## A. Sarbanes-Oxley Is Unconstitutional Because It Imposes Liability Arising From An Underlying Act That Is Not Necessarily Criminal

It is well settled that a person may not be charged criminally under a theory of liability when the underlying, primary conduct is not itself criminal. See Manning v. Biddle, 14 F.2d 518, 519 (8th Cir. 1926); see also 22 C.J.S. Criminal Law § 132 (2003). For example, a person may not be convicted of conspiracy, attempt, or solicitation to commit an act that is not itself criminal. See United States v. Evans, 358 F.3d 1311

(11th Cir. 2004) ("A conviction for attempt required proof [that the defendant] possessed the *mens rea* required for the underlying crime[.]"); United States v. King, 351 F.3d 859, 863 (8th Cir. 2003) ("To prove conspiracy, the government must show an agreement between at least two people and that the agreement's objective was a violation of the law."); United States v. Hasson, 333 F.3d 1264, 1270 (11th Cir. 2003) (the elements of a conspiracy are, inter alia, "an agreement . . . to achieve an unlawful objective[.]"); United States v. Fernandez, 892 F.2d 976, 987 (11th Cir. 1990) ("[The government's] argument is flawed because it asserts that the mere agreement to advance a lawful object can support a conspiracy charge. . . .[But,] it is fundamental to the law of conspiracy that the government show an agreement between two or more persons to commit a *crime*.") (emphasis in original); United States v. Rahman, 189 F.3d 88, 125 (2d Cir. 1999) ("To convict [defendant] of solicit[ation] . . . the Government must prove by strongly corroborative circumstances, that the defendant had the intent that another person engage in conduct constituting the crime[.]") (quotation omitted); United States v. Polk, 118 F.3d 286, 292 (5th Cir. 1997) ("To obtain a conviction [of solicitation], the Government was required to prove that the defendant intended that another person [commit a crime], and that the defendant induced or otherwise endeavor[ed] to persuade the other person or persons to commit the underlying crime.") (quotation omitted).

Likewise, when an offense is derivative of other conduct, the underlying conduct must itself be criminal. See, e.g., Shuttlesworth v. City of Birmingham, 373 U.S. 262, 265 (1963) (holding that "there can be no conviction for aiding and abetting someone to do an innocent act."); United States v. Rodgers, 419 F.2d 1315, 1317 (10th Cir. 1970) ("The law is settled that one cannot be guilty of aiding and abetting in the commission of a crime until it has been established that someone has committed that crime"); Edwards v. United States, 286 F.2d 681, 683 (5th Cir. 1961) ("The basic principle of law is recognized that an aider and abettor may not be guilty in aiding or abetting a principal unless a principal did as a matter of fact commit a crime."). The reason for this rule of law is clear -- a person cannot be held criminally liable for assisting or contemplating an act that is not wrongful. See Shuttlesworth, 373 U.S. at 265; United States v. Zerbst, 111 F. Supp. 807, 811 (E.D.S.C. 1953).

The touchstone of criminal liability under Sarbanes-Oxley is the certification of financial statements which do not comply with Sections 13(a) or 15(d) of the Exchange Act. However, technical non-compliance with Sections 13(a) or 15(d) does not itself result in criminal liability. Rather, as set forth in Section 32(a) of the Exchange Act, criminal liability attaches to violations of Sections 13(a) or 15(d) only if the filings required under those sections are willfully and knowingly made with statements that are "false or misleading with respect to any material fact[.]" 15 U.S.C. § 78ff(a).[2] See United States v. Lang, 766 F. Supp. 389, 392-93 (D. Md. 1991) ("Section 32(a) sanctions

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[2] Although Section 32(a) of the Exchange Act also provides that "[a]ny person who willfully violates any provision of this Act (other than Section 30A), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this Act," 15 U.S.C. § 78ff(a), we know of no reported criminal case brought under Section 32(a) with that specific charge. While we are aware of United States v. Guterma, 281 F.2d 742 (2d Cir. 1960), the defendants in that case were charged not with a mere technical or even a "willful" Section 13(a) violation, but rather, were alleged to have "willfully, knowingly and without just cause hindered, delayed and obstructed the making and filing of [the company's] annual report (Form 10-K)" for the reporting period in question. Id. at 745. The clearly articulated and defined criminal conduct and the heightened mens rea charged in Guterma were above and beyond the requirements of Section 32(a) and are readily distinguishable from the non-criminal, technical infractions of Section 13(a) that form the basis for criminal liability under Section 906 of Sarbanes-Oxley. Such non-criminal infractions are not prosecuted criminally but are enforced only through SEC administrative proceedings.

criminal penalties for misstatements or omissions in reports filed [pursuant to Section 13(a)] only if they are made 'willfully and knowingly' and are misleading 'with respect to any material fact.'"); see also United States v. Bilzerian, 926 F.2d 1285, 1298-99 (2d Cir. 1991) ("Although §13(d) is a reporting requirement rather than an antifraud provision, criminal penalties are available against one who knowingly makes a false and misleading statement of material fact on a document required to be filed by the securities laws (citing Section 32). . . . Section 32(a) requires proof of materiality and contains a provision that imprisonment will not be imposed on a defendant who was ignorant of the substance of the rule.").

Notwithstanding this well-settled law of criminal liability, Section 906 of Sarbanes-Oxley does not recognize any such limitations and even seeks to hold corporate officers derivatively liable for conduct that, when committed by another, may itself be non-criminal. Section 906(c)(2) imposes criminal liability for "willfully certif[ying] any statement as set forth in subsections (a) and (b) of this section knowing that that periodic report accompanying the statement does not comport with all the requirements set forth in this section."[3] 18 U.S.C. § 1350(c)(2). Subsections 906(a) and (b) require that periodic reports referenced in Section 906(c)(2) comport with the requirements of section 13(a) or 15(d) of the Exchange Act.[4] See id. § 1350(a)-(b). So, under Section 906(c)(2) a

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[3] As set forth in Point C.1, *supra*, the use of the hopelessly ambiguous term "willfully certify" makes the statute unconstitutionally vague.

[4] Section 13(a) of the Exchange Act (a non-criminal and non-fraud statute) requires every issuer of a security registered pursuant to Section 12 of the Exchange Act to file with the Commission annual and quarterly reports containing the detailed information required by the SEC's regulations

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corporate officer can be held criminally liable for "willfully certifying" that periodic reports prepared by his subordinates comply with Sections 13(a) and 15(d) when the reports do not. Thus, subordinates who prepare periodic reports containing non-willful, though technical violations of Sections 13(a) or 15(d), or even prepare reports that are false or misleading but not materially so, cannot themselves be held criminally liable. But, a Chief Executive Officer or Chief Financial Officer who certifies that the very same report complies with Sections 13(a) or 15(d) faces a possible twenty-year prison sentence, a $5 million fine, or both. The law does not permit the imposition of such draconian secondary liability when the primary conduct is not itself criminal. See, e.g., Shuttlesworth, 373 U.S. 262. For these reasons, Counts 48-50 of the Indictment should be dismissed.

**B. Sarbanes-Oxley Is Unconstitutional Because It Seeks To Hold Corporate Officers Criminally Liable For Inaction, Even In The Absence Of Any Defect In The Underlying Periodic Reports**

The prospect of a corporate officer being held liable as the result of a technical violation of Sections 13(a) or 15(d) is particularly draconian because criminal penalties may be imposed even if the officer does not certify a periodic report at all. In fact, under Sarbanes-Oxley, a CEO can be held criminally liable for failing to certify a financial statement that is precisely accurate in all respects.

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promulgated thereunder. See 15 U.S.C. § 78m(a). Section 15(d) of the Exchange Act (another non-criminal and non-fraud statute) requires each issuer that has filed a registration statement that has become effective pursuant to the Securities Act of 1933 ("Securities Act") to file supplementary and periodic information, documents, and reports as required by Section 13 and the Commission's rules

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Specifically, Section 3(b)(1) makes any violation of Sarbanes-Oxley a violation of the Exchange Act as well. See 15 U.S.C. § 7202(b)(1). Section 906(a) requires that each periodic report "shall be accompanied by a written statement by the chief executive officer and chief financial officer (or equivalent thereof) of the issuer." Thus, because Section 906 requires certification, any failure to certify can be prosecuted as a criminal violation under Section 32(a) of the Exchange Act, punishable by up to a $5 million fine and/or up to twenty-years imprisonment. See 15 U.S.C. § 78ff(a).

As the result of this troubling statutory construction, a wholly innocent CEO can be "damned if he does and damned if he doesn't." For example, a CEO who is unable to determine definitively whether his company's periodic reports are accurate (whether due to a lack of information, his own negligence, a change in circumstances or cold feet) and wishes to take steps, as a responsible corporate officer, to ensure their accuracy, can nonetheless be prosecuted under Sarbanes-Oxley for willful failure to certify. However, a CEO should not be left in the position of having to certify in reliance on the assurances and representations of his trusted subordinates (e.g., Richard Scrushy) or refusing to certify and facing prosecution for inaction regardless of whether or not his reservations about certifying were justified (and the underlying periodic reports were inaccurate). A statute leaving an individual with the only option of violating "this law" or violating "that

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thereunder, with respect to a security registered under Section 12 of the Securities Act. See 15 U.S.C. § 78o(d). Neither section imposes a scienter or mens rea requirement.

law" simply cannot stand. See, e.g., United States v. Dalton, 960 F.2d 121, 124-26 (10th Cir. 1992); United States v. Spingola, 464 F.2d 909, 911 (7th Cir. 1972).

Even more troubling is that, under Section 13(a) of the Exchange Act, failure to file a required report results in penalties imposed against the issuer itself, not against its corporate officers. See 15 U.S.C. § 78m(a). Thus, under Sarbanes-Oxley, a CEO can be held criminally liable for failure to submit a certification of a periodic report, whereas the failure to file the periodic report itself would only lead to sanctions against the company.

### C. Section 906 Of Sarbanes-Oxley Is Unconstitutionally Void For Vagueness

The risks faced by a CEO under Sarbanes-Oxley, even a CEO who acts with the utmost good faith and without any guilty *mens rea* whatsoever, are particularly acute because of the statute's profound vagueness. Even a CEO with the best of intentions cannot fathom whether he is on the right side or wrong side of the hopelessly blurry Sarbanes-Oxley line.

The void for vagueness doctrine requires that a criminal statute "define the criminal offense, first, with sufficient definiteness that ordinary people can understand what conduct is prohibited and, second, in such a manner that does not encourage arbitrary and discriminatory enforcement." Timmons v. City of Montgomery, 658 F. Supp. 1086 1088-89 (M.D. Ala. 1987) (emphasis added) (citing Kolender v. Lawson, 461 U.S. 352, 357 (1983)). The purpose of the first requirement -- one of "fair notice" -- is to enable persons to whom a statue applies to conform their conduct to the law. See City of Chicago v. Morales, 527 U.S. 41, 58 (1999). The fair notice requirement is based on the due process principle that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the [law] commands or forbids." Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

The second requirement -- that a criminal statute establish explicit, objective standards to prevent arbitrary and discriminatory enforcement -- recognizes that absent governing standards, a criminal law violates due process by "permit[ting] 'a standardless sweep that allows policemen, prosecutors, and juries to pursue their own personal predilections.'" See Kolender, 461 U.S. at 358 (quoting Smith v. Goguen, 415 U.S. 566, 575 (1974)).

Consistent with these requirements, criminal statutes must be narrowly construed and are subject to the rule of lenity, which "commands that where there are alternative readings of a criminal statute [a court is] to choose the harsher only when Congress has spoken in clear and definite language." United States v. Brown, 79 F.3d 1550, 1556 (11th Cir. 1996); see also United States v. Phipps, 81 F.3d 1056, 1060 (11th Cir. 1996). Although guidance sometimes may be gleaned from prior judicial or administrative explanations or interpretations of statutory language, and previous applications of the statute to the same or similar conduct, no such guidance is available with respect to Section 906. This is the first time Section 906 has been subjected to judicial scrutiny and thus there is no prior judicial explanation or previous application of the statute. Nor has the United States Department of Justice, the federal agency tasked with enforcing Section 906, issued any meaningful guidance clarifying the statute's extraordinary ambiguity. Thus, in performing the vagueness analysis, the Court is "left with nothing more that the undefined language of the [statute] itself." Stephenson v. Davenport Comty. Sch. Dist., 110 F.3d 1303, 1309 (8th Cir. 1997).

Because Section 906 imposes such severe penalties, it must meet an even higher constitutional standard of certainty and definiteness. See, e.g., Kolender, 461 U.S. at 358 n.8; Connally v. General Constr. Co., 269 U.S. 385, 393 (1926) (employing stringent vagueness test with respect to a criminal law imposing "severe and cumulative penalties"). Broad and uncertain terminology is particularly impermissible in statutes, such as Sarbanes-Oxley, that create new offenses. See Connally, 269 U.S. at 391; see also Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99 (1982) ("The [Supreme] Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.").

Several of the provisions of Sarbanes-Oxley discussed below are so vague that they fail to provide ordinary people with an understanding of what conduct is prohibited and place no limitation on the discretion of government officials to curtail arbitrary and discriminatory enforcement.[5] In fact, several members of the very Congress that passed the statute have had difficulties interpreting the statute and explaining the precise conduct that it seeks to proscribe.[6] For these reasons, the statute is unconstitutional.

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[5] The vagueness of what the section requires in attesting to a company's financial condition, along with the requirement that a corporate officer sign a report that he may not know has flaws, is a particularly fatal "one-two punch."

[6] In fact, even Representative Michael Oxley, who co-sponsored the legislation bearing his name, publicly expressed his own uncertainty as to the critical distinction between the *mens rea* requirements under Section 906's penalty provisions in subsection (c)(1) and (c)(2), instead "defer[ing] to regulators, law enforcement agencies, and existing bodies of law to define 'knowing' versus 'willful' violations of [Sarbanes-Oxley] . . ." Vinson & Elkins Corporate Governance & Compliance Bulletin No. 17 (Nov. 8, 2002)). Passing the buck to someone else's interpretation of a facially defective statute does not pass constitutional tests established by the courts. Cf. United States v. Reese, 92 U.S. 214, 221 (1875)

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### 1. Section 906(c)(2) Is Unconstitutionally Vague Because It Fails To Define What Constitutes A "Willful Certification"

The phrase "willfully certifies" in Section 906(c)(2) defies definition and thus renders the statute void for vagueness. In traditional statutory construction, the term "willfully" has been applied to modify an act that is itself unlawful, to add a greater level of culpability because the act is done with manifest disregard for its criminality. See e.g., Bryan v. United States, 524 U.S. 184, 191-92 (1998) (holding that 18 U.S.C. § 924(a)(1), prohibiting "willfully violat[ing] any other provision of this chapter," requires proof that "the defendant acted with knowledge that his conduct was unlawful."). Section 906(c)(2), however, proscribes "willful certification." But, certification is not itself wrongful. And, the statute fails to define what act or mental state makes certification willful or why "willfully certifying" creates greater culpability than just merely certifying, which itself is a willful act. See Nova Records, Inc. v. Sendack, 706 F.2d 782, 789 (7th Cir. 1983) ("A scienter requirement cannot eliminate vagueness [] if it is satisfied by an 'intent' to do something that is itself ambiguous."). Thus, willfulness is a "word of many meanings" that must be carefully defined in the specific context of its application. Ratzlaf v. United States, 510 U.S. 135, 141 (1994); Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000) ("Willfulness is usually understood to be contextual."). Congress's failure to so define the term in this context makes the statute unconstitutionally vague.

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(noting that the legislature may not "set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large").

This statutory defect is particularly acute because of the distinction created between subsections 906(c)(1) and (c)(2). While subsection 906(c)(1) subjects an offender to fines up to $1 million and/or ten-years imprisonment for merely "certifying" a periodic report knowing that it does not comport with the statute's requirements, subsection (c)(2) subjects an offender to fines up to $5 million, twenty-years imprisonment, or both, for "willfully" certifying the same periodic report. But, it is impossible to discern what conduct or mental state results in a twenty-year prison sentence under (c)(2) as opposed to a ten-year prison sentence under (c)(1). Subsection (c)(1), by its plain terms, already requires the highest level of specific intent recognized in the criminal law, demanding proof that a defendant had actual knowledge not only of Section 906(a)'s certification requirements, but also of the specific reporting law referenced therein. See 18 U.S.C. § 1350(c) (proscribing certification by anyone "knowing that the periodic report accompanying the statement does not comport with all the requirements of this section . . ."); cf. United States v. Eisenstein, 731 F.2d 1540, 1543 (11th Cir. 1984) (emphasizing that failure to file currency transaction reports with the IRS is a specific intent offense because, "without knowledge of the reporting requirement, a would-be violator cannot be expected to recognize the illegality of his otherwise innocent act"). Thus, the phrase "willfully certifies" cannot mean that subsection (c)(2) also is a specific intent offense on par with subsection (c)(1) because to construe it as such would render "willfully" in subsection (c)(2) superfluous when Congress clearly intended it to mean something. See Potter v. United States, 155 U.S. 438, 446 (1894) (explaining that the term "willful" used to describe certain offenses but not others in the same statute "cannot be regarded as mere surplusage; it means something"). This defect alone makes Sarbanes-Oxley unconstitutionally vague. See e.g., Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971) (invalidating an anti-loitering regulation on the ground that the indefinite and subjective term "annoy" as used therein was enough by itself to render the statute void for vagueness).

In addition, Section 906(c)(2) is unconstitutionally vague because it requires no overt act or other outwardly observable manifestation of intent that would clarify the meaning of "willfully certifies" and distinguish it from the purportedly lesser degree of mens rea required by Section 906(c)(1). Cf. Morales, 527 U.S. at 57-58 nn.25-26 (discussing ordinances criminalizing loitering that were cured of vagueness by the additional requirement of an overt act or evidence of criminal intent to distinguish between innocent conduct and conduct threatening harm); Ala. Code § 36-10-4 (prescribing criminal penalties for a notary "who, with intent to injure or defraud, or to enable any other person to do so, willfully certifies that any conveyance was duly proved or acknowledged when such acknowledgement was not in fact made" (emphasis added), repealed 1977 Ala. Acts 607 § 9901 (effective Jan. 1, 1980). And because certification is mandatory, not volitional, under Section 906, there is no way to differentiate between a corporate officer certifying merely because Section 906 commands him to do so, and a corporate officer certifying because he has the undefined "willful" criminal intent contemplated by Section 906(c)(2).

Absent any clearly articulated definition of "willfully certifies" in Section 906(c)(2), it is impossible to determine when the statute is violated. This effectively eliminates the constitutionally-required "fair notice" of what the statute commands and forbids and also opens the door to arbitrary and discriminatory enforcement. The

Indictment in this case demonstrates the dangers of Section 906(c)(2)'s vagueness. Here, the Government has charged Defendant Scrushy with violating Section 906(c)(2), not Section 906(c)(1). But the absence of any cognizable standard upon which the Government could have made its charging decision creates the unavoidably strong inference that the Government charged Scrushy under Section 906(c)(2) merely because it carries higher penalties, not for any difference in conduct.

### 2. Section 906(B) Is Unconstitutionally Vague In That It Fails to Define The Requirement That Periodic Reports "Fairly Present" The Issuer's Financial Condition and Results Of Operations

#### a. Section 906(b)'s Fair Presentation Requirement Is Vague Because It Is Inherently Subjective

Section 906(b) mandates that the information contained in a periodic report subject to the certification requirement "fairly presents, in all material respects, the financial condition and results of operations of the issuer." See 18 U.S.C. § 1350(b). The term "fairly presents," however, is inherently subjective and open ended in scope; what constitutes a fair presentation of information is in the eye of the beholder. See Timmons, 658 F. Supp. at 1089. For example, an inaccuracy in the Management Discussion and Analysis ("MD&A") section of a Form 10-K (i.e., a non-financial inaccuracy), could give rise to criminal liability (or not) solely on the basis of a prosecutor's subjective conclusion that the inaccuracy is (or is not) of such significance that the report ceases to "fairly present the financial condition and results of operations of the issuer."[7]

But, criminal statutes cannot stand absent objective criteria for determining what constitutes a violation and what does not. See, e.g., Morales, 527 U.S. at 52, 60; United States v. L. Cohen Grocery Co., 255 U.S. at 89 (making of any "unjust or unreasonable rate or charge" was void for vagueness because "[i]t leaves open . . . the widest conceivable inquiry, the scope of which no one can foreshadow or adequately guard against"); Champlin v. Corporation Comm'n of Okla., 286 U.S. 210, 243 (1932) (striking down as vague the term "waste" in an oil industry regulation in part because its meaning "necessarily depends upon many factors subject to frequent changes" and thus "the court could not foresee or prescribe the scope of the inquiry that reasonably might have a bearing or be necessary in determining whether in fact there had been waste"). Statutes that allow for subjective interpretation and enforcement are unconstitutional. See Coates, 402 U.S. at 614 (holding that the word "annoy" was impermissibly vague as used in an anti-loitering law because "[c]onduct that annoys some people does not annoy others"); Kramer v. Price, 712 F.2d 174, 178 (5th Cir. 1983) (holding "that a statute is unconstitutionally vague when the standard of conduct it specifies is dependent upon each complaintant's sensitivity"); Timmons, 658 F. Supp. at 1089 (striking down as vague a law criminalizing loitering "without any apparent reason" because "[w]hat is

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[7] While Section 906 was intended to address corporate financial statements, by its terms the statute extends the "fair presentation" requirement to other information in periodic reports that are unrelated to financials statements, such as MD&A and other narrative sections contained therein. See 18 U.S.C. § 1350(b).

'apparent' idle conduct will vary depending upon the personal experiences and prejudices of the person viewing the conduct").

It should not be left to the whim of law enforcement, as it is in Section 906(b), to determine whether a periodic report "fairly presents" the condition of a company, and whether a corporate officer's certification that it does so, should result in criminal penalties. See, e.g., Coates, 402 U.S. at 614 (explaining that local governments may not enact and enforce a loitering law "whose violation may entirely depend on whether or not a policeman is annoyed"); Baggett v. Bullitt, 377 U.S. 360, 373 (1964) ("It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful perjury prosecution for some of the activities seemingly embraced within the sweeping statutory definitions.") (emphasis added). Section 906 is thus unconstitutionally "vague, not in the sense that it requires a [corporate officer] to confirm his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." Coates, 402 U.S. at 177.

**b. The Impermissible Vagueness of Section 906(b) Is Compounded By The Use of The Phrase "In All Material Respects"**

Section 906(b) is also unconstitutionally vague in its use of the subjective and open-ended phrase "in all material respects." See 18 U.S.C. § 1350(b). In this context, the materiality analysis seeks to determine whether there is a "substantial likelihood" that information would be viewed by "the reasonable investor as having significantly altered the 'total mix' of information available." Oxford Asset Mgt., Ltd. v. Jaharis, 297 F.3d 1182, 1189 (11th Cir. 2002) (quoting Basic, Inc. v. Levinson, 485 U.S. 224, 231 (1988)). Adding to the indefiniteness is that, with respect to financial statements, materiality normally is not determined solely on the basis of objective quantitative benchmarks, but rather must be assessed in light of highly subjective qualitative factors as well, depending upon the particular circumstances of each case. See SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45150, 45152 (1999); see also Ganino v. Citizens Util. Co., 228 F.3d 154, 162-63 (2d Cir. 2000) (noting that courts "have consistently rejected a formulaic approach to assessing materiality" and that "[w]ith respect to financial statements, the SEC has commented that various qualitative factors may cause misstatements of quantitatively small amounts to be material" (citing SAB No. 99)). Thus, Section 906(b) requires that a certifying corporate officer first attempt to determine what information a "reasonable investor" likely would consider important in light of the "total mix" of available information and a host of unpredictable and uncertain qualitative considerations before he even can begin to assess whether a periodic report's disclosures meet the amorphous "fair presentation, in all material respects," requirement under Section 906(b). The mixture of materiality with the "fairly presents" requirement thus further exacerbates the statute's unconstitutional vagueness by providing no fair warning of what the fair presentation requirement commands and forbids, and places no meaningful, objective limitations on the discretion of law enforcement officials to prevent capricious and arbitrary enforcement.

## IV. CONCLUSION

There is no doubt that Congress had cause to examine whether corporations and their executive officers were operating as they should, and to consider and enact laws to address perceived needs in the current legislative and administrative mosaic. There is also no doubt that Congress owed this country resistance to simply legislating to appear to be tough on corporate crime. A new law that was intended to rearrange corporate responsibility in this country needed to be carefully considered so that it addressed the conduct it was intended to regulate in a manner that provided clear guidance and which, if it was going to include criminal penalties, passed age-old requirements for due process of law. Here, Congress failed the test. In Section 906, Congress failed to resist the temptation to legislate for its own sake, rushed important provisions through without consideration or explanation, and ended up with parts of a statute that impermissibly turn innocent conduct into serious felonies and are so vague as to allow any prosecutor on any day to define the law anyway he or she wants. These flaws are unconstitutional and, for all the foregoing reasons, counts 48, 49 and 50 of the Indictment should be dismissed.

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Respectfully submitted,

CHADBOURNE & PARKE LLP

Abbe David Lowell
Thomas V. Sjoblom
Scott S. Balber
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 974-5600

Arthur W. Leach, Esq.
c/o Thomas, Means, Gillis & Seay, P.C.
505 20th Street North
Birmingham, Alabama 35243
(205) 681-1000

Counsel for Defendant Richard M. Scrushy

## CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2004, a copy of the foregoing Defendant Scrushy's Motion to Dismiss or Counts 48-50 of the Indictment was served by hand delivery to:

Alice Martin, United States Attorney

Michael Rasmussen, Assistant United States Attorney

James Ingram, Assistant United States Attorney

Northern District of Alabama
1801 4th Avenue North
Birmingham, Alabama 35203

and by facsimile to the following government lawyer:

Richard C. Smith, Deputy Chief, Fraud Section

Arthur W. Leach
Arthur W. Leach, Esquire
Counsel for Richard M. Scrushy
Georgia Bar No. 442025
2310 Marin Drive
Birmingham, Alabama 35243
TEL. (205) 682-1000
FAX. (205) 824-0321