

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

04 APR -5 PM 3:26
U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES OF AMERICA,

v.

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

RICHARD M. SCRUSHY,

Defendant.

**DEFENDANT SCRUSHY'S MOTION TO DISMISS OR CONSOLIDATE
COUNTS OF THE INDICTMENT AS MULTIPLICITOUS**

Defendant Richard M. Scrusy respectfully submits the following Motion to Dismiss or Consolidate Counts of the Indictment (the "Indictment") as being impermissibly multiplicitous.

I. INTRODUCTION

A classic tactic of prosecutors is to charge a defendant with more counts than fit the alleged crime in hopes that a jury will think the defendant's conduct was especially egregious to merit so many counts and also to encourage compromise if the jury wants to "do right" by both parties. Given the government's zeal in this case -- an early attempt to use the SEC as a stalking horse to freeze Mr. Scrusy's assets, a horde of FBI agents descending on Mr. Scrusy's house and properties to execute search warrants as if he was unaware of the investigation and threatening to flee, an overbroad temporary restraining order seeking to accomplish what the SEC could not and a request for restrictions on bail and release that were aimed more at public relations than Mr. Scrusy's risk of flight -- it could only be expected that the indictment that the U.S. Attorney's Office drafted would

adopt the same overkill approach. And it did. For what the government alleges is really one basic scheme -- accounting fraud to inflate the performance of HealthSouth -- that the prosecutors have sliced and diced into 85 separate charges. They did not do that to ensure a proper penalty, as the sentencing guidelines would group most of the counts in any event. They did not do that to address all of Mr. Scrushy's conduct, because one conspiracy count and a securities count would accomplish that goal. They did it to create the aura of a really "bad" defendant and to increase the likelihood that, if they threw enough of the proverbial spaghetti against the wall one or two strands might stick. Really, over one alleged scheme, was it necessary to file 85 separate charges?

While the prosecutors' ability to write indictments as they wish is mostly unfettered, and while grand juries will follow prosecutors' strategies without much independence, the courts have put some limits to the government's overkill tactics. The letter and the spirit behind the law of multiplicity in indictment charges can regulate a prosecutor's improper attempt to bury a defendant, the court, and a jury with more charges that can be properly understood or handled in a reasonable trial setting. Here, that law and its background should be used by the court to pair down and group the charges in a way that insures a fair trial and one in which the outcome will result from the quality of the evidence and not the quantity of counts.

II. THE INDICTMENT'S CHARGES

A. **The Government's Theory That There Is An Overarching Accounting Fraud Resulting In A \$2.7 Billion Fraud Undercuts The Filing Of Eighty-Five Different Counts**

If one reads the Indictment and all of the government's pronouncements about it and the guilty pleas it has negotiated with other former HealthSouth officers, the

allegation is that Mr. Scrushy and others engaged in an accounting fraud to inflate HealthSouth's financial results to deceive investors and the public at large. The Indictment alleges that this basic scheme occurred between 1996 and 2002 and involved one basic means-- "to cause false and fraudulent entries to be made to HealthSouth's books and records" in order "to increase the value of HealthSouth's stock price." Indictment at ¶ 24, 26. That means was through the "cooking HealthSouth's books...and vouching for false financial statements with the SEC to cover up [the] scheme."¹ The government's press releases and statements echo this theory that there was an overarching accounting fraud that resulted in a \$2.7 billion fraud.² From that one basic allegation, the prosecutors have filed 85 separate counts.

An intellectually honest approach to the government's own allegations would have resulted in just eight counts -- conspiracy, securities fraud, a fraud being carried on through the wires, a fraud being carried through the mail, a false statement of the financial data to the SEC, a false certification of the financial data to the SEC and public, a money laundering of taking proceeds from HealthSouth as total compensation, and a forfeiture of those total proceeds. As the government well knows, charging these eight would have

¹ See Department of Justice, Press Release, Healthsouth Founder and Former CEO Richard Scrushy Charged in \$2.7 Billion Accounting Fraud Conspiracy (Nov. 4, 2003), available at http://www.usdoj.gov/opa/pr/2003/November/03_crm_603.htm (quoting Assistant Attorney General Christopher Wray.); see also Scrushy Indictment ¶ 22 ("A purpose of the conspiracy was to enrich and benefit the defendant ...by fraudulently inflating the results of the operations and the financial condition that HealthSouth reported to others.").

² See id. (characterizing Mr. Scrushy's actions as a "wide-ranging scheme to defraud investors, the public and the U.S. government about Health South's financial condition.").

provided it with the same potential penalties against Mr. Scrusby as the 85 they chose. So, the decision to bring more than 75 "add-on" counts, nearly ten times the amount covering the government's own theory of the case, was for another purpose. That purpose was the drama, the hype, the attempt to bury a defendant in charges, and the ploy to encourage jury compromise. None of these are proper bases for the government to use.

B. A Detailed Review Of The Actual Substance Of Each Charge Shows That They Are Completely Duplicative And Are Legally Unnecessary

The 85 counts of the Indictment can be broken down as follows:

- Count 1 - Conspiracy
- Counts 2 - 3 - Securities Fraud
- Counts 4 - 21 - Wire Fraud
- Counts 22 - 41 - Mail Fraud
- Counts 42 - 47 - False Statements
- Counts 48 - 50 - False Certification (Sarbanes-Oxley)
- Counts 51 - 70 - Money Laundering
- Counts 71 - 85 - Criminal Forfeiture

More than this classification, the non-conspiracy counts can even be more specifically described as follows:

- Counts 2 - 3 (Securities Fraud) - while 2 different charges, the government's securities fraud charges that for the same year of 2002 Mr. Scrusby caused the same type of SEC filings containing the same inflated HealthSouth financial information

- Counts 4 - 21
(Wire Fraud) - while 18 different counts, the government's wire fraud charges the same basic allegation -- a conference call hosted by HealthSouth or press release in which Mr. Scrushy stated or commented including what is alleged to be the same accounting fraud results
- Counts 22 - 41
(Mail Fraud) - while 20 different counts, these mail fraud allegations amount to the same 2 types of charges -- the shipment of a variety of pounds of annual reports to stockholder, while in different years having the same allegedly false financial information and the mailing of the same proxy card and notice to shareholders on the same day, April 12, 2002
- Counts 42 - 47
(False Statement) - while 6 different counts, these false statement allegations are all the same, charging the same false financial information to have been included in S-4 filings with the SEC for HealthSouth bonds
- Counts 48 - 50
(Sarbanes Oxley) - while 3 different counts, these Sarbanes Oxley charges are exactly the same -- Mr. Scrushy was involved in the false certification of the same HealthSouth financial information.

- Counts 51 - 70 (Money Laundering) - while 20 different counts, the government's money laundering allegations amount to one basic charge -- that Mr. Scrusby committed a crime and then took the proceeds from HealthSouth and put them into his accounts from which he then purchased the things he did over the years
- Counts 71 - 85 (Forfeiture) - while 15 different charges, the government's forfeiture charges track the money laundering counts by seeking to seize what was in effect one set of proceeds from alleged wrongdoing that the government chops into 15 (not the 20 for the laundering counts) different items

With this breakdown, one can see various counts with the same category of offense (e.g., securities fraud or mail fraud) and between various categories of offenses (e.g., same document for wire fraud or false statement) allege the same basic act, committed by the same basic people, over the same time period. Consequently, reviewing the Indictment in this fashion reveals that the following counts can be grouped as almost completely duplicative:

- Count 1 - Conspiracy
- Count 2 (presently 2 and 3) - Securities Fraud
- Count 3 (presently 4 - 21) - Wire Fraud
- Count 4 (presently 22 - 41) - Mail Fraud
- Count 5 (presently 42 - 47) - False Statement

Count 6 (presently 48- 50) - Sarbanes Oxley
Count 7 (presently 51 - 70) - Money Laundering
Count 8 (presently 71 - 85) - Forfeiture

III. ARGUMENT

A. **Courts Should Scrutinize Prosecutor's Overkill Indictments To Determine Whether Counts And Charges Are Improperly Multiplicitous**

The charging flaw of "multiplicity" occurs when the government "charges[s] a single offense in more than one count." United States v. Anderson, 872 F.2d 1508, 1520 (11th Cir. 1989)(quoting other cases)³. Courts recognize that this tactic creates numerous problems:

First, the defendant may receive multiple sentences for the same offense. Second, a multiplicitous indictment may improperly prejudice a jury by suggesting that a defendant has committed several crimes -- not one.

United States v. Langford, 946 F.2d 798 (11th Cir. 1991), cert. denied, 503 U.S. 960 (1992) (quoting cases). A third vice is that the presentation of dozens of counts to a jury unnecessarily complicates and prolongs a case, and a fourth vice is that throwing so many counts to a jury can encourage jury compromise to give something to the prosecutor and something to the defense when the underlying conduct is the same. Cf. United States v. Smith, 231 F.3d 800, 815 (11th Cir. 2000) (generally discussing psychological impact of multiplicitous charges on the jury); Langford, 946 U.S. at 802 (same). Multiplicitous indictments creating these vices implicate the due process clause because they deprive a

³ United States v. De la Torre, 636F.2d 792, 792 (5th Cir. 1981); United States v. Free, 574 F.2d 1221, 1224 (5th Cir.), cert. denied, 439 U.S. 873 (1978)

defendant of a fair trial. See United States v. UCO Oil Co., 546 F.2d 833, 835 (9th Cir.1976) (noting that multiplicity considerations “reflect the fundamental due process rights of [a] defendant...”); Cf., Langford, 946 F.2d at 577-78 (discussing interplay between multiplicity and double jeopardy).

As a consequence, courts look to a variety of tests to determine whether the government has overstepped its bounds when, as in this case, it takes what it alleges to be one basic offense and divides it into seven dozen counts.

In reviewing the government's handiwork, courts sometimes determine whether two or more counts require the "proof of an additional fact." See United States v. Costa, 947 F.2d 919, 926 (11th Cir. 1991). Another test is for a court to determine the "allowable unit" of prosecution for the type of offense being alleged. Langford, 946 F.2d at 802. In some charges where the basic offense is, as here, alleged to be an overall scheme, courts will look to determine whether an indictment properly alleges the "execution" of that scheme or improperly and "merely a component of such execution." See United States v. Sirang, 70 F.3d 588 (11th Cir. 1995); United States v. Lemons, 941 F.2d 309, 317 (5th Cir.1991).

There are certainly cases (which the government will cite in its opposition) decided in the mail fraud, wire fraud, and money laundering context that support the prosecutors' ability to bring these multiple charges predicated upon the separate and distinct acts of a defendant, see generally, United States v. Sheldon, 669 F.2d 446, 446 n.36 (7th Cir. 1982) (mail fraud); United States v. Garlick, 240 F.3d 1919 (9th Cir. 2000) (wire fraud); United States v. Smith, 46 F.3d 1233 (1st Cir. 1995) (money laundering), but these cases and their theories should not control in this instance. Rather, where the

government makes a strategic choice, choosing to prosecute Mr. Scrushy under one overarching scheme of accounting fraud, the prosecutors should be constrained from arbitrarily dividing their charges into 85 counts as a tactic to confuse and overwhelm the jury.

In any event, there should be room for a court to look underneath the actual words of the charge to determine the essence of the allegation so that the government cannot pick a fairly meaningless extra "fact," or too narrow a "unit," of prosecution or too sparing a definition of the "scheme" in trying to avoid multiplicity.

B. Various Of The Eighty-Five Counts Devised By The Prosecutors Fail The Letter Or Sprit Of The Law Of Multiplicity And Should Be Dismissed

The essence of the government's case is that Mr. Scrushy was involved in an accounting fraud with the purpose of inflating the financial results of HealthSouth and, as a result, the value of its publicly traded stock. Indictment at ¶¶ 23-27. Thus, this is, at its heart, a securities fraud case. The Eleventh Circuit has suggested that when the overall issue is securities fraud, the government can quite arbitrarily manipulate charges to create anomalous results. Langford, 946 F.2d at 798. As an example, a securities fraud involving the misstatement of a material fact sent out to a great number of people or agencies gives the government too much discretion. In language particularly apt to the way the government has charged this case, the appellate court stated: "With the purchase and sale of securities, a single document, such as a prospectus, is mailed to thousands of shareholders, which raises the specter of thousands of counts." Smith, 231 F.3d at 815. This is precisely the result here. The government's actual two securities counts concern the same type of filing in the same year for the same basic purpose. The various mail and wire fraud counts based on the alleged securities scheme on their face often talk about the

same or the same type of "conference call" or mailing of pounds of annual reports or the same proxy statement on the same day. Using counts 26 - 41 as examples, the government could have just as easily charged Mr. Scrusby with hundreds of counts instead of the fifteen chosen if they alone could decide to make each separate sending of the same proxy form a separate charge.

The same approach can be the basis for reviewing the false statement counts of this indictment. Here, it is not how many times a person is alleged to have made the same false statement to the government agency involved or even the same false statement to different government agencies, but rather whether the repeated false statements "constituted an additional impairment of the operations of the government." United States v. Graham, 60 F.3d 463, 466 (8th Cir. 1995). The Indictment here alleges that S-4 statements sent to the SEC for the issuance of bonds contained the same false financial information as alleged in virtually every other count. Certainly, these multiple filings in the ordinary course of business did not create any additional impairment to any operation of the government. See UCO Oil Co., 546 F.2d at 836 ("Congress was concerned with proscribing the prohibited result rather than particular kinds of conduct . . . interpreting the enumeration of different kinds of conduct . . . as reflecting different modes of achieving that result, not separate and distinct offenses").

The government has taken wrongful advantage of even the money laundering statute in this case. Here, the government really has piled on creating 20 different counts, nearly a quarter of the entire Indictment, from the act of Mr. Scrusby taking the money he made at HealthSouth and spending it. So, paying for a single piece of property (Count 51 - 54 relating to 360 acres in Wilcox, County) on a single day with four checks is not one

count of converting proceeds into land but becomes four counts in the government's tactic of piling on. Paying for one boat in two installments is not one count of turning illegal funds into something else but two charges (Counts 55 -56). Yet, Mr. Scrushy's paying for two cars (Count 57) is combined for one count, but the armoring for those vehicles becomes two more (Counts 58 - 59). It is a good thing Mr. Scrushy was not on the installment plan at his automobile dealer, because a purchase of one GMC truck costing \$50,000 could be fifty counts if he decided or could only afford to pay only \$1000 a month. These kinds of purchases, done in this manner ,was not what the money laundering statute was intended to address.

Even the forfeiture counts artificially divided by the government prove how arbitrary this practice has become in this Indictment. While the government alleges twenty separate counts of money laundering supporting the requests for forfeiture, there are only fifteen counts of forfeiture. Why? Because the very grouping of counts that Mr. Scrushy contends should be done in this case was adopted by the government for forfeiture. So, all the payments for the 360 acres in Wilcox that the government chooses to make four counts of money laundering (Counts 51-54) creates just one count of forfeiture (Count 72). The same is true for the boat and the automobiles (Counts 73 and 74). The government proves the logic of grouping offenses, but preferred to divide as many as it could think of to create the appearance of a massive case.

IV. CONCLUSION

The law provides the court with authority to see through such a blatant government tactic of turning a handful of charges into a seven-dozen count charging instrument. If the government believes Mr. Scrushy joined a conspiracy to commit

securities fraud than it should charge those offenses. Slicing and dicing the alleged conduct into eighty-five counts does add dramatic effect, does portray a case more serious, does influence the public and the jury to think there is more there than there is, but it does not make the case easier to try, it does not accurately capture the conduct, and it does not make for a fair trial. The counts should be examined and grouped so that the jury receives only that which is proper.

Defendant Richard Scrushy's Motion should be granted⁴.

Dated: April 5, 2004

Respectfully submitted,

CHADBOURNE & PARKE LLP

A handwritten signature in black ink, appearing to read "Abbe David Lowell", is written over a horizontal line.

Abbe David Lowell
Thomas V. Sjoblom
Scott S. Balber

1200 New Hampshire Avenue, N.W.
Washington, DC 20036
(202) 974-5600

⁴ It may be that the issue of multiplicity will merge into a motion for judgment of acquittal, F.R.Cr.P. 29, based on insufficient evidence to support each of the repetitious counts or be the basis for the Court to group counts in jury instructions. United States v. Reed, 639 F.2d 896, 904 n.6 (2d. Cir. 1991); See United States v. Droms, 566 F.2d 361, 363 (2d Cir. 1977). If that is the case, the Court can defer consideration of this motion until it hears the government's evidence.



Arthur W. Leach, Esq.

c/o Thomas, Means, Gillis & Shay, P.C.
505 20th Street North
Birmingham, Alabama 35237
(205) 681-1000

Counsel for Defendant Richard M. Scrusby

CERTIFICATE OF SERVICE

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

Alice Martin, United States Attorney

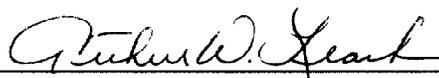
Michael Rasmussen, Assistant United States Attorney

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