

indictment to avoid duplicity, which can lead to the denial of a defendant's constitutional right to a unanimous verdict. However, Scrushy would like to prevent a trial jury from considering the numerous instances of criminal conduct perpetrated by him during his tenure as the CEO at HealthSouth by limiting the United States's ability to present such charges, and evidence on those charges, to a trial jury for its consideration. He wants this Court to dismiss the 85 charges in his indictment and rewrite them into eight charges for the trial jury to consider, although he presents no law to support such interference by the Court with prosecutorial discretion and the grand jury's function.

Although Scrushy correctly cites some of the appropriate law applicable to the issue of multiplicity in indictments, nowhere in his motion does he apply that law to the charges in his case and demonstrate that his indictment is, in fact, multiplicitous. Moreover, while he also correctly cites the vices the law of multiplicity is designed to address, those vices can only be addressed by the Court if multiplicity does, in fact, exist. As already noted, nowhere in his motion does Scrushy demonstrate he was charged for the same crime in more than one count of his indictment, so this Court does not have the authority to "correct" the alleged vices in his indictment identified by Scrushy in his motion. Finally, in his motion, Scrushy admits that existing authority as to the mail fraud, wire fraud, and money

laundrying counts supports the multiple charges in his indictment, but he then asserts that that authority should not control in his case, without stating a single legally supportable reason why. This Court should not bypass existing authority, especially when no valid basis for doing so exists.

Scrushy has been charged as the leader of a massive accounting fraud conspiracy at HealthSouth Corporation that involved many individuals, occurred over at least six years, and led to at least 85 separate criminal acts. Clearly more could have been charged. For example, the indictment charges that thousands of individuals and institutions held HealthSouth securities. Each would have been mailed annual reports. Under the mail fraud statute, each mailing is a separate offense, permitting thousands of counts. Of these thousands, the indictment charges but 16 substantive counts.

Scrushy and his coconspirators committed the numerous criminal acts over the life of the conspiracy for the primary purpose of enriching themselves at the expense of the company and its many stockholders, bondholders, and other investors. Despite his many years of criminal conduct involving many separate criminal acts, Scrushy wants this Court to help him limit his liability by “pairing down” and “grouping” the charges against him on the specious grounds that the charges constitute “overkill” by the United States and that the “letter and spirit”

behind the law of multiplicity support his request. The United States did nothing more than charge Scrushy with the separate crimes he committed, and the law of multiplicity – neither its “spirit” or its letter – requires or permits the result sought by Scrushy.

ARGUMENT

I. The Prosecution, Not The Defendant Or The Court, Has The Power To Select The Charges Brought In A Particular Case And, Absent A Demonstration That A Constitutional Right Has Been Infringed, The Court Is Without Authority To Interfere With That Discretion.

The Supreme Court “has long acknowledged the Government’s broad discretion to conduct criminal prosecutions, including its power to select the charges to be brought in a particular case.” *Ball v. United States*, 470 U.S. 856, 859, 105 S.Ct. 1668, 1670 (1985); *accord, Dermota v. United States*, 895 F.2d 1324, 1326 (11th Cir. 1990). A prosecutor’s discretion as to what, if any, charges to bring against a criminal suspect “is an integral feature of the criminal justice system, and is appropriate, so long as it is not based upon improper factors.” *United States v. Cespedes*, 151 F.3d 1329, 1333 (11th Cir. 1998), *citing United States v. LaBonte*, 520 U.S. 751, 117 S.Ct. 1673, 1679 (1997).

“[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests in his discretion.” *Bordenkircher v. Hayes*,

434 U.S. 357, 364, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978). Indeed, the federal courts have long recognized “that when an act violates more than one criminal statute, the Government may prosecute under either [or both] so long as it does not discriminate against any class of defendants.”

Cespedes, 151 F.3d at 1332. Moreover, “the Supreme Court has unambiguously upheld the prosecutor’s ability to influence the sentence through the charging decision” and “a prosecutor’s selection of which charge to file against a given defendant necessarily implicates the range of potential penalties available to the court.” *Cespedes*, 151 F.3d at 1332, 1333. Finally, precedent in this Circuit recognizes “that there is a broad ambit to prosecutorial discretion, most of which is not subject to judicial control.” *Hardwick v. Doolittle*, 558 F.2d 292, 301 (5th Cir. 1977). “The judiciary cannot interfere with a prosecutor’s exercise of charging discretion, except in narrow circumstances where it is necessary to do so in order to discharge the judicial function of interpreting and applying the Constitution.” *United States v. Smith*, 231 F.3d 800, 807 (11th Cir. 2000).

Despite this clear authorization placing the power of determining what charges to bring against Scrushy with the United States, Scrushy asks this Court to interfere with that power, even though he has not demonstrated any constitutional violation made by the United States in its charging decision. Specifically, Scrushy has failed to demonstrate that his indictment is, in fact, multiplicitous and in

violation of his constitutional right not to be placed in jeopardy twice for the same crime. Because Scrusby has failed to demonstrate a constitutional violation, no interference by this Court with the charging decision is authorized or warranted.

II. Multiplicity Does Not Exist If Each Count Of The Indictment Charges A Separate Offense.

Scrusby begins his argument by urging this Court to rewrite his indictment to include only eight charges: one count of conspiracy under 18 U.S.C. § 371; one count of securities fraud under 18 U.S.C. § 1348; one count of wire fraud under 18 U.S.C. § 1343; one count of mail fraud under 18 U.S.C. § 1341; one count of making false statements under 18 U.S.C. § 1001; one count of false certifications under 18 U.S.C. §§ 1349 and 1350; one count of money laundering under 18 U.S.C. § 1957; and one count of criminal forfeiture under 18 U.S.C. §§ 981 and 982. While he surprisingly does not dictate which of the charges under each designated violation he believes the Court should keep and which should be dismissed, he urges that all of the charges but eight be dismissed as multiplicitous, without demonstrating how each count is the same as the other counts within each category of offenses. Because multiplicity is the charging of a single offense in more than one count, and each of the offenses charged in Scrusby's indictment are not the same offense, Scrusby is not entitled to the result he seeks.

1. The *Blockburger* test for multiplicity should be used to evaluate the charges.

The Supreme Court set forth the applicable test for determining whether multiplicity exists in a charging instrument in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180 (1932), as follows:

The distinction stated by Mr. Wharton is that, ‘when the impulse is single, but one indictment lies, no matter how long the action may continue. If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie.’ Wharton’s Criminal Law (11th Ed.) § 34. Or, as stated in note 3 to that section, ‘The test is whether the individual acts are prohibited, or the course of action which they constitute. If the former, then each act is punishable separately. ... If the latter, there can be but one penalty.’

284 U.S. at 302, 52 S.Ct. at 181. The Court continued that, once it is determined if the statute prohibits a course of action or individual acts, “[t]he applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.” 284 U.S. at 303, 52 S.Ct. at 182. This test has been repeatedly reaffirmed by the Supreme Court and adopted and applied by the Eleventh Circuit. *See, e.g., Rutledge v. United States*, 517 U.S. 292, 297-300, 116 S.Ct. 1241, 1245-47 (1996); *United States v. Dixon*, 509 U.S. 688, 113 S. Ct. 2849

(1993); *Missouri v. Hunter*, 459 U.S. 359, 365-69, 103 S. Ct. 673, 678-79 (1983); *Albernaz v. United States*, 450 U.S. 333, 337-42, 101 S.Ct. 1137, 1141-44 (1981); *United States v. Howard*, 918 F.2d 1529, 1532-33 (11th Cir. 1990); *United States v. Anderson*, 872 F.2d 1508, 1520 (11th Cir. 1989); *United States v. Glanton*, 707 F.2d 1238, 1240 (11th Cir. 1983).

2. *Langford*, to the degree it differs from *Blockburger*, only applies to the securities fraud counts of the indictment.

In his motion, Scrushy argues that there are a variety of tests to determine if there is multiplicity in the indictment, relying primarily on the Eleventh Circuit's decision in *United States v. Langford*, 946 F.2d 798 (11th Cir. 1991). However, *Langford* does not really rely on a different test than that described in *Blockburger*. It simply focuses on the initial inquiry described in *Blockburger* instead of the second inquiry; it focuses on the nature of the offense defined in the statute, or the unit of prosecution. Before it can be determined if the same offense is described in different counts of the indictment, it first must be determined what constitutes "the offense."

In *Langford*, the Eleventh Circuit addressed the issue of whether there was multiplicity in an indictment involving three counts of securities fraud, all based on the same scheme to defraud and on the same purchase of securities, a single

sale of stock, but involved three different mailings. 946 F.2d at 804. In determining whether the three counts of securities fraud were multiplicitous, the Court had to “first determine the allowable unit of prosecution.” *Id.* at 802. This initial determination was in keeping with the first part of the Supreme Court’s test in *Blockburger* – determining whether the statute proscribed a course of action or individual acts, or, in other words, determining what constituted the elements of the offense. The Court determined that securities fraud, unlike mail fraud, involved a series of actions resulting in but one transaction: a separate purchase or sale of securities and a separate false statement of material fact in connection with that purchase or sale. The use of the mails in that statute was merely a jurisdictional requirement, not the substance of the crime; therefore, the fact that there were three separate mailings in themselves did not support three separate charges. While the factual allegations were different in the three different counts, they did not constitute three separate offenses, because those factual differences did not address the elements of the charge. After first determining the unit of prosecution, the court then proceeded to address whether each charge required proof of a relevant fact that the others did not. It concluded that the charges in that case did not.

Langford, did *not* proscribe the charging of several securities fraud counts

in one indictment. Instead, it merely stated that each charge “must be based on a separate purchase or sale of securities and each count must specify a false statement of material fact – not a full-blown scheme to defraud – in connection with that purchase or sale.” *Id.* at 804. Because Langford’s indictment did not allege a material misstatement in each count and did not allege that the use of the mails was in conjunction with a separate purchase or sale transaction, it was multiplicitous. *Id.*

Langford has been limited in its application to securities fraud and it does not apply to crimes like making a false statement to obtain a bank loan, giving false information to obtain an absentee ballot, bank fraud, mail fraud, wire fraud, or money laundering. *See United States v. Smith*, 231 F.3d 800, 815 n.16 (11th Cir. 2000). In *Smith*, the Eleventh Circuit addressed the issue of whether an indictment was multiplicitous because it contained separate charges based on the same false statement, but contained in two different documents used to obtain a single absentee ballot. *Id.* at 815. In holding the indictment was not multiplicitous, the court specifically held that “[t]he *Langford* holding was ... explicitly limited to securities fraud cases” and it refused to follow it as precedent to the extent there were any inconsistencies in it and the court’s prior decision in *United States v. Davis*, 730 F.2d 669 (11th Cir. 1984). *Smith*, 231 F.3d at 815

n.16.

In *United States v. Davis*, the Eleventh Circuit rejected a contention that an indictment was multiplicitous because it contained two separate charges of making a false statement in two separate documents used to obtain a single loan, in violation of 18 U.S.C. § 1014. In rejecting the contention that “the alleged false statements [were] so closely related that they forme[d] one functional activity, and therefore, should be considered as one false statement for the purpose of [the offense described in the statute], 730 F.3d at 671, the court held:

[W]e are bound by the decision of the former Fifth Circuit Court of Appeals in *Bins v. United States*, 331 F.2d 390 (5th Cir. 1964), *cert. denied*, 379 U.S. 880, 85 S.Ct. 149, 13 L.Ed.2d 87 (1964), In *Bins*, the court addressed convictions under 18 U.S.C. § 1010 with respect to false statements to the Federal Housing Administration, a statute analogous to 18 U.S.C. § 1014. The *Bins* court held that false statements contained in each of two separate documents comprised two distinct offenses which were properly charged in two separate counts. The court noted that “*it is well settled that the test for determining whether several offenses are involved is whether identical evidence will support each of them, and if any dissimilar facts must be proved, there is more than one offense.*” 331 F.2d at 393. In evaluating the evidence before it, the court observed that different elements of proof were required to show the falsity of each document since they were separate and executed on different dates. The court also stated that it was of no consequence that all of the documents referred to in each count were part of a single transaction.

“Whether a continuous transaction results in the commission of but a single offense or separate offenses is not dependent on the number of unlawful motives in the mind of

the accused, but is determined by whether separate and distinct prohibited acts, made punishable by law, have been committed.”

Id. at 672 (footnote omitted and emphasis added), *citing Caballero v. Hudspeth*, 114 F.2d 545, 547 (10th Cir. 1940). Therefore, in *Smith*, a case decided subsequent to *Langford*, the Eleventh Circuit, by reference to its previous decision in *Davis*, held that the test to be applied in determining whether one offense or two offenses are charged, and therefore are multiplicitous or not, is the test described in *Blockburger*: whether identical evidence will support each count and, if any dissimilar facts must be proved, there is more than one offense.

Because *Langford* has been limited to securities fraud cases, this Court should not use the test described in that case, to the extent it differs from the *Blockburger* test, to evaluate any but the securities fraud counts in the indictment to determine if there is multiplicity in the charges. Moreover, this Court cannot simply ignore the admonition in *Smith* that *Langford* is limited to the securities fraud context, as Scrusby would have this Court do, and simply dismiss or group offenses based on the reading of *Langford* that Scrusby ascribes to that decision. Established precedent requires the Court to evaluate the many other charges in Scrusby’s indictment under the *Blockburger* test as described by the United States, above.

3. Multiple counts of the charges in the indictment are authorized, because each offense requires proof of a fact the others do not.

“In order to avoid multiplicity, only one fact or element need be different between each charge.” *United States v. Costa*, 947 F.2d 919, 926 (11th Cir. 1991). Thus, where one fact or element is different in each charge, courts have upheld, for example, multiple counts of mail fraud, *see, e.g., United States v. Soba*, 132 F.3d 662, 673-75 (11th Cir. 1998); *United States v. Serino*, 835 F.2d 924, 930 (1st Cir. 1987); *United States v. Shelton*, 736 F.2d 1397 (10th Cir. 1984); *United States v. Sherl*, 923 F.2d 64, 66 (7th Cir. 1991); multiple counts of wire fraud, *United States v. Hasson*, 333 F.3d 1264, 1268 (11th Cir. 2003), *cert. filed*, No. 03-9828 (Dec. 12, 2003); *Henderson v. United States*, 425 F.2d 134, 138 n.4 (5th Cir. 1970); *United States v. Luongo*, 11 F.3d 7, 9 (1st Cir. 1993); *United States v. Garlick*, 240 F.3d 789, 792 (9th Cir. 2001); multiple counts of money laundering, *United States v. Kramer*, 73 F.3d 1067, 1072, 1073 n.11 (11th Cir. 1996); *United States v. Smith*, 46 F.3d 1233, 1234 (1st Cir. 1995); multiple counts of securities fraud, *United States v. Ashdown*, 509 F.2d 793, 799-800 (5th Cir. 1975); multiple counts of making false statements to obtain a single bank loan, *see, e.g., United States v. Davis*, 730 F.2d at 671-72; *United States v. Glanton*, 707 F.2d 1238, 1240 (11th Cir. 1983); multiple counts of making false declarations in the same trial

testimony, *see, e.g., United States v. Molinares*, 700 F.2d 647, 652-53 (11th Cir. 1983); *United States v. Wood*, 780 F.2d 955, 962-63 (11th Cir. 1986); multiple counts of extortion of a single individual, *see, e.g., United States v. Smalley*, 754 F.2d 944, 947 (11th Cir. 1985); and multiple counts of bank fraud based on one check-kiting scheme, *see, e.g., United States v. Sirang*, 70 F.3d 588, 595-96 (11th Cir. 1995). Therefore, if each of the counts of Scrusy's indictment charges a fact or element different than the others, the charge cannot be dismissed on the basis of multiplicity.

Scrusy urges this Court to ignore cases that support the United States's ability to bring the multiple charges within each offense category predicated on his separate and distinct acts, urging that those cases *should* not control because the United States is prosecuting him "under one overarching scheme of accounting fraud." *See* Scrusy motion at 8-9. But Scrusy provides no legal or factual support for his contention that those cases should not control, and this Court cannot simply ignore the law to reach Scrusy's desired result. Moreover, contrary to Scrusy's suggestion throughout his motion, the United States has not chosen to only charge him with the overall scheme of accounting fraud (the conspiracy count), but has also chosen to charge him with each and every crime Scrusy committed in furthering that scheme that it believes it can establish at

trial. It is within its discretion to do so, so long as it does not violate Scrusy's constitutional rights. Scrusy has failed to demonstrate that it has; therefore, he cannot receive the relief he seeks from this Court.

III. Scrusy Has Failed To Demonstrate That Any Charge In His Indictment Charges The Same Offense As Charged In Any Other Count In His Indictment; Therefore, The Court Cannot Revise The Indictment As Scrusy Would Have It Do.

Instead of demonstrating how the various charges in his indictment constitute the same offense for double jeopardy purposes, as he must do to be entitled to have counts of the indictment dismissed on grounds of multiplicity, Scrusy simply groups the various charges together and discusses how each charge involves the same *type* of offense. *See* Scrusy motion at 9–11. Of course, all of the mail fraud counts involve all the same *type* of offense as all of the other mail fraud counts, just as all of the wire fraud, money laundering, and forfeiture counts all involve the same *type* of offense, but they do not involve *the same* offense. It is the latter – the same offense – that Scrusy must demonstrate to have counts of his indictment dismissed as multiplicitous.

“An indictment is not multiplicitous merely because it charges more than one violation of the same statute based on related conduct; instead, a defendant can be convicted of multiple violations of the same statute if the conduct

underlying each violation involves a separate and distinct act.” *United States v. Technic Services, Inc.*, 314 F.3d 1031, 1046 (9th Cir. 2002). Each mail fraud count (counts 22 through 41) in Scrusy’s indictment constitutes a separate offense because each count involves a separate use of the mails. *See United States v. Ashdown*, 509 F.2d 793, 800 (5th Cir. 1975); *United States v. Levine*, 794 F.2d 1203, 1207 n.3 (7th Cir. 1986), *rev’d on other grounds, sub nom. United States v. Shelton*, 848 F.2d 1485 (10th Cir. 1988). Each wire fraud count (counts 4 through 21) in Scrusy’s indictment constitutes a separate offense because each count involves a separate use of the wires. *See Henderson v. United States*, 425 F.2d 134, 138 n.4 (5th Cir. 1970); *United States v. Luongo*, 11 F.3d 7, 9 (11th Cir. 1993). Each money laundering count (counts 51 through 70) in Scrusy’s indictment constitutes a separate offense because each count involves a separate transfer or transaction. *See United States v. Kramer*, 73 F.3d 1067, 1072, 1073 n.11 (11th Cir. 1996); *United States v. Smith*, 46 F.3d 1233, 1134 (1st Cir. 1995); *United States v. Martin*, 933 F.2d 609, 611 (8th Cir. 1991). Each securities fraud count (counts 2 and 3) in Scrusy’s indictment charges a separate offense because each count involves different false statements contained in different SEC filings on different dates. *See United States v. Langford*, 946 F.2d at 803-04. Each false statement count (counts 42 through 47) in Scrusy’s indictment charges a separate

offense because each count involves different false statements in different documents filed with the SEC on different dates. *See, e.g., United States v. Glanton*, 707 F.2d 1238, 1240 (11th Cir. 1983) (3 counts of making false statements to obtain single bank loan made in different documents not multiplicitous). Each false certification count (counts 48 through 50) in Scrushy's indictment charges a separate offense because each count again involves a different false certification made in a different document filed on a different date. *See, e.g., United States v. Wood*, 780 F.2d 955, 962-63 (11th Cir. 1986) (three counts of making false material declaration while under oath not multiplicitous because each required different factual proof); *United States v. Molinares*, 700 F.2d 647, 652-53 (11th Cir. 1983) (same). And finally, each criminal forfeiture count (counts 71 through 85) in Scrushy's indictment charges a separate offense because each count involves a separate expenditure of illegal proceeds.

Furthermore, with each of the mail fraud, wire fraud, and securities fraud counts, the victims are, or conceivably could be different, and with the false statement counts, different people saw and relied on the false statements. Because these factual allegations are different in each count, each count charges a separate offense. Thus, because all of the counts of the indictment charge different offenses, the indictment is not multiplicitous.

Finally, the fact a conspiracy is charged in count one of the indictment does not preclude the United States from charging every single offense committed during that conspiracy in separate counts in the indictment, as seems to be argued by Scrusby in continuously alleging in the motion that the indictment involves one overarching accounting fraud scheme. *See, e.g., United States v. Howard*, 918 F.2d at 1532-33 (conspiracy to kidnap and attempt to kidnap).

CONCLUSION

Scrushy's complaints about his indictment are unfounded; no multiplicity exists and he has not demonstrated to the contrary. Despite his cries of overkill, the United States had done nothing more than charge him with the crimes it believes it can prove he committed. Only he can be faulted for the many crimes alleged.

Respectfully submitted this 6th day of May, 2004.

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