

Scrushy, who it alleges committed numerous acts of wrongdoing, has brought this motion to ask "this Court to help him limit his liability . . ." Government Opposition, at 3. This is completely wrong as the government must know. The number of counts does not determine sentencing under the guidelines; counts are grouped and the grouping plus other factors (e.g., loss) determine sentencing. The government did not bring 85 counts to add time to any sentence; it brought them for the improper strategic reasons (e.g., suggesting greater wrongdoing, promoting jury compromise) set out in the Motion. As such, Mr. Scrushy does not ask this Court to "help him limit his liability," but rather to review the Indictment, group those counts which amount to a single unit of prosecution, and dismiss those which do not, in order that the Indictment fairly and accurately represent the wrongs that he is actually charged with, in accordance with the law of this circuit.

ARGUMENT

As the government asserts, Mr. Scrushy "has been charged as the leader of a massive accounting fraud" allegedly "committed for the primary purpose of enriching [himself] at the expense of the company, and its many stockholders, bondholders, and other investors. Government Opposition at 3. Thus, above all else, this is a securities fraud case. And, as set forth in Mr. Scrushy's Opening Brief, the Eleventh Circuit has provided much guidance regarding the extent to which multiple counts can be charged in a securities fraud case. Defendant's Motion, at 7 - 8. But the government gives short shrift to the Eleventh Circuit's instructions in United States v. Langford, 946 F.2d 798

(11th Cir. 1991). Opposition, at 8-10. Langford holds that the court may view a case as a "securities case" even if the government folds other counts into the indictment and that the "offense" or the "unit of prosecution" should be applied broadly in securities cases. The government acknowledges (grudgingly) these legal principles, but seeks to distinguish Langford on the grounds that the use of mails in that case "was merely a jurisdictional requirement, not the substance of the crime." Government Opposition at 9. However, the same is true here. According to the government's own indictment, once Mr. Scrusby created the accounting fraud, he then used the mails or the wires to communicate the allegedly false information. This should have resulted in such allegations being "jurisdictional requirements" and not separate counts.

In order to distinguish Langford's holding from securities cases like the one at bar, the government points to the decisions in bank fraud and other financial institution cases that are inapposite. Government's Opposition, at 11. Mr. Scrusby does not disagree that in United States v. Davis, 730 F.2d 669 (11th Cir. 1984), the court held that there could be two separate counts of making a false statement to a bank (18 U.S.C. § 1014) when two separate false pieces of paper were sent to the bank for what turned out to be one loan. However, this begs the issue of the facts and groupings in this securities based indictment. In addition, the government ignores the cases, see, e.g., United States v. Sirang, 70 F.3d 588 (11th Cir. 1995), which seek to determine whether various counts amount to the "execution" of an alleged scheme and not a "component part." All of the

alleged conduct set out by the government can be interpreted as constituting the entire execution of the alleged scheme.

Once the government agrees with the definitions of multiplicity in the law, the question then becomes whether the government is the sole arbiter of how many counts it can slice and dice the same conduct to become. In other words, what is the "offense" or "unit of prosecution," like beauty, may be in the eye of the beholder, but the law does not give the government the only look see. In a refreshing moment of candor, the government acknowledges the arbitrariness of its own charging decisions when it say "[c]learly 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." Government's Opposition, at 3. The government then supposes that Mr. Scrushy is grateful that its cynical charging scheme piled on dozens instead of hundreds of counts. However, one count more than is supported by the law and due process would be unfair, and, given the government's admission, it should be the Court who decided the proper grouping of counts.

Rather than rely on the standard set forth in Langford, the government instead seeks to extend the language of Blockburger v. United States, 284 U.S. 299 (1932) and its progeny to an illogical conclusion. While the courts do talk of "proof of an additional fact," to determine whether counts can be separate or not, that phrase would mean nothing if the government could use any fact, no matter how material or immaterial, to

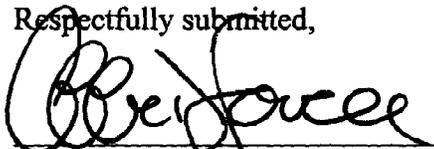
create a "distinction." As pointed out in the Motion, differences in the counts often are predicated on different recipients of the same alleged misstatement or even the same exact alleged misstatement delivered in two separate filings on the same day to the same government agency. Defendant's Motion, at 5.

Despite much rhetoric, the government never responds grouping by grouping to explain its charging decision and how the separate counts in each grouping is a different offense. Reference to the descriptions of counts in the original motion, Defendant's Motion, at 4 - 6, demonstrates that the factors on which the government relies to support separate counts do not amount to material or substantial differences (e.g., the same statement in the same text of e-mails going to different people on the same day, the same statement being picked up from one annual report to the next without any additional action by Mr. Scruschy). Nevertheless, as Mr. Scruschy suggested in his Motion, this review of counts to determine the correct grouping may be more effectively done after the government rests its case to determine whether there truly has been separate offenses or units of prosecution charged.

CONCLUSION

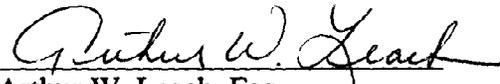
For the foregoing reasons, Mr. Scrusby asks the Court to review the present counts, groups those which amount to a single unit of prosecution, and dismiss those which do not.

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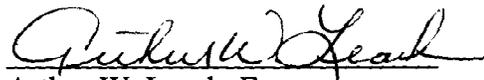
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CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2004 a copy of the foregoing Reply in Further Support of Defendant's Motion to Consolidate or Dismiss Counts of the Indictment was served by hand delivery to:

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