

It is axiomatic that in this Country no person is required to stand trial, unless the statute under which he is to be prosecuted passes constitutional muster. Where, as is the case with respect to Section 906, the statute contains no ascertainable standards to govern its application, it matters not what the Government alleges in the Indictment. Nor does it matter what the Government hopes to offer into evidence at trial. The Government simply cannot leap over the constitutional hurdle of an invalid statute and prosecute with a "wait and see" attitude. Due process is violated when inadequate notice leads to a trial with the unacceptable risk of convicting the innocent.

The Court in this case -- especially given that the issue here is one of first impression with grave and far-reaching implications -- must address the constitutional issues put forth by Defendant Scrushy and decide those issues as a matter of statutory interpretation. These are purely *matters of law*, and not matters of fact, regardless of how the Government would like to portray the alleged facts. Admittedly, the Court's burden may be difficult in the absence of clear legislative history. But, it is of no help for the Government to point to belated, after-the-fact remarks by a senator (Senator Joseph Biden) about a statute in which he had little or no involvement in the legislative process leading up to its enactment.

Defendant Scrushy simply cannot be prosecuted under a statute that does not unambiguously define the requisite state of mind (*mens rea*) and conduct (*actus reus*) that

the criminal law and constitutional due process require. And because it does not, it is on those grounds that Section 906 of Sarbanes-Oxley must fail.

ARGUMENT

I. SECTION 906 IS UNCONSTITUTIONALLY VOID FOR VAGUENESS

For nearly seventy years, the U.S. Securities and Exchange Commission ("SEC" or "Commission") has required public companies to file periodic (annual or quarterly) reports containing the detailed information and disclosures specified by the Commission's rules. See Securities Exchange Act of 1934 ("Exchange Act"), §§ 13(a), 15(d), 15 U.S.C. §§ 78m(a), 78o(d). As part of this reporting obligation, Sections 13(a) and 15(d) require officers to personally sign their company's periodic reports, effectively certifying to the best of their knowledge the accuracy and completeness of information (including financial statements) contained therein. Although Section 32(a) of the Exchange Act imposes criminal penalties for willful violations of the Exchange Act and the SEC's rules thereunder -- including the reporting requirements of Sections 13(a) and 15(d), see Exchange Act § 32(a), 15 U.S.C. § 78ff(a) -- there is no reported criminal case under Section 32(a) to enforce the provisions of Section 13(a).¹

¹ United States v. Colasurdo, 453 F.2d 585 (2d Cir. 1971), cited by the Government (Br. at 5 & n.2), is not to the contrary because the defendants in that case were charged under an entirely separate clause of Section 32(a) that criminalizes the knowing and willful making of a "false

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The certification requirement of Section 906 of Sarbanes-Oxley neither replaces the Section 13(a) signature requirement nor adds anything new to the Exchange Act's reporting scheme. Section 906 simply makes the signing of quarterly and annual SEC reports a potentially criminal act. Congress, in doing so, however, has not specified with particularity the requisite mental state that will subject CEOs and CFOs to criminal prosecution under Section 906, as opposed to civil charges under the Exchange Act. The statute gives no guidance as to when conduct is punishable criminally versus civilly. The vagueness concern is increased by virtue of the extraordinary ease with which the Government, without explicit standards, can invoke the harsh criminal penalties of Section 906(c) and creates the risk of arbitrary and standardless criminal prosecution.

A. Sarbanes-Oxley's Legislative History Is Itself Vague And Indefinite Thus Requiring That Section 906 Be Construed As Written

The Supreme Court has made clear its preference to construe a statute according to its plain meaning without resort to legislative history. See, e.g., Ex parte Collett, 337 U.S. 55, 61 (1949). Functionally, "the default rule in statutory interpretation is plain meaning." William N. Eskridge, Jr. et al., Legislation and Statutory

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or misleading statement." The Second Circuit specifically noted that the conviction under review involved a violation of Section 32(a) "for making a materially false or misleading statement, rather than for violating a rule or regulation." Id. at 549. In addition, in contrast to Section 906 of Sarbanes-Oxley, the conduct charged in Colasurdo required the Government to prove explicit and detailed *mens rea* elements.

Interpretation, 223 (Found. Press 2002). Legislative history is considered only when there is "reliable evidence of consensus within the legislature that can be routinely discerned." Id. at 296 (emphasis added). In the case of Section 906 of Sarbanes-Oxley, there simply is no "reliable" evidence of congressional "consensus."

Section 906 of Sarbanes-Oxley, the product of a "congressional stampede," 148 Cong. Rec. H5462, H5465 (July 25, 2002) (remarks of Rep. Boehner), represents one of the most radically ill-conceived revisions to the federal securities laws since their original enactment in the 1930s. Given the frantic pace with which Section 906 was pushed through the legislative process in only three weeks, it is no surprise that Sarbanes-Oxley's legislative history offers no meaningful guidance to clarify the statute's ambiguous language. Neither the relevant conference committee report, statements made by members of Congress on the floor, nor the ex post facto legislative history of Senator Biden exclusively relied upon by the Government (see, e.g., Opposition Of The United States To The Motion Of Defendant Richard M. Scrushy To Dismiss Counts 48-50 Of The Indictment ("Br.") at 4-8), provide the needed clarification. Consequently, the Court must utilize the default rule favored by the Supreme Court, which is to construe Section 906 as written.

1. Legislative History Does Not Clarify Section 906's Ambiguity

The Government represents that the Conference Committee retained in Section 906 in "substantially identical form" the certification provision proposed in

S.2673. (Br. at 3.) This is simply not the case. In fact, the Conference Committee rejected the certification proposal in S.2673 and instead drafted its own new certification provision. Compare 148 Cong. Rec. S6735, 6793 (July 15, 2002), with H.R. Conf. Rep. No. 107-610, at 63 (July 24, 2002) ("Conf. Rep."). The Conference Committee's version was reported to Congress and now appears in Section 906. See Conf. Rep. at 63.

Because the Conference Committee drafted Section 906, it is the best potential source of legislative history. See Eskridge, supra, at 302 ("Committee reports are the most useful legislative history" (*italics omitted*)). However, no such guidance is available here because the Conference Committee did not make a record of its deliberations. The conference report has neither analysis nor discussion of Section 906. See H.R. Conf. Rep. No. 107-610 (July 24, 2002). The best potential source of legislative history -- the conference report -- is thus silent on the issues this Court must address, as a case of first impression, in conducting its vagueness analysis.

A secondary but less reliable potential source of legislative history regarding Section 906 is the House and Senate floor debates on July 25, 2002 prior to Congress' approval of the conference report. Unfortunately, these floor debates also provide no clear evidence of congressional intent nor evidence of consensus. In fact, the cacophony of statements made by members of Congress is as conflicting and inconclusive as Section 906 is vague and ambiguous. Many of the congressmen's remarks describe Section 906's provisions in a manner inconsistent with statements made by other members of both

houses. More importantly, the remarks on that day fail to comport with the statutory language that emerged from the Conference Committee. Senator John Kerry, for example, apparently was under the mistaken belief that the enhanced penalties under Section 906(c)(2) apply to only Chief Executive Officers who themselves falsify financial information in periodic reports: "The conference report requires CEOs to certify their financial statements or face up to 20 years in prison for falsifying information on [sic] reports." 148 Cong. Rec. S7350, S7360 (July 25, 2002) (statement of Sen. Kerry). Other members of Congress who supported the legislation made remarks which suggested that they mistakenly believed Section 906's certification requirement covered only financial statements even though the plain language of Section 906 requires certification of all information contained in periodic reports, including information unrelated to financial statements. Consider the following inconsistent and divergent statements:

Sen. Leahy: expressing the belief that the conference report creates "a new crime for certifying false financial statements." 148 Cong. Rec. at S7358.

Rep. Sensenbrenner: "The legislation punishes top corporate executives that certify the financial statements of the company . . ." 148 Cong. Rec. at H5464.

Rep. Maloney: Section 906 "requires CEOs and CFOs to certify the accuracy of their company's financial statements . . ." See id.

Rep. Waters: "This bill will make corporate CEOs and others responsible. They will have to sign the financial statements . . ." See id. at H5466.

In light of these and other similarly conflicting and contradictory statements by lawmakers, the floor debates are an inconclusive and unreliable source of legislative

history. See Eskridge, supra, at 304 ("After committee reports and sponsor statements, the reliability of legislative history falls off rapidly."). Moreover, the considerable confusion and variance of interpretation among even members of Congress who voted to enact Section 906 underscores the conclusion that the statute fails to provide persons of ordinary intelligence with the requisite "fair notice" of the conduct it proscribes.

2. Senator Biden's Oxymoronic Subsequent Legislative Analysis Interpretation Of Section 906 Carries No Authoritative Weight In Determining The Meaning Of The Ambiguous Statutory Language

Implicitly acknowledging that the phrase "willfully certifies" in Section 906(c)(2) is incomprehensible, the Government argues that the certification penalty provision survives vagueness scrutiny because of "interpretive guidance" provided by Senator Biden on April 11, 2003 as part of his section-by-section analysis that he inserted into the Congressional Record, many months after the passage of Section 906(c)(2). ("Biden Analysis"). (Br. at 4.) Based solely on the Biden Analysis, the Government contends that the ambiguity of "willfully certifies" in Section 906(c)(2) is resolved by construing it to require specific intent. (Br. at 7-8, 19-20.)

The Government's reliance on the Biden Analysis is profoundly misplaced in several critical respects. First, the Biden Analysis has no probative weight in determining

the meaning of Section 906(c)(2) because it represents only the personal, post-enactment views of Senator Biden rather than the understanding of the full Congress at the time it passed Sarbanes-Oxley.² See, e.g., Regional Rail Reorganization Act Cases, 419 U.S. 102, 132 (1974); Sullivan v. Finkelstein, 496 U.S. 617, 632 (1990) (Scalia, J., concurring in part) ("[T]he views of a legislator concerning a statute already enacted are entitled to no more weight than the views of a judge concerning a statute not yet passed."); European Cmty. v. RJR Nabisco, Inc., 355 F.3d 123, 135 (2d Cir. 2004) (rejecting a section-by-section analysis as a competent source of legislative intent because it was "simply Senator Leahy's own discussion of the provisions of the Act"), petition for cert. filed, 72 U.S.L.W. 3659 (Apr. 12, 2004) (No. 03-1427); University Hosp. Of Cleveland v. Emerson Elec. Co., 202 F.3d 839, 848 n.7 (6th Cir. 2000) (courts "do not look to post-enactment statements of legislators when determining the meaning of statutes"); Kirby v. Tennessee Valley Auth., 877 F. Supp. 589, 591 (N.D. Ala. 1994) (post-enactment statements proffered by individual legislators are inadmissible to establish legislative intent). And, contrary to the Government's repeated references in its brief to the Biden Analysis as "legislative history," it simply is not part of Sarbanes-Oxley's legislative

² Even Senator Biden himself made clear that his analysis represents his own interpretation of Section 906, not that of Congress. See 149 Cong. Rec. S5325, S5326 (Apr. 11, 2003) (Statement of Sen. Biden) ("In order to provide guidance in the legal interpretation of those provisions, I have compiled the following analysis and discussion . . ." (emphasis added)).

history and cannot be considered in attempting to clarify the meaning of its statutory language. As the Court of Appeals for the Fifth Circuit emphasized in Rogers v. Frito-Lay, Inc., 611 F.2d 1074 (5th Cir. 1980):

The retroactive wisdom provided by the subsequent speech of a member of Congress stating that yesterday we meant something that we did not say is an ephemeral guide to history. . . . What happened after the statute was enacted may be history and it may come from members of the Congress, but it is not part of the legislative history of the original enactment.

Id. at 1080 (emphasis added); see also Goolsby v. Blumenthal, 581 F.2d 455, 460 (5th Cir. 1978) (a post-enactment "Statement of Congressional Intent" by members of Congress was "not part of the legislative record and cannot be considered when determining congressional intent"). Indeed, the leading treatise on statutory interpretation characterizes as "oxymoronic subsequent legislative history" remarks like those of Senator Biden and considers them to be the most unreliable source of interpretive guidance. See Eskridge, supra, 295, 306 ("After-the-fact statements seem particularly prone to insincerity and are not as likely to be refuted if misleading."). Thus, such post-enactment remarks are "highly disfavored for both rule of law and policy reasons." Id. at 306 & n.44 ("The Rehnquist Court has taken a harder rhetorical line against subsequent legislative history.").

Second, although the Government would like this Court to judicially legislate into existence Senator Biden's "amendment" regarding "willful certification," Senator Biden simply is not a reliable source for determining the meaning of that provision. He

was not a member of the Conference Committee that drafted it.³ In fact, his certification provision, contained in S.2673, was explicitly rejected by the Conference Committee in favor of its own certification provision that Congress enacted as Section 906. See Conf. Rep. at 63.

As proposed by Senator Biden in S.2673, Section 906(c)(2) would have provided that:

(c) Criminal Penalties. - Notwithstanding any other provision of law -

. . . . (2) any person who willfully violates any provision of this section shall upon conviction be fined not more than \$1,000,000, or imprisoned not more than 10 years, or both.

148 Cong. Rec. S6735, S6793 (July 15, 2002) (emphasis added).

The phrase "willfully certifies" in Section 906(c)(2) of Sarbanes-Oxley did not even appear in Senator Biden's version of the certification provision that the Conference Committee rejected. And, because Senator Biden was not a member of the Conference Committee, he did not participate in its deliberations when it created the subsection (c)(2) "willfully certifies" provision. See Eskridge, supra at 304 (characterizing as "not very reliable" statements by legislators "without institutional responsibilities for the bill

³ The Senate conferees were Senators Sarbanes, Dodd, Johnson, Reed, Leahy, Gramm, Shelby, Bennett and Enzi. See H.R. 3763, Bill Summary & Status at 4, 107th Cong. (2002).

[because they] face few sanctions for inaccuracies or misrepresentations, and their misstatements are less likely to be monitored or corrected."). Thus, Senator Biden is in no position to offer authoritative guidance as to Conference Committee's purpose and intent in incorporating "willful certification" into Section 906(c)(2). See United States v. United Mine Workers of Am., 330 U.S. 258, 281-82 (1947) (refusing to accept post-enactment opinions regarding the legislative intent of the Norris-LaGuardia Act as authoritative guides to statutory construction because none of the Senators who expressed them was a member of the committee that reported the bill Congress later enacted); Disabled In Action of Metro. N.Y. v. Hammons, 202 F.3d 110, 126 n.16 (2d Cir. 2002) (recognizing that little weight is accorded to statements by members of Congress not involved in the drafting and consideration of challenged legislation).

Third, the Biden Analysis is of no guidance to this Court in any event because it was not published until long after Defendant Scrushy allegedly committed the violations of Section 906(c)(2) charged in Counts 48-50 of the Indictment.⁴ Thus, even if the Biden Analysis could resolve Section 906's ambiguities, the statute still would be void for vagueness as to Defendant Scrushy because at the time he is alleged to have

⁴ The Biden Analysis was published on April 11, 2003. See 149 Cong. Rec. S5325 (Apr. 11, 2003). The violations of Section 906(c)(2) with which Defendant Scrushy is charged in counts 48, 49 and 50 allegedly occurred on August 14, 2002, November 14, 2002 and March 18, 2003, respectively.

committed the charged offenses in August 2002, he had not received the constitutionally-required "fair notice" of what Section 906(c)(2) proscribes, see Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939), and Senator Biden's belated history in April 2003 offered by the Government does not and cannot supply it ex post facto.

Finally, this Court cannot accept the Biden Analysis as an authoritative source of legislative intent because its interpretation of Section 906(c)(2) is a tortured construction of the statute that blissfully defies the plain language of its terms. See Bouie v. City of Columbia, 378 U.S. 347, 362-63 (1964) (a court is not "justif[ied] in departing from the plain meaning of words, especially in a penal act, in search of an intent which the words themselves do not suggest"); United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 83 (1932) (legislative history "cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms"). The blunt reality is that whether or not the provision of Section 906(c)(2) that Senator Biden proposed in S.2673 is amenable to the interpretation as set forth in the Biden Analysis, neither his proposal nor his pseudo history is what Congress had in mind when it enacted Section 906. Thus, the Biden Analysis is merely Senator Biden's attempt "to smuggle into judicial consideration" his own version of legislative history in an effort to incorporate retroactively into Section 906(c)(2) the language proposed in his version of the certification requirement that Congress declined to enact. See Sullivan, 496 U.S. at 631 (Scalia, J., concurring in part); see also Eskridge, supra, at 302 (sources other than

committee reports and sponsor statements are markedly less reliable because "[t]here is less reason to think that such material reflects the views of the enacting coalition and more reason to worry that it might have been strategically planted"). This Court cannot reinsert into the statute Senator Biden's version of the certification provision nunc pro tunc. See J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 563 (1981) (when Congress enacts legislation omitting a provision deleted in conference committee, a court may not "judicially legislate" by construing the statute to include the provision); Moore v. American Fed. of Tel. & Radio Artists, 216 F.3d 1236, 1246 (11th Cir. 2000) (refusing to adopt a reading of a statute explicitly deleted during conference committee).

In sum, lacking clear, reliable and authoritative legislative history that resolves Section 906's ambiguities, this Court in performing the vagueness analysis is left with only the undefined and undifferentiated language of the statute itself. See Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 412 n.29 (1971). Adherence to the plain meaning rule is particularly important here because this Court's consideration of Section 906's constitutionality is an issue of first impression, the outcome of which will have a far-reaching impact on future applications of the law. A matter of such widespread public importance must be determined based on the intent of Congress as expressed in the statute itself rather than inconclusive, unreliable and self-serving legislative history.

B. The Government Oversimplifies The Vagueness Doctrine And Fails To Appreciate Its And Scope

Since the vagueness doctrine invalidates Section 906 on constitutional grounds, the Government attempts to avoid application of the constitutional rule by arguing that: (1) in a case like this involving a statute that does not implicate First Amendment rights, courts should rarely, if ever, apply the vagueness doctrine; (2) in rare cases in which the vagueness doctrine is applied outside the First Amendment context, courts determine only whether the statute is vague "as applied;" and (3) Defendant Scrusby's vagueness challenge is premature. (Br. at 17-24.) The Government is wrong on all three counts.

1. The Vagueness Doctrine Operates Independently Of The First Amendment And Applies To Criminal Statutes Like Section 906

The Government's contention that the vagueness doctrine is primarily concerned with protecting First Amendment freedoms and is rarely applied outside that context is belied by more than a century of Supreme Court precedent to the contrary, dating back to the advent of the "principle of legality." That principle posits that "conduct may not be treated as criminal unless it has been so defined by [a competent] authority . . . before it has taken place." United States v. Lanier, 520 U.S. 259, 265, n.5 (1997) (quoting H. L. Packer, The Limits of the Criminal Sanction, 79-96 (1968)). The principle of legality is a "very widely accepted ideal:"

Put simply, the principle forbids retroactive crime definition. Often reduced to the maxim, nulla poena sin

lige, . . . the essential idea is that no one should be punished for a crime that has not been . . . defined in advance. . . . This precept is widely recognized as a cornerstone of the criminal law.

Bonnie, Coughlin, Jeffries, Jr. and Low, Criminal Law, 35-36 (Found. Press, 1997).

The vagueness doctrine is a manifestation of the principle of legality's "fair warning" requirement, see Lanier, 520 U.S. at 266 (citing Packer supra, at 79-80 ("Functionally, the vagueness doctrine is the instrument by which the courts keep the principle of legality in good repair.")), that was applied to the criminal law long before the vagueness doctrine was used in the First Amendment setting, see United States v. Reese, 92 U.S. 214, 221 (1875) ("It would certainly be dangerous if the legislature could 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."), and even before the modern articulation of the vagueness concept as a violation of due process. In fact, the "Supreme Court, in early cases, overturned federal convictions under vague statutes without reference to any particular constitutional proscription." LaFave, Criminal Law §2.3 at 97 n.1 (West Group, 3d ed., 2000) (citing United States v. Brewer, 139 U.S. 278 (1891)).

Contrary to the Government's contention, the constitutional requirements of the vagueness doctrine -- to give "fair notice" of what the law proscribes and to prevent arbitrary and discriminatory enforcement, see Timmons v. City of Montgomery, 658 F. Supp. 1086, 1088-89 (M.D. Ala. 1987) (citing Kolender v. Lawson, 461 U.S. 352, 357

(1983)) -- apply to all laws, A.B. Small Co. v. American Sugar Ref. Co., 267 U.S. 233, 239 (1925) (vagueness doctrine not confined to the criminal law but applies to civil statutes as well), not just those in the First Amendment arena. On many occasions the Supreme Court has invalidated even non-criminal, commercial statutes on vagueness grounds. See e.g., Champlin Ref. Co. v. Corporation Comm'n of Ok., 286 U.S. 210, 242-43 (1932) (striking down as vague the term "waste" in an oil industry regulation).

Thus, the vagueness doctrine requires a criminal statute to define with sufficient definiteness the *mens rea* and *actus reus* it proscribes. See Morissette v. United States, 342 U.S. 246, 251-52 (1952) ("Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil."). Although the vagueness doctrine is strictly applied to laws affecting First Amendment rights, it is equally intolerant of ambiguity and indefiniteness in criminal laws, see Exxon Corp. v. Busbee, 644 F.2d 1030, 1033 (5th Cir. 1981) ("[T]he void-for-vagueness doctrine is most rigorously applied in the context of penal statutes and in the area of First Amendment rights" (internal citation omitted)),⁵ especially criminal statutes like Section

⁵ The Government shamelessly cites Busbee for the purported rule that, "to be void for vagueness, a statute must be 'substantially incomprehensible'" (Br. at 18), even though Busbee itself explicitly states that this stringent vagueness test is inapplicable to criminal statutes, see

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906(c)(2) that impose harsh penalties, see Kolender, 461 U.S. at 358 n.8 ("where a statute imposes criminal penalties, the standard of certainty is higher"); Connally v. General Constr. Co., 269 U.S. 385, 393 (1926) (strict vagueness test applied to criminal law that imposed "severe and cumulative penalties"). In short, this Court should not be misled by the Government's erroneous assertion that the vagueness doctrine does not apply to Section 906. Rather, the vagueness doctrine applies here and should be enforced rigorously in light of the statute's severe criminal penalties.

2. An "As Applied" Vagueness Test Resembles A Facial Challenge With Respect To Statutes Like Section 906 That Have No Governing Standards

The Government insists that because Defendant Scrusby does not challenge Section 906 on First Amendment grounds, he may not attack the statute as vague on its face but only "as applied." (Br. at 2-3, 11-12, 15, 17-23.) This contention misconceives, however, the Supreme Court's blending of the facial and "as applied" vagueness tests in the context of statutes like Section 906 that have no governing standards. In Smith v. Goguen, 415 U.S. 566 (1974), the respondent argued, like the Government here, that Goguen could not challenge a law criminalizing "treat[ing] the flag of the United States contemptuously" as void for vagueness on its face, but only as applied, and that because

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644 F.2d at 1033, like Section 906. Even if the Busbee test were applied to criminal laws, Section 906 is without question "substantially incomprehensible."

Goguen's alleged conduct was prohibited by the statute, it was not unconstitutionally vague as to him. The Supreme Court, however, struck down the statute using an "as applied" vagueness test without reference to Goguen's alleged conduct. See id. at 577.

The Court explained:

[Respondent takes the position] that Goguen's behavior rendered him a hard-core violator as to whom the statute was not vague, whatever its implications for those engaged in different conduct. To be sure, there are statutes that by their terms or as authoritatively construed apply without question to certain activities, but whose application to other behavior is uncertain. The hard-core violator concept makes some sense with regard to such statutes. The present statute, however, is not in that category. This criminal provision is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." . . . The absence of any ascertainable standard for inclusion and exclusion is precisely what offends the Due Process Clause.

Id. at 578 (quoting Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971) (emphasis added)).⁶ The Court's "as applied" analysis in Goguen did not proceed beyond the statutory text to consider whether it was vague as applied to Goguen because the statute

⁶ The Court took a similar approach in United States v. National Dairy Products Corp., 372 U.S. 29, 31-32 (1963), in considering a vagueness challenge to Section 3 of the Robinson-Patman Act: "It is true that a statute attacked as vague must initially be examined 'on its face,' but it does not follow that a readily discernible dividing line can always be drawn, with statutes falling neatly into one of the two categories of "valid" or "invalid" solely on the basis of such an examination. . . . Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed."

was devoid of any discernable standards to apply. See id. Thus, "[t]reating the as-applied and on-the-face vagueness attacks as essentially indistinguishable," the Court's "resolution of Goguen's void-for-vagueness challenge to the statute as applied to him necessarily adjudicate[d] the statute's facial constitutionality" as well. Id. at 571-72 (citation omitted).

Section 906 is not vague in that it contains merely an "imprecise but comprehensible normative standard;" rather, by failing to define the hopelessly ambiguous and indefinite phrases "willfully certifies" and "fairly presents," and "in all material respects," Section 906 falls into the category of similar enactments the Supreme Court has condemned as vague "in the sense that no standard of conduct is specified at all." See Coates, 402 U.S. at 614 ("annoy" in anti-loitering statute devoid of standards); see also Goguen, 415 U.S. at 578 ("treats contemptuously" devoid of standards); Connally, 269 U.S. at 393-95 ("current rate of wage" and "locality" in minimum-wage law devoid of standards); Champlin, 286 U.S. at 242-43 ("waste" in a oil regulatory statute devoid of standards); L. Cohen Grocery Co., 255 U.S. at 89 ("unjust or unreasonable rate or charge" devoid of standards). Because Section 906 is devoid of any

discernable, objective standards to govern its application, this Court's "as applied" analysis begins and ends with the statute itself.⁷

3. Defendant Scrushy's Vagueness Challenge Is Not Premature

Despite clear Supreme Court precedent to the contrary, the Government insists that Defendant Scrushy's vagueness challenge is premature because "whether Section [906] 'clearly applies' to Scrushy's conduct as alleged in the indictment is a matter for proof at trial." (Br. at 22-24.) This argument is plainly invalid.

It is axiomatic that in this country no person is obligated to go to trial to defend himself when he has made a constitutional challenge⁸ to a statute unless a court first finds that the statute under which that prosecution will proceed is valid. See Fawcett v. Bablitch, 967 F.2d 617 (7th Cir. 1992). The Government cannot leap over that hurdle and ask this Court first to hear the evidence against the defendant. There is no such "trial

⁷ The two Eleventh Circuit cases cited by the Government which state that vagueness challenges not raising First Amendment issues are analyzed "as applied," do not require a different result because neither case involved a statute devoid of "any ascertainable standard," like Section 906(c)(2). (Br. at 17).

⁸ Once the defendant raises the issue, Federal Criminal Rule 12(b)(3) requires the court to decide the matter before trial.

evidence" rule for as applied vagueness challenges and none of the cases cited by the Government stands for that proposition.⁹

Thus, the Government's plans or hopes as to the evidence it intends to present at trial have no bearing on this Court's determination of whether Section 906 is unconstitutionally void for vagueness as a matter of law. See United States v. Petrillo, 332 U.S. 1, 5-6 (1947) (vagueness challenge decided pretrial because "no refinement or clarification of issues which we can reasonably anticipate would bring into better focus the question of whether the contested section is written so vaguely and indefinitely that one whose conduct it affected could only guess what it meant"); United States v. Fabro, Inc., 206 F. Supp. 523, 525 (M.D. Ga. 1962) (rejecting the same assertion made by the Government here that "the constitutionality of the statute as applied should not be determined on a motion to dismiss," because there was "no reasonable likelihood that the production of evidence will make the answer to the [vagueness] question[] clearer The answer to that question is apparent upon the face of the statute itself"). The

⁹ Neither Parker v. Levy, 417 U.S. 733 (1974), nor Bama Tomato Co. v. U.S.D.A., 172 F.3d 1542 (11th Cir. 1997), has anything to do with postponing vagueness challenges. And United States v. Adkinson, 135 F.3d 1263 (11th Cir. 1998), is not even a vagueness case. (Br. at 23-24.) Yet, Adkinson indicates why this Court's ruling on Defendant Scrushy's vagueness challenge need not be postponed: "A defense [raised in a motion to dismiss] is capable of pretrial determination if trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense." Id. at 1369 n.11.

Government's "wait and see" approach would only undermine the vagueness doctrine by forcing Defendant Scrushy to bear the considerable burden of defending at trial an alleged violation of an invalid statute, Section 906(c)(2).

C. Section 906 Is Unconstitutionally Vague

The requirements of *actus reus* and *mens rea* are "basic premises which underlie the whole of Anglo-American substantive criminal law." LaFave, supra, § 3.1, at 204. A criminal statute must define clearly the requisite *mens rea* and *actus reus* constituting the offense. See Morissette v. United States, 342 U.S. 246, 251 (1952). The absence of an intelligible standards in Section 906(c)(2) underscores the vagueness of the statute.

The Supreme Court has made clear that statutes that criminalize non-compliance with complex regulatory schemes require a heightened standard of culpable *mens rea*. In Ratzlaf v. United States, 510 U.S. 135 (1994), the Supreme Court considered a criminal provision that prohibited the evasion of a bank's duty to report cash transactions of more than \$10,000 by "structuring" transactions to avoid triggering a bank's reporting obligation. The Supreme Court held that to willfully violate the anti-structuring law, a defendant must act with specific intent and know that his structuring of currency transactions to avoid triggering a bank's reporting obligation is unlawful. Similarly, in Cheek v. United States, 498 U.S. 192, 201-02 (1991), the Court construed criminal tax provisions to require proof of the defendant's specific intent to commit the

offense and his awareness of the particular provision of the tax code he was charged with violating.

The Government argues, incorrectly, that Section 906(c)(2) can be saved from its constitutional invalidity under the vagueness doctrine simply by reading into it the Ratzlaf/Cheek heightened *mens rea* standard. (Br. at 8.) The Government proceeds under the erroneous presumption that the word "willfully" in and of itself automatically provides a statute with a clearly-defined scienter requirement.¹⁰ In the process, the Government seeks to redraft Section 906(c)(2) nunc pro tunc so that the statute would read "willfully violates" instead of "willfully certifies." (See, e.g., Br. at 7.) This post-enactment surgical restructuring must fail, especially when it could result in severe draconian penalties.

¹⁰ The Government's assertion that Defendant Scrusby's vagueness claim is "rebutted" by "Congress' careful definition of 'willfulness' in the context of Section [906(c)(2)] and the term's well-settled meaning as established by cases like Bryan [v. United States, 524 U.S. 184, 191 (1998)] . . ." (Br. at 19 n.6.) could not be more unfounded. The word "willfully" is not defined in Section 906 or anywhere else in Sarbanes-Oxley. And in Bryan, the Supreme Court noted that the meaning of willfully, far from being "well-settled," is "a word of many meanings whose construction is often dependent on the context in which it applies." 524 U.S. at 191.

1. The Government's Ex Post Facto Statutory Reconstruction Is Invalid

The Government's analysis is flawed because of the structure of subsection (c)(2) and the positioning of "willfully" in the convoluted language of the provision. The Government ignores the plain fact that there is no discernable *mens rea* in Section 906(c)(2) because, as enacted by Congress, the adverb "willfully" modifies only the verb "certifies" -- which is itself a non-culpable, neutral act that always will be undertaken volitionally. Thus, inserting "willfully" before "certifies" adds nothing to the meaning of Section 906(c)(2), and certainly does not supply the missing scienter requirement, which explains why the phrase "willfully certifies" appears in no other provision of Title 18 or anywhere else in the United States Code.

The Government nevertheless urges that the vagueness problem created by Section 906(c)(2)'s use of the non-culpable, neutral word "certifies" can be cured by interpreting "certifies" to mean "violates," the term that appeared in subsection (c)(2) of the certification provision Senator Biden proposed in S.2673, (see, e.g., Br. at 7 , 8), but which was rejected. Such a construction is foreclosed, not only by the plain text of the statute, but also by the legislative evolution of the provision. It is absolutely clear that the Conference Committee to which S.2673 was referred, expressly rejected the term

"violates" and substituted "certifies" in its place -- clear evidence that the Conference Committee, by rejecting a broader provision of the willfulness requirement, intentionally chose to use "willfully" to modify only "certifies" in Section 906(c)(2).¹¹ As the Court of Appeals for the First Circuit pointed out in Goncalves v. Reno, 144 F.3d 110, 132 (1st Cir. 1998), "[a] contrast in statutory language is 'particularly telling' when it represents a decision by a conference committee to resolve a dispute in two versions of a bill, and the committee's choice is then approved by both the House and Senate." See also In re Flo-Lizer, Inc., 916 F.2d 363, 365 (6th Cir. 1990) ("A rejected [legislative] proposition strongly militates against a judgment that Congress intended a result: that it expressly declined to enact.").

Had Congress intended to use the phrase "willfully violates" or to combine "willfully" with some other culpable act in Section 906(c)(2), it knew how to do so, as it did elsewhere in the Sarbanes-Oxley Act, see, e.g., Sarbanes-Oxley, § 802(b) ("Whoever knowingly and willfully violates subsection (a)(1)" (emphasis added)), and in other criminal statutes, see, e.g., 31 U.S.C. § 5322(a) (prescribing criminal penalties under the Bank Secrecy Act for "willfully violating this subchapter" (emphasis added)). In short, Congress clearly made a conscious decision to have the term "willfully" modify the

¹¹ See, discussion supra, at 11.

word "certifies" in Section 906(c)(2), and that conclusion cannot be disturbed by judicial construction. As the Supreme Court observed in INS v. Cardoza-Fonseca, 480 U.S. 421, 442-43 (1987), "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language."¹²

Moreover, the vagueness defects of Section 906(c)(2) are not cured despite the Government's urging, by the requirement that the certification must state that the financial report "fully complies with the requirements of sections 13(a) and 15(d)" of the Exchange Act because these requirements have been part of the SEC's reporting regime since Exchange Act was enacted. Yet, failure to comply with these reporting

¹² That Section 906(c)(2) contains a *mens rea* element that is indistinguishable from the standard of subsection (c)(1), creates the additional risk that it opens the door to discriminatory and arbitrary enforcement by prosecutors who are left to impose at their whim the more severe sanctions under subsection (c)(2) over those provided in subsection (c)(1). See Defendant Scrushy's Motion To Dismiss Counts 48-50 Of The Indictment ("Mot.") at 16-17. Remarkably, even the Government concurs on this point. See Tom Hanusik, Trial Attorney, U.S. Dept of Justice, Fraud Section, Sarbanes-Oxley: Broader Statutes-Bigger Penalties, U.S. Atty's Bull. 13, 16 (Vol. 51, No. 3, May 2003) ("Although it is difficult to practically demonstrate the legal ramifications of section [906's] distinction between knowing violations [*i.e.*, Section 906(c)(1)] and willful violations [*i.e.*, Section 906(c)(2)], . . . in the context of section [906], it is clear that Congress intended to draw a distinction between those who knowingly certify false financials and those who willfully do so - a distinction that has a difference of up to ten years in jail. In practice, this distinction will fall almost entirely into the realm of prosecutorial discretion." (emphasis added)).

requirements never before has been deemed to be "wrongful" in the criminal sense.¹³ Section 906 of Sarbanes-Oxley, by merely making the very same underlying conduct a potential crime but failing to distinguish between the conduct necessary to constitute a civil versus criminal violation, falls short of the particularity and definiteness that the Due Process Clause demands and opens the door to standardless criminal prosecution. See Tom Hanusik, Trial Attorney, U.S. Dep't of Justice, Fraud Section, Sarbanes-Oxley: Broader Statutes-Bigger Penalties, U.S. Atty's Bull. 13, 16 (Vol. 51, No. 3, May 2003) ("Although it is difficult to practically demonstrate the legal ramifications of section [906's] distinction between knowing violations [*i.e.*, Section 906(b)(1)] and willful violations [*i.e.*, Section 906(c)(2)], . . . in the context of section [906], it is clear that Congress intended to draw a distinction between those who knowingly certify false financials and those who willfully do so - a distinction that has a difference of up to ten years in jail. In practice, this distinction will fall almost entirely into the realm of prosecutorial discretion." (emphasis added)).

The Government cannot derive constitutional comfort by pointing to the undefined phrase "fairly presents, in all material respects" in Section 906(b). (Br. at 21-22.) As explained in our opening brief, "fairly presents" defies comprehension because it

¹³ See, supra, n.1 (discussing Colasurdo); see also Mot. at 7 n.2 (discussing United States v. Guterma, 281 F.2d 742 (2d Cir. 1960)).

is intrinsically subjective and open-ended in scope, encompassing an infinite variety of presentations that may be deemed "unfair" depending solely upon an individual's own predilections and sensitivities. (Mot. at 17-19.) In response to that concern, the Government makes only the bald assertion that "fairly presents" is a phrase "that ordinary people can understand." (Br. at 20.) In support, the Government cites three wildly inapposite cases in which the words "fairly presents" were used in contexts wholly unrelated to the certification requirement at issue here. In two, United States v. Massell, 823 F.2d 1503, 1510 (11th Cir. 1987), and United States v. Duff, 707 F.2d 1315, 1321 (11th Cir. 1983), the phrase appears in the court's recitation of the general rule that a trial court has broad discretion to formulate a jury instruction provided it "fairly presents the issues to the jury." In the third, Goldberg v. C.I.R., 223 F.2d 709, 710 (5th Cir. 1955), the court used the phrase merely in stating that its recitation of the facts of the case, "being taken from the brief of the respondent, fairly presents the evidence relied on as supporting the Tax Court's decision." Nothing in these cases supports the Government's position that "fairly presents" as used in Section 906(b) is a phrase that ordinary people can reasonably understand in the context of conforming their conduct to a criminal statute.

Equally devoid of merit is the Government's naked contention that Section 906(b)'s use of "in all material respects" is not impermissibly vague because the phrase "has a well-defined meaning" in the criminal law. (Br. at 21.) The so-called "well-

defined meaning" of materiality brings no clarity to Section 906's vagueness, however, because it is itself an open-ended standard that broadly covers any information as long as there is a "substantial likelihood" that the information would be viewed by "the reasonable investor as having altered the 'total mix' of information made available." Basic, Inc. v. Levinson, 485 U.S. 224, 231-32 (1988). And, as if the materiality standard were not already indefinite enough, in the context of financial statements, the SEC has further muddied the waters by expressly requiring that "materiality" be determined in light of a variety of highly-subjective criteria depending upon the circumstances of a particular case. See SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45150, 45152 (1999) ("Evaluation of materiality requires a registrant and its auditor to consider all the relevant circumstances." Also, "financial management and the auditor must consider both 'qualitative' and 'quantitative' factors in assessing an item's materiality," including whether management's intent as evidence of materiality). Thus, far from resolving the ambiguity of "fairly presents" in Section 906(b), the phrase "in all material respects," especially to the extent it depends on subjective intent, adds yet another layer of vagueness that further deprives corporate officers of fair warning of what the fair presentation requirement demands and forbids. It thus imposes no meaningful, objective constraints on the discretion of law enforcement to curtail arbitrary and indiscriminate enforcement.

Furthermore, the Government cannot be heard to argue or imply that the unconstitutional vagueness of Section 906's fair presentation requirement is of no moment here because no matter how it is interpreted, the sheer size of the financial overstatements alleged in the Indictment cannot be deemed to have been "fairly presented." (Br. at 21 & n.8.) For one thing, paragraphs 1-20 and 48-50 of the Indictment do not refer to the size of the alleged overstatements. For another, this argument is a red-herring because the fair presentation requirement in the statute contains no discernable standards to govern its application. The purported magnitude of the crime alleged cannot save a defective statute. An elephant, by its mere size alone, cannot be charged with "sampling" grass, though it devours an entire plain, when the conduct proscribed, "sampling," is devoid of meaning. As discussed above, criminal statutes like Section 906 cannot stand absent objective criteria to determine when they are violated, Morales, 527 U.S. at 52, 60, and, as the Supreme Court made plain in Goguen, such statutes are constitutionally infirm regardless of the magnitude of the conduct alleged in a particular case. See Goguen, 415 U.S. at 571-72, 577-78.

Even if, as the Government contends, Defendant Scrushy's vagueness challenge were strictly confined to evaluating Section 906(c)(2) as applied, the Indictment is bereft of factual detail to support an "as applied" analysis to the offenses charged in Counts 48 through 50. The only allegations in support of these charges are the allegations contained in paragraphs 1 through 20 of the Indictment, which are

incorporated by reference in Counts 48, 49 and 50, and the assertions set forth in each of the counts themselves. See Indictment ¶¶ 1-20, Counts 48-50. Yet, nowhere in the first twenty paragraphs of the Indictment does the Government specify conduct of Defendant Scrushy that qualifies as any wrongful or criminal conduct that possibly could constitute a Section 906(c)(2) violation. Nor are such facts identified anywhere in the allegations in Counts 48 through 50 themselves, each of which merely charges Defendant Scrushy with violating Section 906(c)(2) by reciting the vague and undefined language of the statute itself. In short, the bare-bones conclusory allegations of counts 48 through 50 lend no support to the Government's primary position that Section 906(c)(2) as applied is not unconstitutionally vague.

2. Section 906's Vagueness And Severe Criminal Penalties Impose An Impossible Duty On A CEO

Section 906's extraordinary vagueness and its coercive threat of criminal prosecution makes compliance with the statute's certification requirement an impossible legal duty. This duty effectively makes CEOs the virtual guarantors of their companies' periodic reports if the reports later are deemed to be inaccurate and subjects them to draconian criminal sanctions. That the statute does so in the event of fraud is one thing. That it can be interpreted to permit its application at the mere prospect of a technical Section 13(a) reporting violation is quite another, and smacks of a strict liability offense. Thus, Section 906 imposes on CEOs a legal duty that is impossible to fulfill at the moment of its undertaking (i.e., the act of certifying SEC periodic reports) and which

CEOs must discharge, on pain of severe criminal sanctions, pursuant to a statute utterly devoid of clearly delineated standards indicating what the duty requires of them. Whether a CEO has complied with this duty is thus left largely to the subjective determination of prosecutors, who may decide for themselves whether or not the CEO is a criminal. The role of the prosecutor thus supercedes the role of the statute, due to its lack of clarity, breadth of application and arbitrary enforcement on the basis of 20/20 hindsight.

This is even more true in large public companies like HealthSouth with complex accounting, auditing and reporting mechanisms. At the time Defendant Scrushy served as HealthSouth's CEO, HealthSouth was a multi-billion dollar company with nearly 50,000 employees, 1800 facilities, and three operating divisions spanning all fifty states, Great Britain, Saudi Arabia and Puerto Rico. In preparing periodic reports, the Company's sheer size necessitated multiple tiers of drafting, judgmental accounting decisions, and audit review (both internal and external) by lower-level employees within various layers of the organization, culminating in the consolidation of financial statements and other information that ultimately were presented to Defendant Scrushy for his certification as HealthSouth's CEO. To compel a CEO under these circumstances to guarantee the accuracy and completeness of information contained in periodic reports is to command the impossible. Thus, the vice of Section 906 is that it imposes an impossible duty on a CEO for the multitude of acts performed far down in the corporate

hierarchy.¹⁴ See United States v. Dalton, 960 F.2d 121, 124-26 (10th Cir. 1992).

Regardless of the pervasiveness of internal controls at a bank, the law cannot stop an employee from breaking into the bank's vault. Likewise, a CEO is simply incapable of being a corporate guardian ad litem.

¹⁴ This is evident when the statute is contrasted with the language of Section 302 of Sarbanes-Oxley, which imposes a separate certification requirement under the Exchange Act. See Exchange Act, § 302, 15 U.S.C. § 7241. Under Section 302(a), a corporate officer is required to certify that, "based on the officer's knowledge, the [periodic] report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of circumstances under which such statements were made, not misleading." Id. § 7241(a)(2). Section 302, which tracks the language contained in the antifraud provisions of Section 10(b) and Rule 10b-5 of the Exchange Act, effectively requires the CEO to certify that he knows of no information or omission in the periodic report that renders it fraudulent within the meaning of the federal securities laws. Thus, to prove a civil violation of Section 302, the SEC carries a heavy burden to show that the CEO certified knowing that the report was fraudulent.

By stark contrast, far less is required for a criminal violation of Section 906's certification requirement. Under Section 906(b), a corporate officer must certify that the periodic report "fully complies with the requirements of Sections 13(a) and 15(d) of the [Exchange Act], and that information contained in the periodic report fairly presents, in all material respects," the issuer's financial condition. 18 U.S.C. s. 1350(b) (emphasis added). In light of the statute's use of the conjunctive "and," to impose criminal liability, the Government need only prove that the underlying periodic report failed to meet a technical (non-fraudulent) Section 13(a) reporting requirement, even though the report still made a materially fair presentation of the issuer's financial position and was not in any way false or misleading.

II. THE CONSTITUTIONAL VAGUENESS INFIRMITY OF SECTION 906 IS COMPOUNDED BECAUSE THE STATUTE CONSTITUTES COERCIVE REGULATION

The Government maintains that Defendant Scrushy cannot argue that Section 906 is constitutionally defective on the ground that it criminalizes "inaction," (i.e., failure to certify) because the Indictment does not charge him with criminal inaction. (Br. at 14-15.) The Government misses the point, namely, that a statute which punishes both action and inaction under a vague standard is, for that reason, constitutionally infirm.

The Supreme Court faced a similar situation in Baggett v. Bullitt, 377 U.S. 360, 361-66 (1964). There, the Court confronted statutes that required state employees, as a condition of employment, to execute vague loyalty oaths subject to penalties of perjury. The statutes required employees to swear allegiance to the United States and/or disclaim being a "subversive person" and a member of the Communist party. In striking down the statutes, the Supreme Court stressed that, as a matter of due process, the Government may not force a person into the position in which they must "choose between subscribing to an unduly vague and broad oath, thereby incurring the likelihood of prosecution, and conscientiously refusing to take the oath with the consequent loss of employment . . ." Id. at 374.

The hazards posed by Section 906 are similar to those presented by the vague loyalty oath laws the Supreme Court invalidated in Baggett. Here, corporate officers are coerced into a position of "damned if you do, damned if you don't." Scrushy had no

choice but to certify. He could not avoid criminal liability by attempting to comply with certification requirements which are so vague and indefinite that he did not know how to conform his conduct to the law. This is the unconstitutional "Catch-22" requirement, or statutorily coercive feature, that Baggett condemns.

The Government fails to realize that criminal inaction under Section 906 is not a separate and distinct offense but part and parcel of the coercion imposed by Section 906 that is indeed a vice of the statute. Even if the alleged inaccuracies contained in periodic reports were brought to the attention of corporate officers responsible for making the Section 906 certification, the threat of severe criminal penalties for failing to certify leaves that officer with no choice but to certify. Such statutes cannot stand in light of the requirements of due process of law. See id.; see generally Dalton, 960 F.2d at 124-26.

III. COUNTS 49 AND 50 MUST BE DISMISSED BECAUSE THEY CHARGE AN UNAVAILABLE AND INCOMPREHENSIBLE INCHOATE OFFENSE

Counts 49 and 50 of the Indictment must be dismissed regardless of the disposition of the other issues raised by this motion because the conduct alleged is not a crime. Count 50 is deficient in three respects: it impermissibly undertakes to construct an unprecedented federal inchoate crime; it charges an offense not authorized under title 18; and it is premised on a faulty *mens rea* theory. Count 49 fails for the same reasons.

A. Impermissible Extension of the Threshold of Criminal Liability

Fundamentally, Count 50 represents the Government's efforts to use this case to construct an unprecedented and broadly reaching crime -- i.e., attempt to cause a third party to violate a criminal statute. But, it seeks to reach too far from the completed act.

The law of attempt, as part of the cluster of inchoate crimes, moves the point of criminality back from the completed act to conduct preceding the completed criminal act.¹⁵ "Liability for an attempted offense is a paradigmatic instance of an inchoate offense. The attempt is inchoate relative to the offense in chief." Fletcher, Rethinking Criminal Law, 132, 134 (1978). But, fundamental principles of criminal law disfavor efforts to move the threshold of crime backward. This concern finds expression in cases rejecting the crime of "attempted attempt." See, e.g., King v. State, 339 So.2d 172, 172 (Sup.Ct. Fla. 1976) ("If a crime is itself an attempt to do an act or accomplish a result, there can be no attempt to commit that crime."); Milazzo v. State, 377 So.2d 1161 (Sup.Ct. Fla. 1979); State v. Dyer, 388 So.2d 374 (Sup.Ct. La. 1980); see also Lowe,

¹⁵ See generally United States v. Plummer, 221 F.3d 1298, 1306 (11th Cir. 2000) ("Attempt, like conspiracy, is an inchoate crime that can be committed regardless of whether the object of the venture is achieved."); United States v. Baptista-Rodriguez, 17 F.3d 1354, 1370 (11th Cir. 1994) ("That the transaction was not consummated is immaterial to the inchoate offenses of conspiracy and attempt."); Enker, Mens Rea And Criminal Intent, A.B.F. Res. J. 845 (1977).

supra, at 23 ("It is nothing short of black letter law to say that there is no such thing as an attempt to attempt a crime.").

Here, the Government undertakes to move the point of criminality back to an impermissible degree. Specifically, Count 50 undertakes to push back the threshold of inchoate criminal liability three steps:

- (1) from the completed act [violation of Section 906(c)(2)],
- (2) to causation of a third party to violate §1350 [violation of §1349],
- (3) to violation of §1350 by virtue of violation of 18 U.S.C. § 2(b), which imposes criminal penalties on a person "who willfully causes an act to be done which if directly performed by him would be an offense."

The Government's unprecedented effort to move criminality back from mere certification, to causing certification, and then to attempted to cause certification must be rejected.

B. The Indictment Impermissibly Charges An Attempt To Commit An Offense Not Within Chapter 63 Of Title 18

Second, the Government's purported attempt charge is not an offense permitted under federal law. "There is no general federal attempt statute. For some substantive crimes, attempt is not criminal. Federal criminal law includes no coherent approach to attempt liability." Welling, et al., Federal Criminal Law and Related Actions §2.6 at 36 (West Group 1998).

The basic principle of federal criminal law is that if an attempt is not defined by a specific statute, attempt cannot be punished. See Keck v. United States, 172 U.S. 434 (1899). Attempt charges are permissible, under settled federal law, only if the statute defining the offense contains an attempt provision.

Count 50 charges that Defendant Scrushy, in violation of 18 U.S.C. § 1349, "attempted" to "cause another person," in violation of 18 U.S.C. § 2, to "willfully certify," in violation of Section 906(c)(2) of Sarbanes-Oxley, 18 U.S.C. § 1350. However, Section 1349 criminalizes attempts to commit offenses arising only under Chapter 63 of Title 18 (covering mail, wire, bank, health care and securities fraud, 18 U.S.C. §§ 1341-1360). Section 2, 18 U.S.C. § 2 (proscribing "willfully caus[ing]" another person to commit a crime), which is an essential component of the charge in Count 50, does not arise under Chapter 63. Thus, the conduct alleged in Count 50 -- an attempt to violate 18 U.S.C. § 2 -- is not a crime under federal law, and must be dismissed. See United States v. Jackson, 560 F. 2d 112, 116 (2d Cir. 1977) ("[T]here is no comprehensive statutory definition of attempt in federal law."). Here, as a matter of plain statutory construction, the attempt charge must fail because 18 U.S.C. § 2 is not one of the offenses specified in Chapter 63.

C. Inconsistent and Mutually Exclusive Mens Rea

Criminal attempt "is more intricate and difficult of comprehension than any other branch of the criminal law." Hicks v. Commonwealth, 9 S.E. 1024, 1025 (1899);

United States v. Mandujano, 499 F.2d 370, 376 (5th Cir. 1974) (noting that courts "give somewhat varying verbal formulations . . . about what conduct will constitute a criminal attempt."). It is settled law that attempt "is a specific intent offense The *mens rea* of attempt . . . is an intent to engage in all of the conduct, result, and circumstance elements that would constitute a criminal offense." Low, Criminal Law, 302 (2d Ed. 2002). Moreover, "[t]here is no such thing as strict liability attempt. . . . An attempt to commit a strict liability offense is . . . possible only if it is shown that the defendant acted with an intent to bring about the proscribed result." United States v. Gracidas-Ulibarry, 231 F.3d 1188, 1194-95 (9th Cir. 2000) (citing 2 LaFave & Scott, Substantive Criminal Law, § 6.2(c)(3), at 28) (ellipses in original).

"The crime of attempt does not exist in the abstract, but rather exists solely in relation to other offenses; a defendant must be charged with an attempt to commit a specifically designated crime, and it is to that crime one must look to identify the kind of intent required." LaFave, supra, at 541.

The specific intent requirement of attempt confounds the multiple *mens rea* problems in Count 50 of the indictment:

(1) Count 48 accuses Defendant Scrushy of violating 18 U.S.C. § 1350(c)(2). In a preceding section of this brief, the notion of "willful certification" has been shown to be an illusory *mens rea* and virtually to transform the crime into a strict liability offense clothed in the apparent doctrine of *mens rea*. It follows from "the generally accepted

notion" that intent is required for an attempt, that there can be no such thing as a strict liability attempt. That is, even if the completed crime can be completed without intent ... the same is not true of an *attempt* to commit that crime." LaFave, Criminal Law, 543 (3d Ed. 2000) (emphasis added).

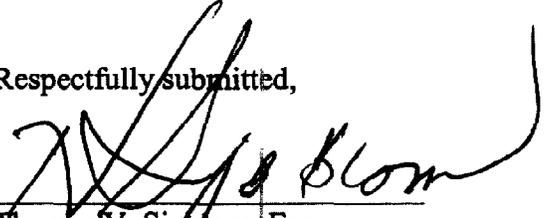
(2) Count 49 accuses Scrusby of "causing" a violation of 18 U.S.C. § 1350(c)(2) in violation of 18 U.S.C. § 2, which in turn, requires the defendant to "willfully cause ... an act." The *mens rea* needed to violate § 2 is inconsistent with the *mens rea* needed to violate § 1350, certifying with *actual knowledge*. The result is a virtual *mens rea* labyrinth, since the attempt charge requires the *mens rea* of the completed act, i.e., actual knowledge, as well as the *mens rea* of the causation, that the defendant act "willfully." The inconsistent *mens rea* elements within Count 50 thus compel dismissal of that count.

CONCLUSION

For all of the forgoing reasons, in addition to those set forth in our opening brief, Defendant Scrusby's Motion To Dismiss Counts 48-50 Of The Indictment should be granted in its entirety.

Dated: May 21, 2004

Respectfully submitted,



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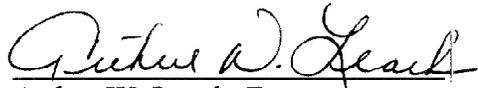
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CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2004 a copy of the foregoing Reply in Further Support of Defendant's Motion to Dismiss Counts 48-50 of the Indictment was served by hand delivery to:

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