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June 25, 2004

**VIA ELECTRONIC & FIRST CLASS
MAIL**

The Honorable Karen O. Bowdre
United States District Judge
Northern District of Alabama
Hugo L. Black U.S. Courthouse
1729 Fifth Avenue North
Birmingham, AL 35203

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U.S. DISTRICT COURT
N.D. OF ALABAMA

FILED

Re: *United States v. Richard M. Scrushy*
CR-03-BE-0530-S

Dear Judge Bowdre:

I am writing to more fully address a few of the questions that Your Honor posed during the oral argument on June 16, 2004 on Mr. Scrushy's motion to dismiss the counts alleging violations of Section 906 of the Sarbanes-Oxley Act. During the hearing, you asked me whether I was aware of any statutes that used the phrase "willfully certifies" and whether any such statute had been struck down for vagueness. At the time, I informed Your Honor that I was not aware of any such statutes. Since then, I have researched the issue and herein provide a more detailed response. In addition, I want to take this opportunity to better respond to a few other questions you posed to me during oral argument. Further, Ms. Irene Grubbs has asked me to respond to a question about the grantors (sellers) of the Wilcox property. These matters are addressed below.

A. VOID FOR VAGUENESS

1. *Statutes Using the Words "Willfully Certifies"*

During oral argument, in response to one of your Honor's question, I informed the Court that our research had not revealed any federal statutes containing the precise formulation used in Section 906(c)(2) of the Sarbanes-Oxley Act, 18 U.S.C. § 1350(c)(2). As we indicated at page 25 of the reply brief, Section 906(c)(2) is the only provision in the United States Code that uses the precise formulation "willfully certifies."

Subsequent research has identified no federal criminal statutes in which the word "certify" or "certifies" appears in the same sentence or clause with the term "willfully." However, for the sake of completeness, we advise the Court that we located two civil statutes

205

which employ the term "willfully" in connection with the term "certify." Both of those two statutes, 42 U.S.C. § 1395i-3(b)(3)(B)(ii) and 42 U.S.C. §1396r(b)(3)(B)(ii), are quite different from Section 906(c)(2) of Sarbanes-Oxley. Those statutes concern statements made in assessments for federal monetary benefits for state medical services and skilled nursing care. They provide as follows:

"(ii) Penalty for falsification

"(I) An individual who willfully and knowingly certifies under clause (i) a **material and false statement** in a resident assessment is subject to a **civil** money penalty of not more than \$1,000 with respect to each assessment.

"(II) An individual who willfully and knowingly causes another individual to certify under clause (i) a **material and false statement** in a resident assessment is subject to a **civil** money penalty of not more than \$5,000 with respect to each assessment."

Unlike Section 906(c)(2), these statutes require a double *mens rea* --i.e., they use the words "willfully *and knowingly* certifies." More importantly, these statutes have both the evil-meaning mind and the evil-doing hand, as required under Supreme Court case law, because they refer to "false " statements. Morisette v. United States, 342 U.S. 246, 251-52 (1952). There is a big difference between a "false" statement and a statement that fails to "fairly present" the financial condition of the company and even one that does so in a "material" way. In addition, by stark contrast, Section 13(a) of the Exchange Act of 1934 (to which Section 906(b) refers) is merely a disclosure statute. Section 13(a) is not a fraud statute, nor does it carry any *mens rea* requirement to support a violation. Thus, unlike the statutes illustrated above, Section 13(a) has no element of falsity in it.

Further, both of those statutes impose minor civil penalties, not major imprisonment or criminal sanctions.

Finally, the above statutes have no companion provision (like subsection 906(c)(1)) that uses "certifies" without the adverb "willfully." Hence, these statutes present the same vagueness problem of distinguishing between the conduct described as "certifies . . . knowing" and "willfully certifies . . . knowing." That elusive distinction is part of the vagueness problem, because it creates the risk of arbitrary and discriminatory enforcement.

It is no answer to say, as the government contends, that Scrusby has not been charged under subsection (c)(1). Since those two provisions are *in para materia*, the Court

should look to subsection (c)(1) in examining the constitutional validity of subsection (c)(2) as applied. See e.g., Branch v. Smith 123 S. Ct. 1429, 1445 (2003) ("[I]t is, of course, the most rudimentary rule of statutory construction ... that courts do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part... [citing United States v. Freeman, 3 How. 556, 564-65, 11 L.Ed. 724 (1845)]. Therefore, under the facial and as-applied analyses (see point 4 below), the Court must take into account the differences between the two subsections.

2. *"Willfully Violates"*

In response to the information Thomas Gannon brought before the Court about the instances in which "willful" is used in the United States Code, we conducted our own search to identify those provisions containing the word "willfully" (or some derivation thereof) and to determine whether the word always modifies some form of wrongful conduct (e.g. "willfully violates") or whether it also modifies otherwise innocent conduct (e.g., "willfully certifies"). Searching the entirety of the U.S. Code, we found 1198 occurrences of the word "willfully." The vast majority of the time, the word "willfully" modifies some otherwise wrongful conduct. Most commonly, "willfully" modifies "violates." Other examples include "willfully obstructs, resists, or interferes" (2 U.S.C. 1966), "willfully deceives" (6 U.S.C. 254), "willfully neglect" (7 U.S.C. 473), "willfully give answers that are false and misleading" (7 U.S.C. 953), "willfully disobeys" (10 U.S.C. 891), or "willfully makes default" (2 U.S.C. 192).

We did locate a cluster of statutes in which the term "willfully," while not modifying conduct that is itself wrongful, nevertheless when read together with other language in the statute clearly includes some form of falsity. Examples of such statutory language include: "Whoever willfully does, or aids or advises in the doing of, any act relating to the bringing in, custody, preservation, sale, or other disposition of any property captured as prize, or relating to any documents or papers connected with the property or to any deposition or other document or paper connected with the proceedings, with intent to defraud, delay, or injure the United States or any claimant of that property, shall be fined not more than \$10,000 or imprisoned not more than five years, or both." (10 U.S.C. 7678); "An individual who knowingly and willfully communicates a false distress message to the Coast Guard or causes the Coast Guard to attempt to save lives and property when no help is needed is ... guilty of a class D felony" (14 U.S.C. 88); "Any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined under Title 18, imprisoned for not more than 2 years, or both." (15 U.S.C. 1681q); "Whoever .. willfully allows any other person to have or use such [forged military] pass or permit" (18 U.S.C. §499); "Whoever willfully advances money or property ... with

reasonable grounds to believe that it is the intention of that person to use the money or property ... for purposes of making extortionate extensions of credit." (18 U.S.C. §893).

Those statutes include a reference to engaging in a fraudulent act or doing or portraying something false, such as "with intent to defraud, delay, or injure," or "under false pretenses," or "false distress message" and are clearly distinguishable from Section 906(c)(2). In other words, unlike Section 906(c)(2), these statutes clearly include some form of falsity or fraud and do not impose criminal liability for non-fraudulent conduct. Moreover, Section 13(a) of the Exchange Act has no such terminology. As stated, that section is not a fraud statute and does not even impose under its own terms any "knowing intent to violate" or any other *mens rea* requirement. There can be a mere technical disclosure violation of Section 13(a).

Therefore, as I had indicated in Court, and in direct response to the information offered by Thomas Gannon, statutes in the United States Code which employ the term "willful" are far different than Section 906(c)(2), and it is that difference which condemns Section 906(c) under the Due Process Clause.

3. *Mere Use of the Adverb "Willful"*

During oral argument, Your Honor also suggested that the use of the word "willful" saves Section 906(c)(2) under the Due Process Clause, and affords ample "fair warning" and conforms to the "principle of legality" that the criminal law requires. *See* Scrushy's Reply Brief, at 15.

It is true that the term "willfully" has been defined as requiring proof that the defendant acted with knowledge that his conduct was unlawful. *Ratzlaff v. United States*, 510 U.S. 135, 136-37 (1994). This heightened *mens rea* standard is required because of the complexity of federal securities regulation. As the Supreme Court said in *Ratzlaff*, "[w]e view [the structuring statutes] mindful of the *complex provisions* in which they are embedded. *In this light*, we count it significant that the [statute's] omnibus 'willfulness' requirement ... has been read ... to require both 'knowledge of the reporting requirement *and* 'specific intent to commit the crime,' *i.e.* 'a purpose to disobey the law.'" *Id.* at 141.

However, the Supreme Court in *Ratzlaff* also made clear that "[w]illful, this Court has recognized, is a 'word of many meanings,' and 'its construction [is] often ... influenced by its context.'" *Id.* at 141. In the context of Section 906(c)(2), the adverb "willful" has to be read next to the verb it modifies, "certifies," which does not impart any notion of criminal wrongdoing. In other words, the concept of a "willful" state of mind is not connected to any criminal conduct. But, as the Supreme Court has made clear, "[c]rime is a *compound*

concept" requiring both an "evil-meaning mind and an evil-doing hand." Morisette v. United States, 342 U.S. 246, 251-52 (1952). Using a term to impose criminal intent when not associated with criminal conduct does not convert an otherwise lawful act into unlawful criminal conduct. Thus, the mere use of the word "willful" does not convert common practices into illegal ones, such as willfully washing your car, or willfully riding a horse, or even willfully signing a contract. For that matter, even willfully structuring cash transactions in the context of Foreign Currency Transaction Reporting Act for the purpose of circumventing that statute does not convert "structuring" into criminal conduct. Since there is nothing inherently nefarious about any of these acts, Ratzlaff v. United States, 510 U.S. 135, 661 (1994)(structuring currency transactions is not inevitably nefarious), the use of "willful" does not in and of itself convert these acts into criminal conduct.

The same is true of the conduct condemned in Section 906(c)(2). There is nothing nefarious in the conduct of one who "certifies." Merely by placing the word "willful" in front of the word "certifies" does not convert non-criminal conduct into criminal conduct. Even though Congress may wish it to be so, the Due Process Clause of the Constitution will not permit such draftsmanship or statutory construction to stand. The concept of "willful certification" simply has "no core." Smith v. Goguen, 415 U.S. 566, 578 (1974).

Further, the other phrases in Section 906 (c)(2), such as "fairly presents" and "in all material respects," do not transform certification from legitimate conduct into criminal conduct. The added words do not save the statute. While it might suffice for *civil* liability under Section 13(a) of the Exchange Act, it will not be sufficient to support criminal liability. This is especially true since neither "fairly presents" nor "in all material respects" are not themselves nefarious forms of conduct, but just further adverbial phrases and modifiers. The statute thus still lacks "core" conduct which specifies the criminal conduct to be outlawed.

Therefore, Section 906(c)(2) fails to pass constitutional due process because it lacks the confluence of both an evil-meaning mind (*mens rea*) and evil-doing hand (*actus reus*).

4. *Facial vs. As Applied Standard of Vagueness*

I do not quarrel with the Court's preliminary view that Section 906(c)(2)'s vagueness should, a first blush, be tested "as applied." Facial constitutional challenges, we acknowledge, are discouraged because, as Justice Souter recently put it in Sabri v. United States, 124 S.Ct. 1941, 1948 (2004), "laws should not be invalidated by 'reference to hypothetical cases' [citing Yazoo & Mississippi Valley R. Co v. Jackson Vinegar Co., 226 U.S. 217, 219-220] ... [since] factual adjudication carries too much promise of [premature interpretation] of statutes' on the basis of factually bare-bones records" [citing United States v. Raines, 362 U.S. 17, 22 (1960)].

However, shifting the constitutional analysis from a "factual" to an "as applied" mode is not an invitation to postpone constitutional analyses until evidence is introduced at trial. Rather, the Court should examine the statutory standards in light of the allegations in the indictment. In the case of § 906(c)(2), neither the statutory standard nor the allegations in the indictment rescue the statute from constitutional infirmity.

The Supreme Court has not hesitated to strike down a statute as unconstitutionally vague when "no standard of conduct is specified at all" in the substantive statute since "the absence of any ascertainable standard . . . is precisely what offends the due process clause" Smith v. Goguen, 415 U.S. 566, 578 (quoting Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971)). Under Goguen, the "as applied and on-the-face vagueness attacks [are] . . . essentially indistinguishable" *Id.* at 571-72. The same approach articulated in Goguen was applied by the Sixth Circuit in United States v. Salisbury, 983 F.2d 1369, 1379 (6th Cir. 1993), when it struck down, as constitutionally void for vagueness, a voting statute because it "sets forth no standard with sufficient particularity for determining whether [the defendant] Salisbury's activities constituted voting more than once and, thus, is unconstitutionally void for vagueness as applied to this case."

These principles undergird Mr. Scrusby's position before this Court. Because § 906(c)(2) does not contain meaningful or discernable standards of the criminal state of mind and criminal conduct to be condemned, the statute is unconstitutional as applied. There are no meaningful standards to apply.

Moreover, as I pointed out in oral argument, the inherent vagueness deficiencies of § 906(c)(2) are not cured by the allegations in the indictment. Counts 48 through 50 make reference to paragraphs 1-20 of the Indictment. However, paragraphs 1 through 20 do not refer to any criminal conduct. Contrary to what Mr. Gannon said at oral argument, they certainly do not refer to a financial fraud bordering on \$2.7 billion. Nor does paragraph 20, the only paragraph that even remotely hints at such a notion, allege financial fraud. Merely deciding not to reveal the company's internal budgetary numbers does not constitute financial fraud, let alone criminal conduct, Ratzlaff, 510 U.S. at 136-37, 140 (defendant admitted that "he structured cash transactions and that he did so with knowledge of, and a *purpose to avoid*, the bank's duty to report" transactions). The addition of the term "material" does not clarify the vagueness of the statute since that term has a highly technical meaning under the federal securities laws-- both in a general sense and more specifically as defined by the SEC. Indeed, whether or not the disclosure or non-disclosure of internal budgetary numbers as alleged in paragraph 20 is "material," even though not criminal, will on a whole host of factors, including whether, as a general matter, there is a substantial likelihood that that fact would alter the total mix of information available, TSC Industries v. Northway, 426 U.S. 438, 449 (1976), but more specifically, whether management intended to manage earnings, *SEC Staff*

Accounting Bulletin #99, at 8 (August 12, 1999)("While the intent of management does not render a misstatement material, it may provide significant evidence of materiality."). *See* Scrushy's Reply Brief, at 30. Thus, even an as-applied analysis warrants dismissal of these counts.

5. *The "Fair Warning" Requirement*

Fundamentally, the constitutional defect in Section 906(c)(2) is that it fails to give adequate "fair warning," at the time the conduct was engaged in, that the line of criminality can be or has been crossed. Justice Soutter's majority opinion in *United States v. Lanier*, 520 US 259, 266 (1997) pulls together all of the related concepts surrounding the fair warning requirement:

"There are three related manifestations of the fair warning requirement. First, the vagueness doctrine bars enforcement of 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' Second, as a sort of 'junior version of the vagueness doctrine,' ... the canon of strict construction of criminal statutes, or *rule of lenity*, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered.... Third, although clarity at the requisite level may be *supplied by judicial gloss on an otherwise uncertain statute*, ... due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decisions has fairly disclosed to be within its scope. [citations omitted.] In each of these guises, the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear *at the relevant time* that the defendant's conduct was criminal."

520 U.S. 259, 266 (1997)(emphasis added)..

I respectfully submit that Sections 906 (b) and (c)(2) were not sufficiently clear at the time Mr. Scrushy signed the SEC 10-K on August 15, 2002 -- only two weeks after Sarbanes-Oxley was adopted -- to satisfy the Due Process Clause.

6. *Saying It Is a Crime Does Not Make It So*

Finally, Your Honor asked me whether I agreed that this statute made it a crime to willfully certify SEC reports. I conceded that the wording of the statute so states, but I disagreed with the notion or concept that such conduct could be a crime as worded.

My point of view is grounded in the notion that, regardless of what conduct Congress seeks to criminalize, no person can stand trial unless a statute first passes constitutional Due Process. "Though it is the function of the judiciary to interpret congressional enactments to avoid unconstitutional construction, no court has a license to rewrite enactments and thereby make law. . . . [Courts should not] become legislators by attempting to retroactively expand the canopy of activities proscribed [by a statute] . . . to include conduct described in the instant case." United States v. Salisbury, 983 F.2d 1369, 1379-80 (6th Cir. 1993). Section 906(c) simply fails to pass constitutional muster. Therefore, it would be inappropriate to subject Mr. Scrusy to a criminal trial under this statute as written.

B. MULTIPLICITY

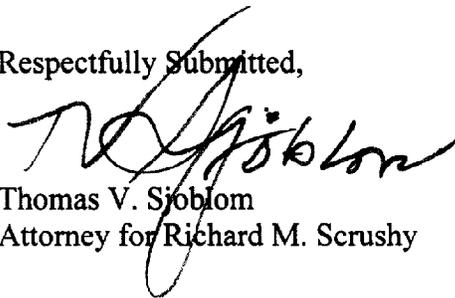
Ms. Irene Grubbs also asked me about the purchase of the Wilcox property.

The property was held solely by Dorothy Tuner Owen. Upon her death in 1998, the property passed to her four children in fee simple to be held jointly. When Mr. Scrusy agreed to purchase the property, the transaction was a sale of the property from the heirs of the decedent's estate in fee simple. Payment for the property is evidenced by a single \$360,000 debit from Mr. Scrusy's bank account at AmSouth on February 1, 2000. However, at closing, as a matter of convenience to the four children, each requested a cashier's check for \$90,000 (rather than a single payment of \$360,000 that they later would have to divide up). Had Mr. Scrusy simply handed the sellers as joint tenants a single sum of \$360,000 in cash, the sellers would have divided that cash among themselves. The mere fact that each of the four sellers requested, as a matter of convenience to them, to receive separate checks does not alter the nature of the transaction, which was a single event.

The Honorable Karen O. Bowdre
June 25, 2004
Page 9

The government could have as easily selected the single debit from AmSouth for \$360,000 as the basis for the money laundering count. Instead, for the reasons discussed during the hearing, the government elected to rely on the four separate checks to support its separate money laundering counts.

Respectfully Submitted,



Thomas V. Sjoblom
Attorney for Richard M. Scrushy

cc: Irene Grubbs, Law Clerk
Richard Smith, AUSA
James Ingram, AUSA
Thomas Gannon, Esq.