Case No.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

IN RE: RICHARD M. SCRUSHY,
Petitioner.

PETITION BY RICHARD M. SCRUSHY FOR
A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA, THE HONORABLE
MARK E. FULLER, CHIEF JUDGE, PRESIDING

Comes now Richard M. Scrushy (hereinafter "Scrushy"), by and through his undersigned attorney, and pursuant to the jurisdiction granted under 28 U.S.C. § 1651 and Fed. R. App. P. 21. petitions this Court for a Writ of Mandamus to the Honorable Mark E. Fuller, Chief Judge of the United States District Court for the Middle District of Alabama (hereinafter "Chief Judge Fuller").

I. Relief Sought

Scrushy petitions for a writ directing Chief Judge Fuller to recuse from any further participation in case number 2:05-CR-119-MEF, United States of America v. Don Eugene Siegelman and Richard M. Scrushy, and Order a vacatur or new trial for Scrushy based upon the arguments presented.

II. Issue Presented

Did the district court abuse its discretion by denying Scrushy's Motion to Recuse and Motion for Vacatur or New Trial?

III. Relevant Facts

A. Procedural History

The Grand Jury returned the indictment in this case on May 17, 2005, and in December 2005, the grand jury handed down the Second Superseding indictment that presented the actual charges against Scrushy of Bribery in violation of 18 U.S.C. §666(a)(2), Conspiracy in violation of 18 U.S.C. §371, and Mail Fraud in violation of 18 U.S.C. §1341-1346. These charges allege Scrushy acted in concert with Don Eugene Siegelman, then Governor of the State of Alabama, to bribe the Governor in exchange for an appointment to the Certificate of Need Board for the State of Alabama. On June 29, 2006, after two weeks of deliberation, the jury returned a guilty verdict against Scrushy and Siegelman.

Since the jury rendered its verdict, Scrushy filed other Motions for New Trial, only one of which remains pending. This pending motion is a request for further investigation and Motion for New Trial based on allegations regarding actions taken by jurors during their deliberative process and the possibility that extrinsic evidence was considered by the jury during their deliberations. This motion was filed after e-mails came to light which purported to be from jurors improperly communicating with one another prior to deliberations, as well as during the deliberation process while all jurors were not present. This motion was

denied on January 11, 2007, after a hearing at which the Court conducted all examination of the jurors without the allowance of involvement of counsel for Defendants. Subsequently, more e-mails were revealed and Scrushy filed another Motion for New Trial on February 26, 2007, based on these newly revealed e-mails as well as those previously revealed, but no ruling has been issued by the Court on this issue and sentencing has subsequently been set by the court for June 26, 2007. No other issues remain pending in the District Court.

Only on February 22, 2007, did Scrushy and his attorneys become aware of the possibility of Chief Judge Fuller having business interests with various departments within the government of the United States. Over the ensuing weeks from February 22, 2007, until April 17, 2007, counsel for Scrushy, with assistance from an investigator, investigated the allegations that were first disclosed to them on February 22, 2007. During this time of investigation, attorneys for Scrushy drafted and revised the Motion to Recuse and Motion for Vacatur or New Trial Based on Newly Discovered Evidence and the Brief in Support thereof which was ultimately filed April 18, 2007. *See* APPENDIX A.

The decision was made to file the motion under seal as the filings dealt with the financial status of Chief Judge Fuller as well as the other owners of the businesses in question. While all of the exhibits were readily available to the

public via the internet and various Secretary of State's websites, the motion was filed under seal so as not to place a spotlight on this financial information in such a highly publicized case. Also, some of the exhibits attached to the motion contained personal identifiers of corporate owners, including Chief Judge Fuller. Again, all of these exhibits were readily available to the public by the internet and it was felt that filing redacted copies would be no better than filing unredacted copies, as the public could then easily locate an original which contained all of the personal information intended to be protected. It was also felt that filing unredacted copies would be a violation of the Court's General Order No. 2:04-mc-3228, which required filing redacted copies of exhibits that contain individuals' personal identifiers. Therefore, the motion was filed under seal, without filing redacted exhibits openly. Permission was requested from the Court to file the motion under seal. This permission was granted by Chief Judge Fuller on April 18, 2007.

On Thursday April 19, 2007, Chief Judge Fuller issued a Sealed Order stating "The Government shall file its response, **if any**,(emphasis added) on or before April 23, 2007. The motion shall be submitted without oral argument and without further submissions from the movant on April 23, 2007." *See* APPENDIX B.

The United States responded (**not under seal**) on April 23, 2007, arguing that the motion was untimely and that it was "based on unsupported, irrational, and highly tenuous speculation and is merely an effort to manipulate this court." No request was made by the United States for permission to file their response openly. *See* APPENDIX C.

On April 24, 2007, Scrushy's attorneys filed a motion to supplement the record (and a motion to unseal further discussed below) to contradict the argument of the United States that the motion was untimely. This motion to supplement was denied as moot as the judge's final Order did not address the timeliness issue.

News reports covered the filing of Scrushy's motion which contained quotes from the United States Attorney's Office, while attorneys for Scrushy refused to comment. Further, the United States did not file its response under seal. Based on the public comments and the response being filed openly, on April 24, 2007, Scrushy requested the motion be unsealed or to be allowed to file redacted exhibits. *See* APPENDIX D.

On April 26, 2007, one week after the original motion was filed, Chief Judge Fuller issued an eleven page Memorandum Opinion and Order denying Scrushy's motion. *See* APPENDIX E. On this same date, although having not yet ruled on the motion for new trial based on juror misconduct related to juror emails filed by

Scrushy on February 26, 2007, Chief Judge Fuller issued an Order setting Scrushy's sentencing for June 26, 2007. In his Memorandum and Order at footnote 6, page 4, Chief Judge Fuller indicates that Scrushy's original motion was sealed in part due to "Scrushy's blatant disregard for the requirements of the E-Government Act of 2002, as amended on August 2, 2004, and the General Order Implementing Requirements of the E-Government Act entered by this Court on December 16, 2004 (General Order No. 2:04-mc-3228)." As previously mentioned, all documents referenced by Chief Judge Fuller were publicly filed documents with various secretary of state's and available for free on the internet.

While Chief Judge Fuller explained why the motion for recusal was placed under seal in his April 26, 2007, Memorandum and Order, he did not rule on Scrushy's motion to unseal for several days. On April 30, 2007, after having already denied the motion to recuse four days earlier, Chief Judge Fuller granted Scrushy's motion to unseal, and Ordered Scrushy's attorney to file certain redacted exhibits which contained personal identifiers, but were readily accessible to the public on the internet. *See* APPENDIX F.

Also on April 30, 2007, Chief Judge Fuller denied Scrushy's Motion to Dismiss for Lack of Jurisdiction (*See* APPENDIX G) and entered an Order

modifying the terms of Scrushy's release which overruled Chief Magistrate Judge Coody's previous ruling on the matter. *See* APPENDIX H.

During the preparation of this Petition for Writ of Mandamus, the United States Attorney's Office filed its sentencing memorandum on May 25, 2007, requesting Scrushy be sentenced to 25 years in prison, despite the initial pre-sentence report giving a sentencing guideline range of between 78 and 97 months.

B. Newly Discovered Evidence Giving Rise to Filing Motion for Recusal and Motion for Vacatur or New Trial

According to the Alabama's Secretary of State, Chief Judge Fuller is the Registered Agent of Doss Aviation, Inc. a Texas corporation qualified to do business in the State of Alabama. There is no record indicating Chief Judge Fuller has ever offered his resignation as the registered agent for Doss Aviation, Inc. in the State of Alabama, nor does Chief Judge Fuller or the United States deny this allegation.

Chief Judge Fuller is the former President of Doss Aviation, Inc. According to Doss Aviation, Inc.'s 2003 annual report filed with the State of Maine, Chief Judge Fuller is one of only seven owners of Doss Aviation, Inc. Chief Judge Fuller's ownership is the largest among all owners and was reported in 2003 as

being 43.75%, with the next largest owner holding 25% and the remaining 5 owners holding 6.25% each.

On the corporate disclosures filed with Maine's Secretary of State on March 26, 2004, April 13, 2005 and March 30, 2006, Chief Judge Fuller was listed as a shareholder and/or director for Doss Aviation, Inc., listing his address of record as One Church Street, Montgomery, Alabama, the address of the United States Federal Courthouse.

Judge Fuller's Financial Disclosure of 2005 admits ownership of stock in Doss Aviation, Inc. and the receipt of distributions from between $100,001.00 and $1,000,000.00 during the year. The disclosure also states Judge Fuller's interest in Doss Aviation, Inc. is valued at between $1,000,001.00 and $5,000,000.00. Judge Fuller's Financial Disclosure for 2003 and 2004 admits ownership of stock in Doss Aviation, Inc. and the receipt of income from between $100,001.00 and $1,000,000.00 during each year. The fact this is listed as income rather than distributions indicates that Chief Judge Fuller is acting not as just a shareholder, but in a closer relationship with the company as an employee and/or officer. The disclosure further states Chief Judge Fuller's interest in Doss Aviation, Inc. is valued at between $1,000,001.00 and $5,000,000.00.

On its official website, www.dossaviation.com, Doss Aviation, Inc. represents: "Doss Aviation, Inc. is a privately owned company with over 29 years experience in flight training, aircraft maintenance and modification, air traffic control, maintenance training fuels and supply management, transient aircraft support services, airfield management and defense fuel support operations. Since our inception, we have performed a variety of services for the U.S. Army, U.S. Navy, U.S. Air Force, Defense Logistics Agency, the State Department and the Federal Aviation Agency."

Doss Aviation, Inc. has been awarded numerous federal military contracts from the United States government worth over $258,000,000, including but not limited to: An August 2002 contract with the Air Force for $30,474,875 for Helicopter Maintenance, a November 2003 contract with the Navy for $5,190,960 for aircraft refueling, a February 2006 contract with the Air Force for over $178,000,000 for training pilots and navigators, and a March 2006 contract with the Air Force for $4,990,541.28 for training at the United States Air Force Academy. The February 2006 contract with the Air Force for over $178,000,000 is for 10 ½ years, **but is renewable from year to year**. In addition to his holdings in Doss Aviation, Inc, Chief Judge Fuller owns a similarly large portion of Doss of Alabama, Inc, which was incorporated in Alabama on or about September 23,

2002, with the incorporator being Mark Fuller. This corporation is merely a spin-of division of Doss Aviation, Inc.

Chief Judge Fuller's Financial Disclosure for 2003 admits ownership of stock in Doss of Alabama, Inc. and again the receipt of income from between $100,001.00 and $1,000,000.00 during the year. This disclosure also states Chief Judge Fuller's interest in Doss of Alabama, Inc. is valued at between $100,001.00 and $250,000.00, after the sale of some interest to Mark Jipson and Ellis Parker on May 1, 2003. Chief Judge Fuller's Financial Disclosure for 2004 admits ownership of stock in Doss of Alabama, Inc. and the receipt of income of between $100.001.00 and $1,000,000.00 during the year. The disclosure also states Chief Judge Fuller's interest in Doss of Alabama, Inc is valued at between $250,000 and $500,000.00, which is an increase from the previous year, despite the sale of a portion of his interest to Mark Jipson and Ellis Parker. Chief Judge Fuller's Financial Disclosure for 2005 admits ownership of stock in Doss of Alabama, Inc. and the receipt of distributions of between $100,001.00 and $1,000,000.00 during the year. This disclosure also states Chief Judge Fuller's interest in Doss of Alabama, Inc. is valued at between $250,001.00 and $500.000.00.

On its official website, www.dossaviation.com, Doss Aviation, Inc. references Aureus International and contains a link to Aureus' official website located at www.aureusinternational.com. On its official website, www.aureusinternational.com, Aureus International reports that "For over 10

years Aureus International has been manufacturing, servicing and supplying flame retardant specialty garments. Our products have been designed with a sincere commitment to quality and service primarily for Medical Rescue Professional, **Law Enforcement**, Fire Fighting Departments and Government Agencies."..... "Aureus International is a division of Doss Aviation Inc., with corporate offices in Colorado Springs, Colorado. Doss Aviation has earned an enviable reputation through their thirty years of service to the Armed Forces and Government Agencies throughout the world." An Enterprise Ledger article dated April 3, 2005, states that "**FBI agents**, **military** and civilian pilots and medical professionals all over the world wear (Aureus International) products which are cut, sewn, inspected, bagged and shipped from its home in Enterprise." (Emphasis added) **There is no mention of Aureus International in any of Chief Judge Fuller's Financial Disclosures and Chief Judge Fuller's Financial Disclosures of 2006 were unavailable at the time of the filing of the Motion at issue**.

FBI agents Keith Baker and James Murray were the primary investigators assigned to this case and presented the case to the United States Attorney's Office. At trial on May 1, 2006, the United States Attorney moved on behalf of the FBI to allow two representatives of the FBI be present throughout the trial of the case, showing the FBI's strong interest in a conviction of Scrushy. This motion was

granted by oral order by Chief Judge Fuller. *See* Record Excerpt 390 (Oral Order of May 1, 2006) contained in APPENDIX I.

Doss Aviation, Inc. provides fuel distribution services at Langley Air Force Base, in addition to other military installations. Assistant United States Attorney Feaga, the lead prosecutor assigned to this case, is a colonel in the United States Air Force reserve. Assigned to Langley Air Force Base, Attorney Feaga is an assistant to Staff Judge Advocate Brigadier General Richard C. Harding, who is the principle legal adviser to the Air Combat Command and staff on all legal issues at Langley, which by definition would include contracts such as those granted to Doss Aviation, Inc.

At no time did Chief Judge Fuller disclose to Scrushy he is the largest shareholder of several businesses which have substantial contracts and do business with branches of the United States government nor did he request a waiver from Scrushy after full and complete disclosure.

IV. Mandamus Standard and the Recusal Statute

A. Mandamus Availability and Standard of Review

A petition for writ of mandamus generally must show "(1) a clear right in the petitioner to the relief sought; (2) a clear duty on the part of the [other party or the court] to do the act in question; and (3) no other adequate remedy available."

District Lodge No. 166, Intern. Ass'n of Machinists and Aerospace Workers, AFL-CIO v. TWA Services, Inc., 731 F.2d 711, 717 (11th Cir. 1984). A judge's decision not to recuse is reviewed in this circuit for an abuse of discretion. *United States v. Bailey*, 175 F.3d 966, 967 (11th Cir. 1999).

B. Standard for Recusal Under 28 U.S.C. § 455(a)

The right to issuance of the writ of mandamus in this case turns factually on whether Chief Judge Fuller abused his discretion in failing to grant Scrushy's motion to recuse and grant a new trial. Recusal is required pursuant to 28 U.S.C. § 455(a), which states that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). This creates an "affirmative, self-enforcing obligation to recuse [themselves] *sua sponte* whenever the proper grounds exist." *United States v. Kelly*, 888 F.2d 732, 744 (11th Cir. 1989). In evaluating a recusal, a judge asks whether "an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality." *United States v. Patti*, 337 F.3d 1317, 1321 (11th Cir. 2003).

Section 455(a) does not require the existence of actual bias or prejudice, but the mere appearance of partiality necessitates recusal. The Court must ask whether a reasonable person would entertain a "significant doubt" about the

Judge's impartiality, not whether the Judge would actually be biased, or whether such bias would change the outcome of the case. *See Patti*, 337 F.3d at 1321. It makes no difference how much practical effect the judge's recusal would have had on the outcome of the litigation. The purpose of the disqualification statute is to avoid even the appearance of impropriety; the appearance of impropriety is not lessened by the fact that the litigation would have come out the same way. *United States v. State of Alabama*, 828 F.2d 1532, 1546 (11th Cir. 1987) .

When looking through the eyes of this reasonable person, the Court must be "mindful that an observer of our judicial system is less likely to credit judges' impartiality than the judiciary." *United States v. Jordan*, 49 F.3d 152, 157 (5th Cir. 1995). The man-on-the-street standard is critical because "people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges." *In re Kensington Int'l Ltd*, 368 F. 3d 289, 302 (3rd Cir. 2004). Thus, a judge considering a motion for recusal must remember that it is the reasonable observer, not the reasonable judge, whose view governs the analysis.

A judge considering a recusal motion should make his ruling in light of the totality of the circumstances. The court "need not decide whether any of the [] facts alone would require[] disqualification," if the court "believe[s] that together

they create an appearance of partiality that mandates disqualification." *In re School Asbestos Litigation*, 977 F.2d 764, 782 (3rd Cir. 1992). In the event of a close call, the judge must recuse. *Kelly*, 888 F.2d at 745, *Patti*, 337 F.3d at 1321, cert. denied, 124 S.Ct. 1146 (2004). Indeed, § 455 "liberalized greatly the scope of disqualification in the federal courts," *Murray v. Scott*, 253 F.3d 1308, 1310 (11th Cir. 2001), eliminated "the old 'duty to sit' doctrine," and replaced it with the requirement that "judges [] resolve any doubts they may have in favor of disqualification," *Kelly*, 888 F.2d at 744 The language of the new statute eliminates the so-called "duty to sit." The use of "might reasonably be questioned" in §455 (a) clearly mandates that it would be preferable for a judge to err on the side of caution and disqualify himself in a questionable case. *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1112 (5th Cir. 1980).

The United States Supreme Court further entrenched its position on recusal in *Liteky v. U.S.*, 510 U.S. 540, 548; 114 S. Ct. 1147 (1994), when it stated: 'Subsection (a) the provision at issue here, was an entirely new "catchall" recusal provision, covering both "interest or relationship" and "bias or prejudice" grounds', (*see Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194, 100 L. Ed.2d 855 (1988) requiring them all to be evaluated on an objective basis, so that what matters is not the reality of bias or prejudice, but its

appearance.) Quite simply and quite universally, recusal was required whenever a judge's "impartiality might reasonably be questioned." *Liteky*, 510 U.S. at 548. Clearly, the goal of the judicial disqualification statute is to foster the appearance of impartiality. *Cf.E. Thode, Reporter's Notes to Code of Judicial Conduct* 60-61 (1973). This overriding concern with appearances, which also pervades the Code of Judicial Conduct and the ABA Code of Professional Responsibility, stems from the recognized need for an unimpeachable judicial system in which the public has unwavering confidence. As this court has noted, " the protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the palladium of our judicial system."*United States v. State of Alabama*, 828 F.2d 1532, 1540 (11th Cir. 1987) (quoting *United States v. Columbia Broadcasting System, Inc.*, 497 F.2d 107,109 (5th Cir.1974)). [A]ny question of a judge's impartiality threatens the purity of the judicial process and its institutions. *Potashnick***,** 609 F.2d at 1111.

Application of this "stringent rule may sometimes bar trial by judges who have no actual bias and who would do their best to weigh the scales of justice equally between contending parties . . .. But to perform its high function in the best way, justice must satisfy the appearance of justice." *In re Boston's Children First*, 244 F.3d 164, 171 (1st Cir. 2001). Also, as a part of the totality of the

circumstances, recusal considerations must be given closer scrutiny in high profile cases. Courts have recognized that the publicity afforded to a "high profile" case, and specifically to a particular judge's ability to preside impartially in the case, is a legitimate consideration in a recusal determination. *See United States v. Tucker*, 78 F.3d 1313, 1324-25 (8th Cir. 1996) (remanding to a different district judge to "insure the perception of impartiality" in a "high profile" case in which the judge's connections to certain persons had been "widely reported in the press"); *see also In re Boston's Children First*, 244 F.3d at 167 (considering in the disqualification analysis the "broad [] publici[ty]" received by the "issue of partiality").

Congress hoped this objective standard would promote public confidence in the impartiality of the judicial process by insisting a judge, when confronted with circumstances in which his impartiality could reasonably be doubted, to disqualify himself and allow another judge to preside over the case. *Liljeberg*, 108 S.Ct. at 2208.

Even if there is the objective appearance of impropriety under 455(a), recusal can be avoided by obtaining a waiver from all parties after full disclosure. 28 U.S.C. §455(e) provides "No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only

under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification."

V. Business relationships at issue

Chief Judge Fuller's business holdings include a large ownership of Doss Aviation, Inc., Doss of Alabama, Inc. and the subsidiary company Aureus International which do business with departments falling under the Executive Branch of the United States government. Chief Judge Fuller, as the largest shareholder of these companies, which have only seven owners, receives millions of dollars from these companies due to their contractual relationships with the United States government, a party to this case. Two of these departments, in particular, form the basis by which a reasonable person might believe Chief Judge Fuller's impartiality as to Scrushy might reasonably be questioned. These relationships should, at a minimum, have been fully disclosed prior to trial in this matter, and Scrushy should have been requested to waive the conflict or request recusal.

A. Federal Bureau of Investigation

The criminal case for which Scrushy was ultimately convicted was initiated by an investigation by the Federal Bureau of Investigations, and agents Keith Baker and James Murray. After this investigation by the FBI, the case was turned

over to the United States Attorney's Office for prosecution. The FBI showed its interest in a conviction of Scrushy by requesting and receiving permission for two agents to be present in the courtroom throughout the course of the trial, when normal procedure is to allow only one representative. Again, Antonio Gonzales is the Attorney General of the United States and according to the organizational chart of the Executive Branch, the FBI answers to him as the Chief Law Enforcement officer for the United States. Additionally, the United States Attorney for the Middle District of Alabama, which brought the charges against Scrushy answers directly to the Attorney General.

In addition, the FBI was the primary investigative agency on Scrushy's previous criminal case held in Birmingham, Alabama during the summer of 2005. FBI agents led the raid on Healthsouth and coordinated the secret recording of Richard Scrushy by a fellow employee as well as interviewing hundreds of witnesses. Several of their agents were present throughout the trial in Birmingham and many actually testified.

Aureus International, as a division of Doss of Alabama, Inc., markets itself by stating that it provides clothing for Federal Bureau of Investigation. Chief Judge Fuller, as an owner of Doss of Alabama, Inc., stands to gain financially by Aureus International's business relationship with the Federal Bureau of

Investigation. Again, there is no information contained in Chief Judge Fuller's financial disclosures indicating **any** ownership in Aureus International. Further, Chief Judge Fuller never denied that his companies do business with the FBI and other law enforcement agencies and that the FBI received permission to have two representatives seated at The United States Attorney's table during the trial in this matter.

B. Military Contracts

Doss Aviation, Inc., of which Chief Judge Fuller is the controlling shareholder, garnered in excess of two hundred fifty-eight million dollars ($258,000,000.00) in government military contracts since its inception. These relationships include contracts with the United States Army, Navy, and most importantly the United States Air Force, which have previously been outlined above.

On or about August 30, 2002, only one month after Chief Judge Fuller's appointment to the Federal Bench, the Department of the Air Force awarded a contract to Doss Aviation, Inc. for Helicopter Maintenance reported to be for an aggregated total contract valued at thirty million four hundred seventy-four thousand eight hundred and seventy-five dollars ($30,474,875.00). Moreover, just prior to the beginning of Scrushy's criminal trial, the Department of the Air Force

announced, on or about February 8, 2006, that Doss Aviation, Inc. had won the bid on the $178 Million contract previously referenced.

The Defendants' criminal trial started on May 5, 2006. Following the commencement of the criminal trial of Scrushy, the Department of the Air Force announced, on or about May 25, 2006, and just prior to the close of the Government's case in chief, that Doss Aviation, Inc. had been awarded the contract to train pilots and navigators for the Air Force for an aggregated total contract price of $178,218,969.65. This contract is not a 10.5 year guaranteed contract, but is renewable from year to year. The fact that this is a renewable contract lends itself to the argument by a reasonable person that Chief Judge Fuller has an ongoing incentive to keep the government pleased, as although Doss Aviation, Inc. was awarded the contract initially, this contract could always be rescinded.

The United States is contractually bound to Doss Aviation, Inc., and it is in Doss Aviation, Inc.'s financial interest to maintain these contracts with the United States. It is therefore in Chief Judge Fuller's financial interest for the United States to keep these contracts with Doss Aviation, Inc. Certainly, Chief Judge Fuller, nor anyone else for that matter, would argue that his receiving millions of dollars as a result of his ownership in Doss Aviation, Inc. would be considered an insubstantial financial interest. It is fair to say that the financial success of these companies

depends largely on its business relationships with the United States Government, and this financial success is passed through to the owners of these corporations, the largest being Chief Judge Fuller.

Additionally, Assistant United States Attorney Feaga was a lead prosecutor assigned to this case, and was a colonel in the United States Air Force reserve at all times during the prosecution of defendants. Attorney Feaga took an active role in the prosecution of Scrushy and aggressively sought his conviction and confinement. In addition, Attorney Feaga was assigned to Langley Air Force Base, which has a contract for fuel distribution services with Doss Aviation, Inc. While it is unknown to Scrushy if Attorney Feaga personally worked on any contracts with Doss Aviation, Inc., it is very likely someone within his office of Staff Judge Advocate with Langley Air Force Base did have involvement with the review, amendment and approval of these contracts. A reasonable man could come to the conclusion that Chief Judge Fuller might be inclined not to rule against an attorney whose office had direct involvement with the review, amendment and approval of Doss Aviation, Inc.'s contracts for which he received a large financial benefit.

Moreover, the Executive Branch of the United States Government, which includes the United States Attorney General, the FBI and the United States Military, certainly has taken a keen interest in the legal proceedings of Scrushy.

The offices of Healthsouth Corporation were raided by the FBI on March 18, 2003, for alleged securities laws violations and falsifications of the company's books and records. Only 10 months prior to the beginning of the trial in this case, Scrushy was acquitted of all charges in a highly publicized trial in Birmingham, Alabama in the United States Federal Court for the Northern District of Alabama case number CR-03-be-0530-s.

It is certainly not beyond reason that the Executive Branch tries to influence governmental prosecutions in light of the recent firings of some eight United States Attorneys. Some of these attorneys have stated that they were fired for not indicting or investigating people that persons associated with the Executive Branch wanted indicted or investigated. Many people in the public and in Congress have gone so far as to call for the resignation of the United States Attorney General Alberto R. Gonzales as a direct result of the congressional investigation and scandal alleging undue influence on the justice system.

Both the FBI and United States Military are arms of the Executive Branch of the United States. Unlike a United States Attorney, a Federal Judge has a lifetime appointment and cannot simply be fired. If a Federal Judge enters rulings unfavorable to the United States, there is generally no way for the Executive Branch to injure or punish that Judge. In this instance, however there is a remedy

available to the Executive Branch against Judge Fuller should they disagree with any of his rulings, that being the denial or cancellation of Doss Aviation, Inc.'s contracts.

VI. The District Court Abused Its Discretion

Although cases previously cited herein set forth the basic principles governing recusal, whether this Court will exercise its discretion to issue a writ depends on the record in this case. As the Fifth Circuit has explained, review of denial of recusal is "extremely fact intensive and fact bound," and the analysis of a 455(a) claim "must be judged on its unique facts and circumstances more than by comparison to situations considered in prior jurisprudence." *Jordan*, 49 F.3d at 155; *see also United States v. Bremers*, 195 F.3d 221, 225 (5th Cir. 1999) ("the analysis of a particular section 455(a) claim must be guided . . . by an independent examination of the unique facts and circumstances of the particular claim at issue.") A review of the record here warrants the relief Scrushy has requested. Scrushy's Motion for Recusal and Vacatur or New Trial Based on Newly Discovered Evidence sets forth clearly Chief Judge Fuller's business interests which absolutely created a conflict, and which should have been disclosed to Scrushy prior to the trial of this case.

A. Timing

If a reasonable man on the street looked at a time line of the events surrounding the filing of Scrushy's Motion to Recuse, the judge's impartiality concerning the motion itself could reasonably be questioned. The motion at issue was filed by Scrushy on April 18, 2007. On Thursday, April 19, 2007, Chief Judge Fuller issued a Sealed Order stating, "The Government shall file its response, **if any**,(emphasis added) on or before April 23, 2007. The motion shall be submitted without oral argument and without further submissions from the movant on April 23, 2007."

By the language, "if any" being included in this Order, one could conclude that the motion was given little credence by Chief Judge Fuller upon its filing and there was little need for the United States to respond. Indeed, a review of the record would show that the only other Order issued by Chief Judge Fuller in this case which includes the language "if any" in this context was Chief Judge Fuller's Order of April 30, 2007, denying the Motion to Dismiss for Lack of Jurisdiction, which Chief Judge Fuller ultimately denied as being "wholly without merit". This theory of a rush to judgment is strengthened by the fact that Chief Judge Fuller issued the Order on the afternoon of Thursday, April 19, 2007 requiring a response "if any" to be filed by Monday, April 23, 2007, only two working days later.

Further, this April 19, 2007, Order stated that the motion would be "submitted without oral argument and without further submissions from the movant on April 23, 2007." In other words, Scrushy would have no chance to respond to any filing of the government or supplement the record, regardless of what the United States' filing contained. This language further indicates that the motion was denied, with little or no consideration, as soon as it was filed.

The United States did ultimately respond on April 23, 2007, arguing that the motion was untimely and that it was "based on unsupported, irrational, and highly tenuous speculation and is merely an effort to manipulate this court." The government's argument essentially states that Scrushy cannot prove that Assistant United States Attorney Feaga has any involvement or contact with Doss Aviation, Inc. and its contracts with the United States Air Force. It is interesting to note, however, that there is no denial on behalf of the United States as to the actual allegations contained in the original motion of AUSA Feaga's department's involvement with Doss Aviation, Inc. contracts at Langley Air Force Base. The United States' response simply says that Scrushy cannot prove this involvement, without denial of any of the allegations. Also, the United States' response fails completely to address the fact that Aureus International is doing business with the FBI.

On April 26, 2007, one week after the original motion was filed, Chief Judge Fuller issued an eleven page Memorandum Opinion and Order denying Scrushy's motion, and also issued a contemporaneous Order setting Scrushy's sentencing date, despite a Motion for New Trial filed by Scrushy on February 26, 2007 still pending. A reasonable man on the street looking at this fact could conclude this is more than just coincidence, but an effort to either punish Scrushy for his recusal request or an effort to get the case over with before too much was made public of Chief Judge Fuller's business holdings.

In addition, while Scrushy requested the motion to recuse be made public on April 24, 2007, due to comments being made to the media by the United States Attorney's Office, Chief Judge Fuller did not grant this motion to unseal until April 30, 2007, despite Chief Judge Fuller's April 26, 2007 Memorandum and Order which specifically mentioned Scrushy's motion being placed under seal for a "blantant disregard for the requirements of the E-Government Act of 2002. . . ."

This motion to unseal was granted on the same date that Chief Judge Fuller denied Scrushy's Motion to Dismiss for Lack of Jurisdiction. In the Order denying the Motion to Dismiss, Chief Judge Fuller cited seven cases from other District Courts in Texas, Kentucky, Missouri, and Pennsylvania, which denied generally the same motion filed by Scrushy, and which were not mentioned in

Scrushy's motion. At footnote 2, page 2, Chief Judge Fuller stated: "The Court deems it appropriate at this juncture to remind all counsel for Scrushy of their duty of candor to this tribunal."

However, attorneys for Scrushy are unaware of any requirement to notify the tribunal of negative cases from other jurisdictions. Rule 3.3 of the Alabama Rules of Professional Conduct and Rule 3.3 of the ABA Model Rules of Professional Conduct are the standard regarding candor to the tribunal. While Alabama's Rules do not speak specifically to the issue of an attorney's duty to notify the Court of contrary holdings from another jurisdiction, the Alabama Rules are patterned after the ABA Model Rules. Model Rule 3.3(a)(2) states an attorney has an obligation to advise the tribunal about "legal authority in the **controlling jurisdiction** known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel (emphasis added)." This was recognized as the standard in the United States Federal Court for the Northern District of Alabama in *Advantage Advertising v. Pelham*, 2004 WL 3362497 (N.D.Ala.). In fact, Scrushy was prepared to argue that these District Court cases were distinguishable or that the logic behind the rulings was incorrect, but was prohibited due to Chief Judge Fuller's previous Order stating: "The motion shall be submitted without oral

argument and without further submission from the movant on May 3, 2007." *See* Record Excerpt 555 (Order) contained in APPENDIX I.

Also on April 30, 2007, Chief Judge Fuller entered an Order which overruled Chief Magistrate Judge Coody regarding allegations of Scrushy violating the terms of his post-conviction release, causing Scrushy to be forced to wear a GPS device from April 30, 2007, forward. This was in light of the fact that Chief Magistrate Coody conducted the hearing, saw all witnesses testify, and judged their credibility. A review of the record shows this as the only occasion on which Chief Judge Fuller overruled or modified any recommendations of Chief Magistrate Judge Coody. A reasonable man on the street could view the timing of the public release of Scrushy's motion, four days after its denial, contemporaneously with two other highly publicized Orders as an effort to shield the evidence of Chief Judge Fuller's business dealings from public scrutiny.

B. Not the Defendant's Burden

In footnote 5, page 3 of the Memorandum Opinion and Order, Chief Judge Fuller points out that Scrushy had previously requested recusal of the Chief United States Magistrate Judge Charles S. Coody. Chief Judge Fuller goes on to say, "Apparently, at no point during the extended period of time when Scrushy was attempting to have Judge Coody removed from the case did it occur to Scrushy to

ascertain whether he had any concerns about the district judge to whom this case was assigned." This statement places the burden squarely on Scrushy to aggressively pursue information about the trial judge that would constitute a conflict. The burden is instead on the judge to make a Defendant aware of potential conflicts, not for a Defendant to seek out such facts. In footnote 7, page 4 of the Memorandum Opinion and Order, Chief Judge Fuller appears to cement his belief that the burden is upon the Defendant by stating: "Again, the Court emphasizes that Scrushy has not explained how it was that he only recently discovered the evidence on which he bases this motion. The Court notes that Scrushy's evidentiary submissions consist of materials obtained from the internet and a private investigator's affidavit explaining the internet websites from which the materials were obtained. All of the materials would have been equally accessible to Scrushy at any point prior to or during the trial."

The logic set out in these footnotes of the Order ignores the reality of the situation. There is no affirmative duty of a Defendant to go on a scavenger hunt for such information. The only evidence that is readily available to a Defendant would be a judge's financial disclosures. However, by simply looking at Chief Judge Fuller's financial disclosure forms, there is no way to determine exactly what type of business in which Doss Aviation, Inc. or Doss of Alabama, Inc. are

engaged. There is a General Order within the Middle District of Alabama (Civil Misc. No. 00-3047) which, for obvious reasons, requires non-individual and non-governmental parties involved in a civil matter before the court to "identify all parent companies, subsidiaries, affiliates, partnerships, or similar entities that could potentially pose a financial or professional conflict for a judge." A review of Chief Judge Fuller's financial disclosure forms makes no mention of Aureus International, a subsidiary of Doss of Alabama, Inc. which is a spin-off of Doss Aviation, Inc. Aureus International is the entity doing business with the FBI. Therefore, even if the burden were on the Defendant to investigate the judge's financial information for possible conflicts, a review of Chief Judge Fuller's disclosure form would not have revealed this vital information.

This exact issue of actual knowledge was logically discussed in *United States v. Pappert,* 1998 WL 596707 (D. Kan.) in which the Defendant requested a new trial based on the fact that the judge owned stock in G.E. Capital Leasing, which was one of 39 entities that lost money as a result of the Defendant's fraudulent copier leasing scheme. Only after his appeal was final did the Defendant in *Pappert* learn of the Judge's stock ownership in G.E. The Court stated that although the information was available through the judge's financial disclosure statement, "Absent evidence that defendant and counsel actually

obtained that information, however, the Court finds that defendant's failure to raise this issue at trial, sentencing or on appeal does not render it untimely." *Id* at 4.

C. Adverse Rulings

In dealing with Scrushy's argument that a reasonable person could believe that the United States Government could deny or cancel contracts if it disagreed with Chief Judge Fuller's rulings in the case, Chief Judge Fuller states: ". . .the undersigned has already made several rulings in this litigation in his favor despite vigorous objection from the United States. There is simply no evidence that anyone has threatened the undersigned as a result of those rulings, nor is there any evidence that any ruling by the undersigned has been influenced in any way by the fear of any reprisal by any person or entity." Scrushy disputes that any substantive rulings have been made in his favor by Chief Judge Fuller. However, this is not an issue to be considered by the judge in his denial of a request for recusal, as adverse rulings are not a basis for the granting of such requests.

Recusal under 455(a) cannot be based on decisions or rulings of the judge. *See Woodruff v. Tomlin* 593 F.2d 33 (6th Cir. 1979). Normally, a judge's rulings at trial do not constitute grounds for recusal because they can be corrected by reversal on appeal. *Johnson v. Trueblood*, 629 F.2d 287 (3rd Cir. 1980) cert. denied, 450 U.S. 999, 68 L.Ed.2d 200 (1981). "This and other courts have identified

various matters arising in cases . . . which will not ordinarily satisfy the requirements for disqualification under 455(a) . . (3) prior rulings in the proceeding, or another proceeding, solely because they were adverse." *United States v. Cooley*, 1 F.3d 985, 993 (10th Cir. 1993)(quoting *Glass v. Pfeffer*, 849 F.2d 1261, 1268 (1988); *Green v. Dorrell*, 969 F.2d 915, 919 (10th Cir. 1992).

D. Case on point not necessary

While there appears to be no case directly on point, this is not fatal despite the language contained in Chief Judge Fuller's April 26, 2007, Memorandum Opinion and Order stating, at footnote 12: "Indeed, by stating 'there is no case law directly on point with the facts and matters raised herein and therefore this matter is a case of first impression' Scrushy's own brief acknowledges that the cases he cites do not clearly support his position." The law is clear that each case, "must be judged on its unique facts and circumstances more than by comparison to situations considered in prior jurisprudence". *Jordan*, 49 F.3d at 155.

E. Fiduciary relationship

In footnote 14, page 9, of the Memorandum Opinion and Order, Chief Judge Fuller distinguishes this case from the facts in *Liljeberg*, which required recusal due to the judge's fiduciary relationship, by stating that he has no fiduciary obligation of any sort to the companies in which he owns shares. However,

Alabama's Secretary of State still lists Chief Judge Fuller as the registered agent of Doss Aviation, Inc., and Scrushy could find no record where this status has been changed. Therefore, it appears that there does exist a fiduciary duty of Chief Judge Fuller to Doss Aviation, Inc. as he is an agent of the corporation. His duties would include accepting service for the corporation and promptly notifying the corporation of any suit filed against it. In footnote 8, page 5 of his Memorandum Opinion and Order, Chief Judge Fuller denies a fiduciary relationship with the corporations by stating, "Scrushy is incorrect in his assertion that the undersigned is currently an officer, directory, or fiduciary to such companies." The Order does not address or deny the specific allegations that Chief Judge Fuller retains his fiduciary position as the registered agent.

F. No bias necessary

The United States' response relies on at least one case which does not appear to directly address the appearance issue under 455(a), but instead actual bias under 455(b), which was never raised by the Scrushy. The United States cites *T.V. Comm'n v. ESPN*, 767 F. Supp. 1077, 1080 (D. Colo. 1991) for the proposition that "Actual facts, not conclusions, showing bias must be shown by the affidavit." This case engages in a general discussion of 455 without differentiation between 455(a) and 455(b). The language cited incorrectly insinuates that there must be

actual bias shown. Although Scrushy never raises actual bias, the United States seems to argue bias must be proven to prevail on a recusal motion, which is not accurate under 455(a).

Despite the actual bias not being necessary, Chief Judge Fuller, in his Order, seems to seize on the United States' argument and misapply the law when he states in Footnote 15: "Additionally, the Court has no doubts concerning its impartiality." It is clear that the judge's opinion is not determinative. The law has substituted the reasonable factual basis reasonable man test to determine disqualification in place of the subjective "in the opinion of the judge" test. *Cf. Kinnear-Weed Corp. v. Humble Oil & Refining Corp.*, 441 F.2d.631, 635 (5th Cir. 1971). A reading of Chief Judge Fuller's Order indicates that while the reasonable man test is correctly cited as the proper standard, Chief Judge Fuller is still allowing his subjective opinion to control his rulings.

G. Clearly Distinguishable from *Zuger*

The argument by the United States that is given great credence by Chief Judge Fuller in his Order is that this case is analogous to the facts in *United States v. Zuger*, 602 F. Supp. 889, 892 (D. Conn. 1984) in which the defendant's claim that the trial judge was biased in favor of the government because the United States pays his salary was dismissed as farsical.

Zuger is clearly distinguishable from Scrushy's case as the compensation received by the judge in *Zuger* was directly related to his position as a federal judge in the form of his salary. This salary is traced directly to the Judicial Branch of the United States government, not the Executive Branch, and therefore cannot be rescinded by the Executive Branch of the United States government. The only way for a federal judge to lose the benefit of this salary is for that judge to resign or be impeached by the Legislative branch of the United States government, an extraordinary occurrence. Chief Judge Fuller's compensation that Scrushy argues gives rise to an appearance of partiality is not related to his salary as judge, but is related to his extra-judicial business holdings. In addition, the compensation to Chief Judge Fuller from these extra-judicial business holdings is greatly in excess of his compensation as a federal judge. This money can also be traced directly back to contracts with the United States military, the United States Attorney General, and FBI, which are parts of the Executive Branch of the United States government. These contracts could easily be extinguished by refusal to renew existing contracts and failing to issue new contracts, which would result in a devastating effect on Chief Judge Fuller's financial situation.

H. Relevant Advisory Opinions

While citing *Zuger* as the most similar to Scrushy's case, Chief Judge Fuller's Order, and the United States' response, never addressed the Advisory Opinions cited by Scrushy from the Judicial Committee on Codes of Conduct. Advisory Opinion No. 27 dealt with the recusal of a judge based fact that his impartiality might reasonably be questioned, where the judge was presiding over a class action complaint in which a drug store was one of the defendants. The judge's wife was the sole beneficiary of a trust which held a shopping center from which the drug store defendant leased space. The judge's wife did not manage the property, rather, it was managed by a real estate company. The drug store defendant, who was being sued by an unrelated third party, paid rent to the trust, which was described as a substantial sum barely exceeding five figures. In deciding in favor of requiring recusal, the Committee on Codes of Conduct reasoned:

> The canon is clear that a judge should disqualify in a proceeding in which his or her impartiality might reasonably be questioned. This is to be read in connection with Canon 2 which states, 'a judge should avoid impropriety and the appearance of impropriety in all activities.' For a judge to preside in a case involving a defendant which pays a substantial amount of rent which eventually is paid or credited to the judge's spouse as the sole beneficiary of a trust managed by the lessor as trustee would, in our opinion, be reasonably subject to the claim of an appearance of impropriety on the judge's party and to questioning his or her impartiality.

Similarly, for Chief Judge Fuller to preside in a case involving a Plaintiff which pays a substantial amount of money to a corporation for which he is a controlling shareholder, would reasonably subject him to claim of an appearance of impropriety and the questioning of his impartiality. In the case at bar Chief Judge Fuller, not his wife, personally receives the money from the United States government as a direct result of his company's contractual arrangement with the United States. It would be considered a very substantial income to him. In fact, his income from the business interests at issue greatly exceeds his income as a Federal Judge.

In the case at hand, the facts are even more heavily weighted on the side of disqualification due to the size of the government contracts, the very substantial incomes generated to the judge as a result of these military contracts, and the removal of one degree of relationship; more particularly, that being it is Chief Judge Fuller himself who is garnering a huge financial benefit.

In Advisory Opinion No. 94 the Committee established facts requiring recusal.

The Committee stated:

> Several factors can help to reconcile these opinions and assist in identifying when recusal is necessary: (1) When a transaction is standardized and generally available to all who qualify, it is not likely to require recusal. To the extent that the parties to the transaction are fungible, with either party able to go elsewhere,

> the power of each party over the other is diminished, and therefore so is the appearance of impropriety. (2) When, during the pendency of the litigation before the judge, a relationship has previously been structured and is not likely to be restructured or to give rise to controversy regarding the duties of the parties, recusal is less likely to be required. The converse is also true. When a relationship is being negotiated or is likely to be renegotiated during the time a party is in court or there is a reasonable possibility that the relationship may become the subject of controversy during the pendency of the court proceeding before the judge, it is much more likely to require recusal. (3) The size of the investment is a relevant consideration in evaluating an appearance of impropriety. (4) It is relevant to consider whether the transaction gave rise to a personal and recurring relationship between the judge and the party or whether it is an impersonal market relationship. (5) Finally, it is necessary to consider whether there are any other unique characteristics of the transaction that give rise to an appearance of impropriety.

In declining to suggest recusal, the Committee pointed out the judge in question in that case was one of many with a fractional royalty interest in the companies in question, and the interests were fairly small in both amount and percentage. The judge would not have had any direct contact with the party due to his fractional royalty interest, and the fractional royalty interests are standardized within a particular community. These arguments clearly do not apply to the relationship of Chief Judge Fuller and Doss Aviation, Inc.

In the present case, the renewal and extension of Doss Aviation, Inc.'s contracts with the United States were not standardized transactions. The parties are

not fungible, as it would be impossible for the Doss Aviation, Inc. to obtain the same business elsewhere. In other words, there is only one United States military, and if Doss Aviation, Inc. is to do contracting work for the United States military, there is but one entity with whom they can contract.

The relationship was in fact being renegotiated prior to and during the trial of Scrushy, as a contract for $178 Million was awarded during the trial of the case. The size of the investment is without question enormous. Chief Judge Fuller gets an extremely large recurring check each year as a result of the relationship of the parties, as he is one of only seven owners of the companies that contract with the government, making his interest in these contracts very large. Doss Aviation, Inc.'s filings indicate Chief Judge Fuller is its largest shareholder. It is also notable that, according to the Alabama Secretary of State, Judge Fuller is the registered agent for Doss Aviation, Inc., and Maine's Secretary of State lists his address as the address of the United States Federal Courthouse for the Middle District of Alabama.

It is undeniable that this is truly a very unique situation, as Scrushy has been unable to locate another Federal District Court Judge in the United States that owns a large and controlling interest in a corporation that has or had contracts with the United States that total in excess of $258,000,000. Nor does Scrushy believe there is a United States District Judge that makes up to $2,000,000 annually as a result of his

association with the United States government which is separate and apart from his responsibilities as a Federal Judge or his obligations on the bench.

Scrushy's position is that this situation is most closely related to the case referred to in *The Guide to Judiciary Policies and Procedure, Volume II, Chapter 5: Compendium of Selected Opinions* §2.11(b) (2005) which states: "Because of appearance of impropriety, a judge who has contracted with a party or parties for use of a service mark created by the judge must recuse from all cases involving such parties or their counsel so long as the royalty agreement remains in effect."

In this case, Chief Judge Fuller is the largest shareholder of Doss Aviation, Inc., Doss of Alabama, Inc. and Aureus International. These companies have contracted with a party, the United States, for the provision of goods and services including flight training, refueling services and uniforms. Chief Judge Fuller's compensation from these dealings greatly exceeds his annual salary as a judge. Therefore, similarly to the situation discussed in the *Compendium supra*, Chief Judge Fuller should be required to recuse in this case.

I. Recusal on all cases in which United States is a party

Chief Judge Fuller's Memorandum Opinion and Order also indicates he has misinterpreted the argument of Scrushy where in footnote 16, page 11 he states: "Were this court to hold otherwise, it would require the undersigned to recuse

himself in all criminal cases and in any civil case in which the United States was a party."

Scrushy has never argued Chief Judge Fuller's interests necessitate recusal in all criminal cases prosecuted by the United States. As discussed herein, the Court could merely secure a waiver after full disclosure to the parties. Each case must be reviewed on a case by case basis. *See Jordan, supra*. The specific factors giving rise to recusal in this case are thoroughly discussed herein, and Scrushy is unaware of these specific factors being present in any other criminal case. However, if a judge's dealings did rise to such a level as to disqualify him from all cases in which the United States was a party, this fact should not preclude recusal at the expense of the liberty of a criminal Defendant where appropriate. This issue has been addressed by other judges by divesture of any interest which could create numerous conflicts, or the creation of a "blind trust;" either of which could help eliminate the appearance of any impropriety.

J. High profile nature of case not considered

Defendant Siegelman is the former Governor of the State of Alabama, and Scrushy is the former CEO of a large Alabama corporation. In addition, Don Siegelman openly campaigned for the Democratic nomination for Governor of Alabama during 2006, even while the trial proceeded in this case. These well known

facts resulted in heightened media coverage of the case. This is undoubtedly a case where close scrutiny to a recusal request would be appropriate as required in a high publicity case. The nature of the case involves bribery of the Governor of the State of Alabama. The former Governor is also a co-defendant in the case. The case was tried in Montgomery, Alabama, the state capital, where the former governor lived and worked. In addition, Scrushy had recently been acquitted in an extremely highly publicized case within the same state only ten months prior. The record itself reflects a large amount of press coverage of the trial, as would be expected with such high profile defendants. *See* Record Excerpt 467 and 509 contained in APPENDIX I.

Certainly Chief Judge Fuller is aware of the status of the Defendants. Nowhere in his Memorandum Opinion and Order does Chief Judge Fuller mention that he has taken into consideration the heightened requirement necessitated by the high profile nature of the case. Indeed, Chief Judge Fuller recognizes the existence of Scrushy's previous case when he notes on page 6 of the Memorandum Opinion and Order that "(Defendant) was acquitted of charges against him **stemming from his conduct** as Chief Executive Office (sic) of HealthSouth."(emphasis added). The inclusion of this language could lead a reasonable man on the street to conclude that Chief Judge Fuller was not only aware of Scrushy's previous case, but of the opinion

that it was Scrushy's conduct which led to his arrest and prosecution, despite his ultimate acquittal. This would further Scrushy's argument of the lack of appearance of impartiality.

VII. Waiver

28 U.S.C. §455(e) provides " No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification." Therefore, Scrushy asserts that the facts outlined in this Motion should have been disclosed pre-trial, at which time Scrushy would have been given the opportunity to either enter a waiver, or request recusal. It is Scrushy's position he would have absolutely requested such recusal, but he was never given the opportunity. This is evidenced by the fact that he had established a history of this through his request to the Honorable Judge Coody asking that he recuse himself in prior filings with this Court.

VIII. New Trial

While generally recusal motions are raised pre-trial, there is no prohibition about a recusal being requested after the trial has ended. This court has previously granted a new trial, after a lengthy trial lasting thirty-three days, when it was

determined that the Judge should have recused himself pursuant to 455(a). *See Potashnick*, supra.

A more recent opinion issue only May 23, 2007, held that the proper remedy for a District Judge's failure to recuse himself from a criminal trial based on the appearance of partiality was a vacatur of the judgments of conviction. *See United States v. Amico*, 2007 WL 1487952 (2nd Cir.)

Similarly, as the issues raised herein were not disclosed pre-trial to Scrushy, never waived by Scrushy, and only discovered post-conviction, Scrushy is entitled to a new trial. This is the only result that would remedy the appearance of impropriety.

CONCLUSION

The record of this case clearly demonstrates that an average layperson would reasonably question Chief Judge Fuller's impartiality to adjudicate this case for all the reasons set forth above. "We must continuously bear in mind that 'to perform its high function in the best way'' justice must satisfy the appearance of justice' *Lijeberg*, 108 S.Ct. at 2205. It is Scrushy's position that no Federal Judge should be profiting in the millions of dollars from any party in a case over which he presides. To deny Scrushy's Petition for Mandamus threatens the purity of the judicial process and its institutions. Scrushy respectfully requests that to satisfy the appearance of justice, this Court issue a writ of mandamus to the district court, directing that court

to enter an order recusing itself from any further participation over United States of America v. Don Eugene Siegelman and Richard M. Scrushy 2:05-CR-119-MEF and further grant a vacatur, or

in the alternative, a new trial based on the reasons stated herein.

Respectfully submitted, this _____ day of _____, 2007.

PARKMAN, ADAMS & WHITE, LLC

_____
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ATTORNEY FOR PETITIONER

_____
WILLIAM C. WHITE, II
ATTORNEY FOR PETITIONER

_____
R. MARTIN ADAMS
ATTORNEY FOR PETITIONER

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Honorable Judge Mark Fuller
Chief Presiding Judge

Honorable Charles Coody
United States Magistrate Judge

James B. Perrine
U.S. Attorney's Office

Jennifer M. Garrett
Office of the Attorney General

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REQUEST FOR ORAL ARGUMENT

COMES NOW the Petitioner, Richard Scrushy, and requests Oral Argument on the issues and law presented in this Petition for Writ of Mandamus.

Dated this the _____day of June, 2007.

PARKMAN, ADAMS & WHITE, LLC

_____ _____

JAMES W. PARKMAN, III
ATTORNEY FOR PETITIONER

WILLIAM C. WHITE, II
ATTORNEY FOR PETITIONER

_____

R. MARTIN ADAMS
ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that, on the ____ day of June, 2007, a copy of the foregoing was served on the respondents by depositing the same in the United States Mail with first class postage prepaid and addressed as follows:

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I further certify that on the ___ day of June, 2007, a copy of the foregoing was served on the trial judge by depositing the same in the United States mail with first-class postage prepaid and addressed as follows:

The Honorable Mark Fuller
Chief Judge Presiding
A-300 Frank M. Johnson, Jr. Federal Courthouse
One Church Street
Montgomery, AL 36104

_____

JAMES W. PARKMAN, III
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