

# How Scrushy Beat the Heat

*Some found it surprising that HealthSouth Corp. founder Richard M. Scrushy was acquitted in his recent federal trial, given that the prosecution expressed such confidence in its case. Expert observers said key witnesses who had made deals with the prosecution and a shrewd defense strategy were the main factors that led to the not guilty verdict. Here's how the trial unfolded.*

BY VERNA GATES

PHOTO BY BRAD DALY

**A**bove all else, two sounds resonated following the pronouncement of the not guilty verdict in the trial of HealthSouth Corp. founder Richard M. Scrushy. One was the sound of jaws dropping onto office floors throughout the Birmingham area, and the other was unrestrained jubilation among Scrushy supporters.

Scrushy maintained his innocence all along and on June 28 was acquitted on all charges, including allegations of wire and mail fraud, money laundering, conspiracy, and of violating the federal Sarbanes-Oxley Act. Still, some former HealthSouth employees, certain past and present stockholders, and those who resented either HealthSouth's admitted accounting fraud or Scrushy's lavish lifestyle would have preferred that U.S. Attorney Alice Martin convict Scrushy. Birmingham community activist Helen Rivas said she hoped that "justice would find him in an orange jump suit." Rivas had no connection to HealthSouth through employment or stock.

Denise LeCroy, who invested in HealthSouth the day its stock went public in 1986, said, "I keep thinking he's living in his luxury with his boats and artwork, and he's living on it with my retirement." LeCroy says that she saw the value of her investment plummet from \$150,000 to \$30,000 in the aftermath of HealthSouth's fraud.

Others, especially a vocal group in Birmingham's African-American community, professed Scrushy's innocence. "I know a government conspiracy when I see one, and this is it," said David Russell, a community activist who regularly attended the trial.

Birmingham radio personality Frank



RICHARD M. SCRUSHY

Matthews says of Scrushy: "He was a glorified nurse who specialized in jaw bones, neck bones and T-bones. They ran a circle around him with numbers." Matthews adds: "If it ain't writ, you can't convict," referring to the lack of documentation relating to the fraud. Nevertheless, Matthews admits that a clear majority of African-American callers to his show — at a rate of about 13 to 2, he says — "talked about Scrushy like a dirty dog." Matthews later hosted a TV show on

a station owned by Scrushy's son-in-law.

## First Test of a New Law

As the dust from the verdict settled down, a central question emerged: Why were prosecutors so confident? Accused of masterminding a \$2.7 billion corporate accounting fraud, Scrushy originally was indicted on 85 counts of conspiracy, fraud and money laundering. And Scrushy's trial marked the first prosecution under the Sarbanes-Oxley Act — passed in the wake of a string of corporate scandals — which was designed to promote executive accountability for fraud within America's publicly traded companies. The country eagerly followed this first test case.

The prosecution boasted of numerous co-conspirator witnesses, secret audio recordings, and an alleged notebook outlining the fraud. "Normally going up the food chain is the most powerful weapon in the prosecutor's arsenal, especially in a case where there is a dearth of a paper trail," says Charna Sherman, co-chair of the white collar practice and a partner with the international law firm of Squire, Sanders & Dempsey, speaking from its Cleveland office. "They don't have any choice but to build their case on the testimony of others."

Despite testimony from seven eye-witnesses — including an assistant controller and all five chief financial officers who had served at HealthSouth over the years — who pointed fingers directly at their former leader Scrushy, jurors were unconvinced.

Presiding judge Karon O. Bowdre debated her own ability to try the case. A former professor of insurance law, Bowdre's



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THE FEDERAL COURTHOUSE IN BIRMINGHAM, WHERE FORMER HEALTHSOUTH CEO RICHARD M. SCRUSHY WAS FOUND INNOCENT ON ALL CHARGES RELATED TO THE COMPANY'S \$2.7 BILLION ACCOUNTING FRAUD.

Photo by Erin Farley



HEALTHSOUTH CORPORATE HEADQUARTERS IN BIRMINGHAM



knowledge and experience in criminal law and jury trials was limited. Combine that with her friendship with Scrushy's daughter, Melissa, and she questioned whether she should recuse herself from the case. But Judge Bowdre ultimately decided against it, according to court documents she filed. Throughout the trial, Melissa Scrushy smiled from the front row behind her father.

Former prosecutor and Scrushy attorney Art Leach surged into the power vacuum. He used only about a tenth of his seat, springing forward with objection after objection. During the testimony of one witness, the prosecution tried to retrieve background for a foundation; Leach objected to relevancy. When the prosecution tried to move forward, Leach objected because no foundation was laid. Prosecutor Colleen Conry was then overheard saying under her breath, "Judge Leach."

## Breaking the Momentum

Interruptions in the trial were numerous. The technician who turned on white noise to mask discussions during bench conferences, or sidebars, calculated that a sidebar was called every 11 minutes during the prosecution. Some 600 sidebars were recorded by the end of the trial, offering one reason why the case ballooned well beyond the estimated four months. Several lawyers and a judge, all of whom refused to speak on the record, decried 600 sidebars as an unheard-of number. The trial schedule also skipped around, meeting in the morning one day, after lunch another, and two days, skip three and back for two.

"My theory of prosecution is: the prosecution wants the jury to piece together a

story. The defense wants to tear it apart. When a trial proceeds smoothly with no interruptions, the jury can put it together. This trial was broken up excessively, and the schedule and pace lent itself to the defense," said former Assistant U.S. Attorney Michael Rasmussen.

With Leach affecting the pace, he emerged as a trial expert. In the jury's post-verdict questioning, much of their reasoning in choosing acquittal echoed Leach's closing arguments. For example, Leach asked why a rich man would need to steal more money; that exact statement was repeated by a juror as his logic for acquitting. "The overall strategy was to dissemble their evidence," defense attorney Leach said. "Their evidence was poor and fell apart on our probing it."

## Excluded Testimony

In several instances, Bowdre dismissed witness testimony by repeatedly saying, "no one can testify as to what someone else knows." With this statement, she diluted testimony from several former HealthSouth executives who testified in open court that Scrushy had knowledge of the fraud at HealthSouth. Ruling such testimony as hearsay instead of evidence resulted in a jury that felt it needed either a confession or personal testimony from Scrushy to convict, according to statements jurors made following the verdict. According to a legal dictionary, hearsay is secondhand information from a third party; Bowdre's narrow definition of hearsay often excluded direct eyewitness testimony. "That was a very important ruling," said Steve Smith, a partner in the Securities Enforcement, Compliance and Litigation practice group at the law firm of Bryan Cave, which defended

former Tyco International CEO Dennis Kozlowski.

"When the issue is what does someone know and what they intend, and all you have is circumstantial evidence, there needs to be more leniency," Rasmussen suggested.

In the Securities and Exchange Commission's written explanation to justify continuing its ongoing civil case against Scrushy following his acquittal, it cited certain Bowdre decisions related to the exclusion of testimony as "hard to understand." For example, Bowdre restricted testimony suggesting that Scrushy micro-managed HealthSouth.

Despite a judge's gag order, the courthouse steps transformed into an impromptu witness stand, with the defense holding daily press conferences. Scrushy was allowed to continue his morning Bible study show with wife, Leslie, and to broadcast a nightly defense-oriented wrap-up called "The Scrushy Trial with Nikki Preede," hosted by former WBRC-Fox 6 reporter Nikki Preede. "In a conventional defense strategy, you do not litigate in the press. It turns out in this jurisdiction, that was a winning strategy," Sherman said.

Scrushy attorney Lewis Gillis regularly approached reporters and cameras with the same statement at the end of the day, typically saying that it was another good day for the defense. He would then make several points on behalf of the defense. Judge Bowdre admitted that such impromptu conferences irritated her.

## Seating the Jury

Trouble for the prosecution began during *voir dire*, the process of jury selection. The judge scrapped the questionnaires prepared by the defense and prosecution in lieu of her own. The amount of time for examining groups of 30 prospective jurors at a time was limited to 15 minutes, according to Alice Martin. In the end, only four of the 18 seated in the jury box had actually answered questions, making it nearly impossible for either side to know the jury. That made it especially tough for prosecutors, who must prove their case to all 12 jurors. The defense, on the other hand, needs only one juror to force a mistrial. "Federal courts are limiting *voir dire*, which is causing a lot of problems, especially in a case like this where you need a fair amount of time to find out if people are unbiased," Smith said.

The jury began with 12 blacks and six whites, a pool that eventually was whittled down to six of each in the final seating. A month after the indictment, Scrushy joined Guiding Light Church, one of the largest African-American churches in the Birmingham area, then he traveled the



pulpit circuit preaching to predominately black congregations and donating money, tax records show. In fact, one juror was released because Scrushy had appeared at her church. Each day during the trial, a group of black supporters — composed mostly of preachers, community activists and congregation members — sat behind Scrushy with Bibles open.

While race may not seem to be important in the trial of a white man from Selma, Ala., Scrushy attorney Donald Watkins, in his closing remarks, proffered stories of segregation. He reminisced about his youth, when his mother passed out peppermint candies in case the children might be tempted to drink out of water fountains designated for whites. He continued with a list of things that “Mrs. Watkins’ boy” could accomplish today. Ironically, the prosecution team — consisting of four women, two African-Americans and two white males — reflected more diversity than did the defense.

As the trial carried on, criticism rolled in — some of it aimed at Judge Bowdre. But she publicly defended her work. “I can’t say it hasn’t hurt me,” Judge Bowdre told *The Birmingham News*. “But I know I conducted the trial right, and judges can’t worry about public criticism when things were done correctly under the law.” Bowdre declined to be interviewed for this article.

## ‘Our Luckiest Day’

The prosecution team originally was led by Rasmussen, a seasoned and effective prosecutor known for charming juries. Faced with a seriously ill father, he retired before the trial began in January; his father died during the trial. “That was our luckiest day, when Rasmussen retired,” Watkins said. Later, in an interview during jury deliberations, Watkins said, “I feel sorry for the prosecution, going from 85 counts to zero, when Richard Scrushy is acquitted.”

Following Rasmussen’s retirement, the U.S. Department of Justice sent in attorneys from Washington, D.C., including Richard Smith, a native of Talladega, and Richard Wiedis, a New York native. Neither seemed to connect with the jurors, especially Wiedis, with his strong Northeast persona. Even Smith occasionally was referred to as a “Yankee” by Parkman. “It is always important to have a strong local presence in a courtroom,” Smith said. “The more you are like the jury, the better.”

On at least one occasion, Judge Bowdre displayed frustration with the prosecution. When Wiedis continued a line of questioning about other corporate fraud cases with James Goodreau, former head of security at HealthSouth, Bowdre slammed her gavel down so hard that it set off an alarm in

## Key Dates for HealthSouth, Scrushy

- 1984: HealthSouth is founded
- 1986: HealthSouth goes public
- Mar. 19, 2003: Civil fraud charges are filed against HealthSouth and Scrushy for allegedly falsifying earnings
- Mar. 26, 2003: CFO William T. Owens pleads guilty to doctoring financial statements
- Mar. 31, 2003: HealthSouth fires Scrushy and its auditors.
- April 22, 2003: The House Energy and Commerce Committee investigates how much auditors and board members knew about HealthSouth’s accounting and billing
- Oct. 16, 2003: Scrushy refuses to testify before Congress
- Nov. 4, 2003: Scrushy is indicted on charges that he directed \$2.7 billion in fraud
- Jan. 25, 2005: Scrushy’s trial begins in Birmingham
- June 28, 2005: Scrushy is found not guilty on all charges

the marshal’s office. Wiedis asked Goodreau if he was familiar with Enron, if he knew people had committed fraud, and if people had gone to jail. Ultimately, Bowdre threatened Wiedis with sanctions. “I pulled aside Richard Smith and asked him about Wiedis,” Watkins said after the incident. “When he assured me he was basically a good guy, I did not push to have him sanctioned. The judge could have sent him to jail.”

## Venue Questioned

Observers and experts alike have speculated whether a change of venue prior to the trial would have produced a different outcome. But U.S. Attorney Martin dismissed the notion. “We tried it in the appropriate venue,” she said.

Early in the case, eyebrows raised when Scrushy dismissed attorney Abbe Lowell — who defended former President Bill Clinton and is regarded as one of the nation’s top defense attorneys — and hired the largely unknown Jim Parkman of Dothan. With his deep South Alabama accent and homespun style, Parkman seemed to connect well with the jury.

Parkman’s courtroom theatrics included pulling on latex gloves while questioning FBI Agent Gerald Kelley and asking why he did not check a certain piece of evidence for fingerprints. This action may have made an impression on jurors, who — speaking in post-verdict interviews — cited the prosecution’s lack of fingerprint evidence in their decision to acquit. Parkman also grilled HealthSouth’s first chief financial officer Aaron Beam on the stand by questioning

him about drinking and infidelity. “I’m not picking on you now, but you got to drinking didn’t you?” Parkman asked Beam.

“Jim Parkman...deserves great credit on his cross-examinations,” Leach said.

Judge Bowdre drew some criticism stemming from the fact that the jury worked just parts of 17 days over five weeks. Parkman and his team spent some of their downtime in a rented apartment playing poker, which was “like living with your ex-wives,” he laughed. U.S. Attorney Martin kept busy with abortion clinic bomber Eric Rudolph’s guilty plea.

Near the end of deliberations, Judge Bowdre dismissed “hold-out” juror Willis Vest, a retired BellSouth engineer and Army veteran who publicly stated that he believed Scrushy was guilty, after he missed days due to migraine headaches. Vest later said that he didn’t want to be excused but didn’t know he had the right to protest. Another juror also had missed days but was retained. A decision quickly followed: full acquittal.

“This is...a case where an incredibly skilled team of lawyers, not only with talent but with an eye toward the jury pool, pulled off an extraordinary victory,” Sherman says.

Free from all criminal charges, Scrushy now faces allegations from the Securities and Exchange Commission and several other civil cases, including actions filed by certain past and present HealthSouth stockholders.

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