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Courtroom Conduct By Spectators

Pamela H. Bucy

Working Paper

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COURTROOM CONDUCT BY SPECTATORS[©]

by Pamela H. Bucy¹

This Article examines courtroom conduct by trial spectators and proposes a protocol for dealing with it. Such conduct can be powerful, in part because it is irrebuttable. To date, there is no recognized method for dealing with such conduct. Part I of this Article focuses on one case study, a recent fraud trial, to highlight how such conduct can impact on the rights of the parties. Part II reviews the case law on point beginning with the recent United States Supreme Court's decision in *Carey v. Musladin*, where the Court side-stepped the opportunity to provide guidance on how to handle such courtroom conduct by spectators. Part II continues by examining the current law regarding admission of character evidence and the "curative admissibility" doctrine and proposes a protocol combining these legal theories for dealing with courtroom conduct by spectators. Part III of this Article concludes by applying the proposed protocol to the fraud trial discussed in Part I.

PART I: UNITED STATES V. RICHARD SCRUSHY

Greed, lies, and broken friendships were part of the \$2.7 billion accounting fraud trial of Richard M. Scrushy, CEO and founder of HealthSouth, Inc., the largest rehabilitation hospital corporation in the United States. Scrushy was acquitted in one of the few major white collar prosecutions lost by the United States Department of Justice (DOJ) in a decade of aggressive fraud

¹ Bainbridge Professor of Law, University of Alabama School of Law. The author expresses her appreciation to Dean Ken Randall and the Alabama Law Foundation for their support, to my colleague, Professor Michael Pardo for his comments, and to Page Pulliam Thead, UA Law '07, for her research assistance.

prosecutions.² It was also the first prosecution under Sarbanes-Oxley. This Article suggests that DOJ lost the case not because of the evidence, but because of the drama in the courtroom played out by trial spectators.

A. Background

1. HealthSouth Inc.

Richard Scrushy was born in Selma, Alabama³ in 1952. At age 17, with a baby on the way, he dropped out of high school, married,⁴ and supported his new family by pumping gas at a service station.⁵ Scrushy earned his GED and trained as a respiratory therapist.⁶ Ambitious and visionary, he realized that physical therapy would be a growing business.⁷ In 1984, Scrushy founded HealthSouth, Inc. and began opening physical therapy clinics throughout the southeast.⁸ HealthSouth went public and by 2003, had grown to 2000 hospitals and 50,000 employees nationwide, reporting \$4.2 billion in revenue.⁹

² Simon Romero & Kyle Whitmire, *Former Chief of HealthSouth Acquitted in \$2.7 Billion Fraud*, N.Y. TIMES, June 29, 2005 [hereinafter Romero & Whitmire, *Former Chief*].

³ Russell Hubbard, *Rocket-Like Ascent Tumbles Back With Crushed Investors*, BHAM NEWS, Apr. 13, 2003 at 1A [hereinafter Hubbard, *Ascent*].

⁴ Dan Morse, Chad Terhune & Ann Carnns, *HealthSouth's Scrushy is Acquitted*, WALL ST. J., June 29, 2005 at A1 [hereinafter Morse, Terhune & Carnns, *Acquitted*].

⁵ Greg Schneider, *Scrushy's Sterling Image Tarnished*, WA. POST, Apr. 9, 2003 at E1 [hereinafter Schneider, *Image*]; Janet Guyton, *Richard Scrushy's Chief Believer*, WASH. POST, May 18, 2006 at D1 [hereinafter Guyton, *Chief Believer*].

⁶ Morse, Terhune & Carnns, *Acquitted*, *supra* note 4 at A1.

⁷ *Id.*

⁸ *Id.*

⁹ Reed Abelson, *In Birmingham, Richard Scrushy is a Local Story*, NY TIMES, Jan. 26, 2005 at C1 [hereinafter Abelson, *Local Story*].

Scrushy flaunted his new wealth.¹⁰ He bought multiple homes,¹¹ including Gulf Coast waterfront property,¹² a \$10 million Palm Springs mansion,¹³ and a 20-room estate with a helicopter pad.¹⁴ He bought a Cessna jet,¹⁵ paintings by Picasso, Miro and Chagall,¹⁶ a 92-foot yacht,¹⁷ and a fleet of cars that included a Lamborghini and Rolls Royce.¹⁸ His wife wore a 21-carat diamond ring.¹⁹

Cracks began to appear at HealthSouth in March, 2003, when Weston L. Smith, a previous Chief Financial Officer for the company, contacted federal investigators to reveal the existence of a massive accounting fraud at HealthSouth. Bill Owens, HealthSouth's current CFO, also went to authorities, confessed to participating in the accounting fraud, and offered to cooperate with authorities.²⁰ Wired and monitored by the FBI, Owens began recording his conversations with Scrushy. In these conversations, Scrushy acknowledges the fraud ("Every company has [expletive]

¹⁰ Jennifer Bayot & Maria Newman, *HealthSouth Founder Acquitted of All Counts of Corporate Fraud*, NY TIMES, June 28, 2005 [hereinafter Bayot & Newman, *HealthSouth Founder*].

¹¹ Guyton, *Chief Believer*, *supra* note 5 at D1.

¹² Carrie Johnson, *Jury Acquits HealthSouth Founder of All Charges*, WASH. POST, June 29, 2005 at A1 [hereinafter Johnson, *Founder*].

¹³ Romero & Whitmire, *Former Chief*, *supra* note 2.

¹⁴ Simon Romero, *Will the Real Richard Scrushy Please Step Forward?*, NY TIMES, Feb. 17, 2005 at C1 [hereinafter Romero, *Step Forward*].

¹⁵ *Id.*

¹⁶ *Id.* Romero & Whitmire, *Former Chief*, *supra* note 2.

¹⁷ Romero & Whitmire, *Former Chief*, *supra* note 2.

¹⁸ Morse, Terhune & Carrns, *Acquitted*, *supra* note 4.

¹⁹ *Id.*

²⁰ Kyle Whitmire, *Deliberating, Scrushy Jury Again Hears Recordings*, NY TIMES, May 20, 2005 at C2 [hereinafter Whitmire, *Deliberating*].

on their balance sheet,)"²¹ and threatens Owens ("If you want to go public with all of this, then you might as well get ready to get fired.")²² Upon the heels of one such conversation, FBI agents executed a search warrant at HealthSouth headquarters.²³ The search broke open the HealthSouth fraud, making it public. Within days of the search, HealthSouth's stock price fell 99%, to 12 cents per share; trading in HealthSouth stock was halted.²⁴

Two and a half years after the search Richard Scrushy was indicted. By this time fifteen former HealthSouth executives, including all five former CFOs of the company, had pled guilty to participating in the \$2.7 billion accounting fraud.²⁵ Scrushy was indicted on eighty-five charges including conspiracy, securities fraud, wire fraud, mail fraud, false statements, money laundering and false certification of assets.²⁶ The indictment alleged that over a seven-year time period, Scrushy and

²¹ Russell Hubbard & Michael Tomberlin, *Scrushy Jury Hears FBI Tapes*, BHAM NEWS, May 20, 2005 at 1A [hereinafter Hubbard & Tomberlin, *Tapes*].

²² *Id.*

²³ Whitmire, *Deliberating*, *supra* note 20.

²⁴ Hubbard, *Ascent*, *supra* note 3.

²⁵ *Id.*; Mary Orndorff & Val Walton, *Scrushy Free on \$10 Million Bail*, BHAM NEWS, Nov. 5, 2003 at A1 [hereinafter Orndorff & Walton, *Scrushy Free*].

²⁶ Carrick Mollenkamp & Chad Terhune, *Scrushy Indicted on Fraud Charges*, WALL ST.J., Nov. 5, 2003 at A3 [hereinafter Mollenkamp & Terhune, *Scrushy Indicted*]. A superceding indictment with only 58 counts was returned in September, 2004. Thomas S. Mulligan, *Ex-CEO Cleared in \$2.7 Billion Fraud: Prosecutors Suffer a Setback After a String of High-Profile Convictions of Business Figures*, LA TIMES, June 29, 2005 [hereinafter Mulligan, *Setback*]. Trial proceeded on the 58 count indictment. If convicted on all counts, Scrushy would have faced a maximum prison sentence of 650 years, more than \$36 million in fines and forfeiture of \$279 million in assets. Orndorff & Walton, *Scrushy Free*, *supra* note 25 at A1; David Voreacos and Laurence V. Davidson, *HealthSouth's Scrushy Led Accounting Fraud, U.S. Says*, www.blomberg.com, Jan. 25, 2005 [hereinafter Voreacos & Davidson, *Accounting Fraud*].

By the time the trial began, in January, 2005, the government had dismissed twelve counts. Abelson, *Local Story*, *supra* note 9 at C1.

other HealthSouth officers inflated HealthSouth's assets.²⁷ The fraud was described as "staggering,"²⁸ because of "its longevity and teamwork."²⁹

Scrushy became a social pariah as the HealthSouth scandal unfolded. He was jeered when he frequented his usual steakhouse.³⁰ Social acquaintances described Scrushy as "an embarrassment,"³¹ reporting that they were "totally disgusted" with him.³² Neighbors told the press: "He wasn't welcome at the height of his power and fame, and he's certainly not now."³³ The new CEO of HealthSouth, who took over as CEO from Scrushy when the scandal became public, stated that HealthSouth was "appalled" by the fraud and that in the future, "under no circumstances will Mr. Scrushy be offered any position within the company."³⁴

2. The Trial

Richard Scrushy's five-month trial took place in Birmingham, Alabama, HealthSouth's

²⁷ There were basically three parts to the fraud as summarized by Scrushy's right-hand man and key government witness: giving analysts inflated guidance about HealthSouth; making false entries in the books of HealthSouth to falsify its earnings; and providing false information to conceal the inflated earnings. Transcript of Record, United States v. Richard M. Scrushy, CR-03-BE-530-S (2005) Vol. 2, pp. 1878-79 (Testimony of Bill Owens [hereinafter *Trial Transcript*]).

²⁸ *Id.* (quoting Christopher Wray, Assistant Attorney General, U.S. Department of Justice).

²⁹ Bayot & Newman, *HealthSouth Founder*, *supra* note 10.

³⁰ Romero, *Step Forward*, *supra* note 14.

³¹ *Id.*

³² *Id.*

³³ Lawrence Viele Davidson, *Scrushy Verdict Angers Neighbors*, *Fort Worth Star Telegram*, July 10, 2005.

³⁴ *Id.*

headquarters and Scrushy's home.³⁵ All five of the company's CFOs in HealthSouth's brief history, some of whom had been Scrushy's closest friends,³⁶ testified against Scrushy. They detailed how he had directed the fraud,³⁷ and how they had facilitated it.³⁸ A number of HealthSouth employees testified that there was an atmosphere of intimidation at HealthSouth. One finance executive

³⁵ Russell Hubbard, *Jurors Decide 'Smoking Gun' Didn't Point to ex-CEO, Not Guilty*, BHAM NEWS, June 29, 2005 [hereinafter Hubbard, *Jurors Decide*].

³⁶ Together they made millions, played in a rock band, (Richard Scrushy, CEO and Founder of HealthSouth, Inc., Bill Owens, CFO of HealthSouth, and Ken Livesay, Chief Information Officer of HealthSouth, played together in a band, Dallas County Line, named for the county line in the rural Alabama county Scrushy grew up in. Michael Tomberlin, *Scrushy, Pals Had Musical Ties*, BHAM NEWS, Feb. 27, 2005 [hereinafter Tomberlin, *Musical Ties*]. There were many connections between the rock band and HealthSouth. A HealthSouth helicopter ferried the band to a weekend getaway, HealthSouth security staff served as bodyguards for band members, HealthSouth buses carried the band to its engagements, a HealthSouth credit card paid for the band's expenses, HealthSouth personnel assisted the band with travel and promotions, HealthSouth paid the band's salary and HealthSouth contracted to pay the band's expenses through seven albums. Michael Tomberlin, *HealthSouth Spent Big Bucks to Promote Singing Group*, May 4, 2003 at D1) served as godfathers for each others' children, *Trial Transcript*, Vol. 6, pp. 8674-8675; Vol. 3, pp. 4147) and, like the good friends they were supported each other through family crises. *Trial Transcript*, Vol. 6, pp. 9324-9326; Vol. 3, pp. 2641. *Trial Transcript*, Vol. 3, pp. 2965. They also testified against each other. *Trial Transcript*, Vol. 6, pp. 9160; Vol. 3, pp. 2070, 4557.

³⁷ The CFOs all testified that Scrushy was aware of and directed it from the beginning (1986 when HealthSouth went public) (*Trial Transcript*, *supra* note 27 at Vol. 1, pp. 371-373, 382-383, 438; *Trial Transcript*, *supra* note 27 at Vol. 4, pp. 5878; *Trial Transcript*, *supra* note 27 at Vol. 5, pp. 6419, 6481-6482; *Trial Transcript*, *supra* note 27 at Vol. 5, pp. 6504-6508, 6516, 6521; *Trial Transcript*, *supra* note 27 at Vol. 6, pp. 8386-8391; *Trial Transcript*, *supra* note 27 at Vol. 3, pp. 1901, 1927-1928. Mike Martin and Weston Smith, Controller and CFO of HealthSouth had been friends of Bill Owens and were recruited to HealthSouth by Owens, *Trial Transcript*, *supra* note 27 at Vol. 6, pp. 8365-8366, and about Scrushy's management style of fear and intimidation, *Trial Transcript*, *supra* note 27 at Vol. 3, pp. 2001, about logistical problems created by the fraud (HealthSouth didn't have the money to pay taxes on the falsely reported income), *Trial Transcript*, *supra* note 27 at Vol. 4, pp. 5753, and wrath when questioned. *Trial Transcript*, *supra* note 27 at Vol. 3, pp. 1997.

Associated Press, *HealthSouth Co-Founder Discusses Ex-CEO*, NY TIMES, Jan. 26, 2005. Accounting experts testified that the fraud, inflating HealthSouth's earnings, began the year HealthSouth went public. It was "not sophisticated sorcery" but simple, straight forward making up of numbers. *Trial Transcript*, *supra* note 27 at Vol. 7-8 (Testimony of Harvey Kelly); *see also* Russell Hubbard and Val Walton, *HealthSouth Fraud Grew Big Quickly, Expert Says*, BHAM NEWS, Jan. 29, 2005 at 1A [hereinafter Hubbard & Walton, *Grew Quickly*]; Morse, Terhune & Carnes, *Acquitted*, *supra* note 4 at A1; AP, *Defense Witness Damaging to Scrushy*, NY TIMES, Apr. 28, 2005.

Reed Abelson & Jonathan Glater, *A Style That Connected With Hometown Jurors*, N.Y. TIMES, June 29, 2005, at C1 [hereinafter Abelson & Glater, *Style Connected*].

³⁸ Jay Reeves, *Scrushy Verdict Likely Rests on Testimony of Five Former CFOs*, BHAM NEWS, May 16, 2005.

testified that she was threatened with the loss of her job if she did not assist in concealing the fraud.³⁹ Another witness,⁴⁰ who left HealthSouth after discovering the fraud,⁴¹ testified that Scrushy screamed at him when he expressed concern about the accuracy of HealthSouth's reporting of revenue and that another HealthSouth employee punched him in the face because he expressed his disapproval of the fraud.⁴²

The trial appeared to be painful for the former friends. Bill Owens, the key government witness,⁴³ had been close friends with Scrushy for over twenty years. They had played in a country and rock band together.⁴⁴ When Scrushy stepped aside as HealthSouth's CEO, he installed Owens

³⁹ *Trial Transcript, supra* note 27 at Vol. 4 (Testimony of Diane Henze). She testified that Bill Owens told her, "We have to do certain things to make this company make its numbers, without it, the stock price will drop and people will lose their jobs." This executive was later told by Owens that she was not promoted because, "You won't do what we've asked you to do." *Id.*

⁴⁰ *Trial Transcript, supra* note 27 at Vol. 3, pp. 4778-4780 (Testimony of Leif Murphy).

⁴¹ *Id.* at 4807-4808. Murphy described the actual financial statements of HealthSouth as "shocking" (*Id.* at 4809) and "that the company was not . . . earning anything near what was going to be reported. . . ." (*Id.* at 4810).

⁴² *Id.* at 4814. This witness, Leif Murphy, testified that Scrushy screamed at him, "Where do [you] get off trying to tell [me] how to run the company I've run for 14 years?" Immediately after Murphy presented his concerns to Richard Scrushy, telling him that the numbers were "fabricated" (*Id.* at 4897), Murphy and Mike Martin (who was the Chief Financial Officer) returned to Martin's office, "very heated, very anxious and he looked at me and yelled, where do I get off telling him how to run his company. He had been running this company for the last fourteen years. And at that point, I pretty much just shut up." Michael Martin, the HealthSouth CFO at the time, pleaded with Murphy to stay at HealthSouth, *Id.* at 4819, offered to pay Murphy a million dollars if he would stay, *Id.* at 4819, and finally, urged Murphy to take what he knew about the false numbers with him for his "own protection . . . and . . . to bury it somewhere" *Id.* at 481. The tension grew over what Murphy would do with his knowledge of the fraud. Martin who "was, obviously, very aggravated" with Murphy gave Murphy a going away card that said "eat shit and die," *Id.* at 4916, and then "sucker punch[ed] Murphy in the face." *Id.* at 4916.

⁴³ Owens was well paid for his services at HealthSouth. Between 1999 and 2001 alone, he was paid \$4 million. In addition he made a profit of \$4 million (before taxes) when exercising HealthSouth stock options. *Id.*

⁴⁴ Tomberlin, *Musical Ties, supra* note 36 at 1D.

Five additional HealthSouth employees also played in one or another of Scrushy's bands. As one employee described, it was easy to get off work for band practice with the CEO's band:

"One of the bizarre scenarios of being an employee of HealthSouth and being in that band was that if you had a boss or supervisor, you could just tell them you have band practice . . . It was like, next Thursday at two o'clock we're having band practice so I won't be in the office. He'd say, 'oh, okay.'"

his place.⁴⁵ Ken Livesay, assistant Controller and later, Chief Information Officer of HealthSouth,⁴⁶ also played in the group's band.⁴⁷ Aaron Beam, co-founder of Health South with Scrushy and the Company's first CFO,⁴⁸ had been friends with Scrushy for 25 years.⁴⁹

Cross-examination by Scrushy's attorneys of his former colleagues and friends was brutal. Questions focused on their adulterous affairs,⁵⁰ excessive drinking,⁵¹ treatment for depression,⁵² money made while working at HealthSouth,⁵³ lack of work ethic,⁵⁴ failure to pay taxes,⁵⁵ marital problems,⁵⁶ efforts to hide assets,⁵⁷ criminal culpability of spouses,⁵⁸ lies to analysts about the

The bands played for a number of functions and self-produced albums and video, *Id.*, and penned titles such as "A Whole Lotta Trouble" and "Dirty Rotten Shame." Schneider, *Image*, *supra* note 5 at E1.

⁴⁵ Jerry Underwood, *Owens Gets a Lesson in Loyalty*, BHAM NEWS, Mar. 30, 2003 at D1; Dan Morse & Evelina Shmukler, *Trial of HealthSouth Head Takes on Personal Note*, WALL ST.J., Jan. 31, 2005 at C1 [hereinafter Morse & Shmukler, *Personal Note*].

⁴⁶ *Trial Transcript*, *supra* note 27 at Vol. 4, pp. 5677-5679.

⁴⁷ *Trial Transcript*, *supra* note 27 at Vol. 4, pp. 5675-5676.

⁴⁸ *Trial Transcript*, *supra* note 27 at Vol. 1, pp. 250, 961-962.

⁴⁹ *Trial Transcript*, *supra* note 27 at Vol. 1, pp. 242.

⁵⁰ *Trial Transcript*, *supra* note 27 at Vol. 1, p. 889-893.

⁵¹ *Trial Transcript*, *supra* note 27 at Vol. 1, pp. 892.

⁵² Guyton, *Chief Believer*, *supra* note 5.

⁵³ *Trial Transcript*, *supra* note 27 at Vol. 1, pp. 906, 5682.

⁵⁴ *Trial Transcript*, *supra* note 27 at Vol. 3, pp. 3788-3789.

⁵⁵ *Trial Transcript*, *supra* note 27 at Vol. 3, pp. 2575-2576.

⁵⁶ *Trial Transcript*, *supra* note 27 at Vol. 3, pp. 2939-2940.

⁵⁷ *Trial Transcript*, *supra* note 27 at Vol. 3, pp. 2943-2945, 4294-4317.

⁵⁸ *Trial Transcript*, *supra* note 27 at Vol. 4, pp. 6072-6073.

HealthSouth profits,⁵⁹ and the light prison sentences they received allegedly in exchange for testimony.⁶⁰ Scrushy's attorneys reduced one former friend to tears on the stand and mocked others, "You're the smartest man alive? I believe that."⁶¹

Before and throughout the trial, pundits and legal experts described the case against Scrushy as "overwhelming,"⁶² "massive,"⁶³ "particularly strong,"⁶⁴ and "nearly airtight."⁶⁵ Before the verdict, legal experts opined that the Scrushy trial gave "federal prosecutors their best chance yet in corporate scandals to secure the conviction of a former chief executive."⁶⁶

⁵⁹ *Trial Transcript, supra* note 27 at Vol. 1, pp. 556-558, 5681-5683.

⁶⁰ *Trial Transcript, supra* note 27 at Vol. 3, pp. 4468-4469.

⁶¹ *Trial Transcript, supra* note 27 at Vol. 3, pp. 3872-3874, 4488.

As one reporter described,

"'No matter how thin you pour it,' [Jim] Parkman [Scrushy's trial counsel] told the jury in Birmingham last year, 'there are always two sides to a pancake.'

What happened next convinced Leslie that God was watching over her family. When the time came to cross-examine the government's star witness, former chief financial officer William T. Owens, it was National Pancake Week. And in the last two hours of the last day of National Pancake Week, Parkman succeeded in undermining Owens's credibility by getting him to testify that he once claimed to be the 'smartest person alive' - this from a man who admitted involvement in the HealthSouth fraud.

'That had to be God,' said Leslie, who marked the week in the little red Bible she carries. 'I never even knew there was a National Pancake Week.'"

Guyton, *Chief Believer, supra* note 5 at D1.

⁶² Associated Press, *Scrushy Acquitted of Fraud at HealthSouth*, N.Y. TIMES, June 29, 2005 ("Joel Androphy, a Houston attorney who specialized in white-collar cases, called the evidence against Scrushy 'overwhelming.'")

⁶³ *Id.* ("A corporate law specialist who had followed the trial was stunned. 'There was a mass of evidence against him. I certainly expected the jury to convict.'")

⁶⁴ Romero & Whitmire, *Former Chief, supra* note 2 at A1; Abelson & Glater, *Style Connected, supra* note 37 at C1 ("It's a stunner [the guilty verdict] given how strong the government's case seemed to be." (quoting Gregory J. Wallance, a former prosecutor and current partner at Kaye Scholer, New York.)

⁶⁵ AP, *Scrushy Acquitted, supra* note 62 at A1.

⁶⁶ Milt Freudenheim & Eric Lichtblau, *Former HealthSouth Chief Indicted by U.S.*, N.Y. TIMES, Nov. 5, 2003, at C1 [hereinafter Freudenheim & Lichtblau, *Chief Indicted*]:

"Experts on white-collar crime said the case gave federal prosecutors their best chance yet in the corporate scandals to secure the conviction of a former chief

Given the apparent strength of the evidence about Scrushy's role in the fraud, it was a surprise to trial followers when Scrushy was acquitted on all counts. Pundits described the verdict as "jaw-dropping,"⁶⁷ "stunning," and "astonishing."⁶⁸ As one reporter who had covered the case explained, "If ever a chief executive seemed destined for prison, it was Richard M. Scrushy."⁶⁹ Conventional wisdom attributed the acquittal not to the evidence but to Scrushy's highly public courting of African-American religious leaders.⁷⁰

3. Race and Religion: Did the Courtroom Drama Steal the Show?

By the time his case went to trial, Richard Scrushy, a white billionaire, had become a highly visible member of the African-American religious community of Birmingham, Alabama, the location of the trial. Scrushy's conversion appeared to coincide with his trial date. After the execution of the search warrant on HealthSouth and the resulting news coverage of extensive fraud at the company,

executive. Fourteen former HealthSouth executives and accounting managers who have already pled guilty to various fraud charges – including all five of the company's former chief financial officers – are expected to testify against Mr. Scrushy."

⁶⁷ Verna Gates, *How Scrushy Beat the Heat*, BUS ALA, Oct. 2005 at 18 [hereinafter Gates, *Beat the Heat*].

⁶⁸ Johnson, *Founder*, *supra* note 12 at A1.

⁶⁹ Abelson & Glater, *Style Connected*, *supra* note 37.

⁷⁰ Simon Romero, Kyle Whitmire, Jennifer Bayot & Roben Farzad, *Fraud-Trial Jury is Told to Restart For an Alternate*, NY TIMES, June 23, 2005 at 1A ("In moves his critics contend are efforts to manipulate racial sentiment among the jurors, Mr. Scrushy joined a predominantly black church in Birmingham and began preaching there and at other black churches in the city before his trial began in January. Mr. Scrushy, who attended a white church before his indictment, is also host of a local television program that discusses the Bible and other religious issues."); Michael Tomberlin, *Scrushy Radioactive*, BHAM NEWS, June 30, 2006 *quoting* Karen Cartee, a University of Alabama Professor [hereinafter Tomberlin, *Scrushy Radioactive*].

Throughout trial the defense portrayed Scrushy as the visionary leader of HealthSouth who left all details to his subordinates and did not know about the \$2.7 billion misrepresentation of HealthSouth's worth that his subordinates conducted. Abelson, *Local Story*, *supra* note 9 at C1; Sherri C. Goodman, *Defense May Blame Subordinates*, BHAM NEWS, Nov. 5, 2003 at A1.

Scrushy left the wealthy, suburban, white church where he and his family had been members,⁷¹ and joined Guiding Light, a predominately African-American church in Birmingham.⁷² Scrushy gave generously to numerous African-American churches⁷³ and began serving as a guest preacher in African-American churches,⁷⁴ including a church at which a juror was a member.⁷⁵ After the execution of the search warrant, Scrushy, along with his wife, Leslie, also began hosting a television talk show that featured African-American pastors as regular guests.⁷⁶ Once Scrushy's fraud trial

⁷¹ Mulligan, *Setback*, *supra* note 26.

⁷² Scrushy was indicted in October, 2003 on 85 counts of conspiracy, mail fraud, wire fraud, securities fraud, false statements and false certification and money laundering. Case No. CR-03-BE-0530-S (N.D. AL). Cf. Mollenkamp & Ann Carrns, *As Trial Looms*, WALL ST.J., Mar. 3, 2004 at B1 [hereinafter Mollenkamp & Carrns, *Trial Looms*]; Abelson, *Local Story*, *supra* note 9; Business Brief, *Scrushy Concludes Classes at Church*, BHAM NEWS, April 25, 2004.

⁷³ For example in 2003, the year the FBI began investigating Scrushy and HealthSouth for accounting fraud, Scrushy's family foundation gave more than \$1 million to Guiding Light Ministries, the predominantly African-American church Scrushy and his family joined in 2003. Dan Morse, *Faith and Hope*, WALL ST.J., May 13, 2005 at A1 [hereinafter Morse, *Faith & Hope*].

⁷⁴ Morse, *Faith and Hope*, *supra* note 73 at A1. During Scrushy's trial he preached at various churches on Wednesday evenings and Sundays. Scrushy's testimonials apparently are quite dramatic. For example:

"Mr. Scrushy took the pulpit. He preached for 47 minutes, swinging from booming Southern cadence to tear-choked whispers. 'I not only talk to God, I listen to Him,' he said.

Pacing, he told the congregants that prayer brought him through his tribulations.

Discussing what he called 'medical miracles,' he said it was God alone who could set a baby's heart to beating, and God alone who gives people eyesight. 'He gave us the eyeball!' Mr. Scrushy thundered.

He closed with a prayer, and the 'Amens' gave way to a standing ovation as he walked down the steps to stand next to his wife. Soon . . . many in the congregation were laying hands on Mr. Scrushy's shoulders and praying for him."

⁷⁵ Morse, *Faith and Hope*, *supra* note 73 at A1. During the trial one juror was dismissed because the juror belonged to a church where Scrushy preached. According to the marquee of Point of Grace Ministries, a Pentecostal congregation, "Join us tonight at 6pm for a good time in Jesus. Special guest Richard Scrushy." Morse, *Faith and Hope*, *supra* note 73 at A1.

⁷⁶ Titled "Viewpoint," the show is funded by Scrushy's new church and features those wronged by the media. Tomberline, *Scrushy's TV Talk Show Debuts*, B'HAM NEWS, Mar. 2, 2004. In 2006, when Scrushy was indicted in another federal jurisdiction in Alabama, along with a former Alabama governor, on corruption charges, he expanded his television show to that jurisdiction. As the Birmingham News cynically opined, the expansion was "just a coincidence." Editorial, *Scrushy's Life of Little Ironies*, B'HAM NEWS, Apr. 9, 2006 at 2B. Their guests on the show have included at least 200 Christian ministers, Morse, *Faith and Hope*, *supra* note 73 at A1, religious

commenced, the African-American pastors who had appeared on his television show were highly visible Scrushy supporters in the courtroom.⁷⁷ Almost every day of the five-month trial, African-American pastors and parishioners sat in the courtroom behind Scrushy and his defense team. They conferred regularly with Scrushy, his family, and various defense attorneys, all while in the courtroom. The pastors and worshipers often held Bibles in their laps while sitting in court and appeared to be praying.⁷⁸ Throughout the trial African-American pastors and parishioners made up

celebrities such as former Alabama Supreme Court Justice Roy Moore who was removed from office for disobeying a court order to remove a Ten Commandments monument from the judicial building housing the Alabama Supreme Court, Mollenkamp & Carrns, *Trial Looms*, *supra* note 72 at B1, and religious entrepreneurs such as executives from the Scripture Candy company. Tomberlin, *Scrushy's TV Talk Show Debuts After Attempts at Radio, Print*, B'HAM NEWS, Mar. 2, 2004 [hereinafter Tomberlin, *Show Debuts*]. Richard and Leslie Scrushy prayed regularly with the guests on their show. The show, "Viewpoint," was purchased by Word of Truth International Ministries. Word of Truth is sponsored by Guiding Light Church, the predominately African-American church Scrushy joined and to which he gave \$1 million shortly before his indictment. *Id.* The sole sponsor of Viewpoint is Alamerica Bank, which is headed by Donald Watkins, lead counsel for Scrushy in his fraud trial. *Id.*

⁷⁷ Scrushy's overtures to the African-American community spawned jokes: "What's the difference between Michael Jackson and Richard Scrushy? Jackson is a black guy who became white before his trial, Scrushy is a white guy who tried to become black before his." Jay Reeves, *Race Plays Subtle Role in Scrushy Trial*, CBSNews.com, May 22, 2005 [hereinafter Reeves, *Race*]. The leading black newspaper in Birmingham, Alabama, the *Birmingham Times* "ran trial coverage often sympathetic of Scrushy." *Id.* The first day of jury deliberations it ran a front-page story "saying 'pastors and community leaders have rallied around Scrushy showing him the support of the Christian and African-American community.'" *Id.* Pundits identified Scrushy's highly public courting of African-American religious leaders on the eve of trial as pure strategy. Sherri C. Goodman, *Defense May Blame Subordinates*, BHAM NEWS, Nov. 5, 2003 ("Scrushy's . . . decision to join a prominent black church, and his friendship with . . . well known black community leaders could . . . be construed as part of the defense team's strategy He's laying the ground work for endearing himself to African-American jurors." Quoting a white collar defense expert, Chris Bebel.) Romero & Whitmire, *Former Chief*, *supra* note 2 ("Mr. Scrushy, who is white, and formerly attended a predominantly white church in Vestavia Hills, an affluent suburb, attracted attention by joining a predominantly black church after his legal troubles came to light and by preaching at black churches around Birmingham Mr. Scrushy's critics portrayed this move as an attempt to gain favor among black members of the jury.")

⁷⁸ Morse, *Faith and Hope*, *supra* note 73 at A1. ("Clergymen often accompany Mr. Scrushy to court. So do churchgoers such as Mona Beck, who spends much of her time there reading from a Bible in her lap and praying.")

During the trial, in the presence of jurors and despite warnings from the bench not to do so, Scrushy would lean across the courtroom railing to speak and pray with black ministers. As one African-American woman grasped Scrushy's hand in hers, she "spoke quietly yet passionately, invoking Jesus' name at the end." Ann Woolner, *Blacks Fill Scrushy's Amen Corner*, BHAM NEWS, Feb. 6, 2005, at B1 [hereinafter Woolner, *Amen Corner*]. One African-American parishioner wore a baseball cap in court that said, "Jesus is Lord." *Id.*

most of the courtroom spectators.⁷⁹

African-American pastors were also active throughout the trial outside the courtroom. They distributed pro-Scrushy pamphlets at the courthouse. Before and after trial proceedings each day, some pastors, in their vestments,⁸⁰ stood behind Scrushy on the courthouse steps while he held press conferences.⁸¹ While awaiting the verdict, Scrushy huddled with African-American ministers and parishioners.⁸² Upon hearing the verdict of Non-Guilty, they embraced Scrushy.⁸³ Some spoke to the press after the verdict:

- “We’ve been praying ever since this started and God accomplished that thing that He said He would do.”⁸⁴
- “We’ve been doing a lot of praying. We knew all along that Mr. Scrushy was not guilty.”⁸⁵
- “Everything is to the glory of God and we knew He was going to deliver him. I was praying before the verdict and during the verdict. Our prayers have been answered.”⁸⁶

⁷⁹ Reeves, *Race*, *supra* note 77.

⁸⁰ John Archibald, *Weird Stuff at Work at Scrushy Trial*, BHAM NEWS, June 12, 2006, at 15A.

⁸¹ Reeves, *Race*, *supra* note 77.

⁸² Woolner, *Amen Corner*, *supra* note 78 at B1; Ann Woolner, *Black, White Congregate in Scrushy’s Amen Corner*, BLOOMBERG NEWS, Feb. 5, 2005 [hereinafter Woolner, *Congregate*].

⁸³ Jeff Hansen, Sherri C. Goodman & Chanda Temple, *Prayers, Cold Shoulder Mark End of Trial*, BHAM NEWS, June 29, 2005 at 8A.

⁸⁴ *Id.* (quoting Pastor Sil Williams of Morning Star Ministries of Birmingham, Alabama).

⁸⁵ *Id.* (quoting Pastor Theo Bailey of Temple Light Ministries of Ensley, Alabama).

⁸⁶ *Id.* (quoting Bishop Jim Love, the pastor at Guiding Light Church in Roebuck, Alabama. Guiding Light is the African-American church Scrushy joined after the HealthSouth fraud became public and to which he donated \$1 million shortly before being indicted).

In an appearance on the courthouse steps after the verdict, Scrushy thanked his “prayer partners,”⁸⁷ “God is good”⁸⁸; “I’m going to a church and pray.”⁸⁹

Many Alabamians viewed Scrushy’s befriending of African American religious leaders with skepticism.⁹⁰ As one commentator described “[Scrushy’s] conversion ‘as’ a savvy public relations move”⁹¹ According to one former Scrushy business associate, “In all my visits to the executive suite at HealthSouth, I never saw a black person there The first time I heard religion and Richard Scrushy mentioned in the same sentence was when I read about him going to Guiding Light Church.”⁹²

B. Did the Courtroom Conduct By Spectators Make a Difference?

In hindsight, pundits offered many reasons for Scrushy’s surprising acquittal: the overly relaxed nature of the trial⁹³ and deliberation schedule,⁹⁴ the light sentences given to many of the

⁸⁷ Morse, Terhune & Carrns, *Acquitted*, *supra* note 4 at A1.

⁸⁸ Mulligan, *Setback*, *supra* note 26.

⁸⁹ Jay Reeves, *Scrushy Acquitted of Fraud of HealthSouth*, BOSTON.COM, June 28, 2005 [hereinafter Reeves, *Scrushy Acquitted*].

⁹⁰ Woolner, *Congregate*, *supra* note 82; Woolner, *Amen Corner*, *supra* note 78 at B1.

⁹¹ Tomberlin, *Scrushy Radioactive*, *supra* note 70; Guyton, *Chief Believer*, *supra* note 5 at D1.

⁹² Romero, *Step Forward*, *supra* note 14 (quoting Paul Finebaum, an Birmingham radio talk show host and former business associate of Scrushy’s).

⁹³ Gates, *Beat the Heat*, *supra* note 67 at 20 (“The trial schedule . . . skipped around, meeting in the morning one day, after lunch another, and two days, skip three and back for two This trial was broken up excessively, and the schedule and pace lent itself to the defense.”) *Id.* at 19 (Sidebars, where lawyers confer with the judge out of the hearing of jurors or courtroom spectators, occurred “every 11 minutes” during the prosecution. Over 600 sidebars occurred by the end of the trial.)

⁹⁴ Associated Press, *Judge Replaces Ill Juror in Scrushy Trial*, NY TIMES, June 22, 2005 [hereinafter AP, *Ill Juror*] (In over a month the jury had deliberated only 16 days. The relaxed deliberation schedule was “repeatedly derided in local media.”)

cooperating witnesses,⁹⁵ the “home-town” venue,⁹⁶ the complexity of the case,⁹⁷ the lack of documentary corroboration for the testimony by the cooperating witnesses,⁹⁸ the missteps by prosecutors trying the case,⁹⁹ the complexity of the verdict forms.¹⁰⁰ Most often, however, they cited Scrushy’s efforts to appeal to the African-American religious community as influencing the verdict.¹⁰¹ One local news commentator opined, “I think the consensus of most people is he played the race card, and he played the religion card.”¹⁰²

There were seven African-Americans and five white jurors on the Scrushy jury. Eight jurors spoke about the verdict after the case. They told reporters that they believed the prosecution had proven there had been a fraud at HealthSouth but had not proven that Scrushy directed it or knew

⁹⁵ Mulligan, *Setback*, *supra* note 26 (defense attorneys asked one former CFO and witness against Scrushy who had been given a sentence of six months home confinement, if he “was sleeping in his own bed and enjoying his big-screen tv.”

“Of the 10 HealthSouth former executives sentenced before Scrushy’s trial, only one received even a brief jail term Scrushy’s lawyers hammered the light sentences” Morse, Terhune & Carrns, *Acquitted*, *supra* note 4 at A1.

⁹⁶ See, e.g., Mulligan, *Setback*, *supra* note 26 at A1; AP, *Scrushy Acquitted*, *supra* note 62; Johnson, *Founder*, *supra* note 12 at A1. Even Donald Watkins, one of Scrushy’s attorneys, said after the acquittal, “You never fight a man on his home turf.”

⁹⁷ Mulligan, *Setback*, *supra* note 26 at A1.

⁹⁸ Johnson, *Founder*, *supra* note 12 at A1; Morse, Terhune & Carrns, *Acquitted*, *supra* note 4.

⁹⁹ Russell Hubbard, *The Scrushy Memo*, BHAM NEWS, July 10, 2005 at D1 [hereinafter Hubbard, *Memo*] (quoting experts who spoke of the prosecutors’ “inability to present a coherent strategy and respond to the defense” as “unbelievable.”)

¹⁰⁰ Associated Press, *Complex Documents Key to Scrushy Trial*, NY TIMES, May 30, 2005 (37 pages containing 247 questions jurors must fill out).

¹⁰¹ AP, *Ill Juror*, *supra* note 94; Reeves, *Scrushy Acquitted*, *supra* note 89; AP, *Scrushy Acquitted*, *supra* note 62. Black ministers who attended the trial in support of Scrushy bristled at the suggestion, “I think that’s an insult to the integrity of the black pastors.” Reeves, *Scrushy Acquitted*, *quoting* Herman Henderson.

¹⁰² Romero & Whitmire, *Former Chief*, *supra* note 2 (quoting Paul Finebaum, host of a popular Birmingham, Alabama radio talk show).

of it.¹⁰³ These jurors described the government witnesses as not credible and “strange,” the taped conversations with Scrushy as “ambiguous,”¹⁰⁴ and the government’s theory as nonsensical (“Why would a rich man want to steal more?”). These jurors said they were disappointed not to see concrete evidence, like a “smoking gun” or fingerprints.¹⁰⁵ Although denying that Scrushy’s religious activities influenced their decision, “at least one juror, an African-American, said he was impressed by the black pastors and church members who appeared in court each day in support of Scrushy.”¹⁰⁶

To the jury, the devotion of these courtroom spectators may have spoken louder than the evidence the government offered. The point is, we will never know because there is no established protocol for addressing courtroom conduct by spectators. Part II of this Article proposes such a protocol.

PART II: APPLICABLE LEGAL DOCTRINES AND A PROPOSAL

A. Overview of Existing Case Law on Courtroom Conduct by Spectators

In 2006, in the case of *Carey v. Musladin*,¹⁰⁷ the United States Supreme Court had the opportunity to address courtroom conduct by spectators. It did not do so. Despite finding the

¹⁰³ Mulligan, *Setback*, *supra* note 26.

¹⁰⁴ AP, *Scrushy Acquitted*, *supra* note 62.

¹⁰⁵ Romero & Whitmire, *Former Chief*, *supra* note 2.

¹⁰⁶ *Id.*

¹⁰⁷ 549 U.S. 70 (2006).

historical treatment by courts on this issue “unclear,” the Court avoided the opportunity to provide guidance.

Mathew Musladin was convicted of first-degree murder for shooting Tom Studer to death outside the home of Musladin’s estranged wife.¹⁰⁸ During Musladin’s trial, members of Studer’s family sat in the front row of the courtroom wearing buttons bearing Studer’s photograph.¹⁰⁹ Musladin argued, on habeas corpus, that this conduct was inherently prejudicial and deprived him of a fair trial.¹¹⁰

The Court began its analysis by noting that courts have long struggled with the issue of spectator trial conduct. This lack of consensus proved fatal to Musladin’s argument. Finding judicial ambiguity on the issue of spectator trial conduct, the Court noted that it was required to reject Musladin’s argument that he suffered prejudice from such conduct. Before granting a defendant relief on habeas corpus grounds, a court must find a violation of “clearly established federal law.”¹¹¹ Because there was no “clearly established federal law” on spectator trial conduct,¹¹² Musladin’s petition for relief must fail.

Reasonable minds could disagree with the Court’s reasoning in *Musladin*. At the time of the Court’s opinion, there appears to have been a fair amount of judicial consensus on how to treat

¹⁰⁸ *Id.* at 72.

¹⁰⁹ *Id.* at 72-73; *Musladin v. LaMarque*, 403 F.3d 1072, 1073 (9th Cir. 2005).

¹¹⁰ *Id.* at 76-77.

¹¹¹ 28 U.S.C. § 2254(d)(1).

¹¹² Because of the “lack of guidance from [the Supreme] Court, lower courts have diverged widely in their treatment of defendants’ spectator-conduct charges.” *Id.* at 654.

courtroom spectator conduct. Most courts explicitly,¹¹³ or at least implicitly¹¹⁴ have held that spectator courtroom conduct may be so prejudicial as to deprive a party of a fair trial.¹¹⁵ A study of these cases¹¹⁶ offers the following six observations.

First, although in this line of cases, one party often had directed the spectators to engage in the conduct at issue,¹¹⁷ such involvement was not a key factor in all cases. Nor should it be. Rather,

¹¹³ *Norris v. Risley*, 918 F.2d 828, 830-831 (1990) (holding that spectator buttons with a picture of the defendant deprived the defendant of a fair trial).

¹¹⁴ See *In re Woods*, *Davis*, *Pachl*, *Buckner*, *Speed*, *Nguyen*, *Kenyon*, *infra* note 116.

¹¹⁵ Interestingly, while recognizing this principle in the abstract, the courts did not grant relief, holding that such prejudice did not occur in the case before the court, at least on the record presented. *Nguyen*, 977 S.W.2d at 457; *Kenyon*, 946 S.W.2d at 710-711.

¹¹⁶ *Estelle v. Williams*, 425 U.S. 501 (1976) (holding that compelling an accused to wear prison clothing at his trial was so prejudicial as to require reversal but further finding that in the case before it, the accused was not compelled to wear prison clothing, *id.* at 512-513); *Holbrook v. Flynn*, 475 U.S. 560, 572 (1986) (holding that seating “four uniformed state troopers” directly behind the defendant at his trial was not so prejudicial as to require reversal.)

See, e.g., *Norris v. Risley*, *supra* note 113 at 830-831; *In re Woods*, 114 P.3d 607 (2005) (en banc) (holding that spectators’ ribbons did not prejudice the defendants); *Billings v. Polk*, 441 F.3d 238, 246-247 (4th Cir. 2006) (holding that habeas corpus should not be granted because of shirt worn by a juror during trial because case law is not “clearly established” for purposes of habeas corpus relief, *id.* at 247.); *Davis v. State*, 223 S.W.3d 446, 474-476 (2006). No. 07-03-0457-CR, 2006 WL 1211091 *6-7 (Tex. App. May 3, 2006) (holding that record failed to show sufficient prejudice to defendant on trial for the murder of a police officer when uniformed officers attended the trial as spectators); *Pachl v. Zenon*, 929 P.2d 1088, 1093-1094, n.1 (1996) (en banc) (holding that trial counsel was not ineffective for failing to object to courtroom spectators wearing buttons that promoted a victims’ rights group. Court noted that any such objection, even if warranted, was not consistent with defendant’s overall trial strategy. The court also specifically noted that “[t]he message of the buttons in this case does not rise to the level of being inherently prejudicial.” *Id.* at 360, n.1.); *Buckner v. State*, 714 So.2d 384, 388-89 (Fla. 1998) (per curiam) (holding that the facts failed to show that the defendant was deprived of a fair trial when spectators briefly held up photographs of the victim); *State v. Speed*, 961 F.2d 13, 29-30 (1998) (holding that it would not reverse defendant’s conviction where trial court refused to make family members take off buttons and shirts depicting the victim’s photograph because the appellate record failed to adequately reflect the “number of persons wearing buttons, or contain any evidence that the jurors showed concern about the buttons.” The court noted, however, that it would have been better for the trial court to order the buttons removed or shirts covered up.); *Nguyen v. State*, 977 S.W.2d 450, 457 (Tx.App. 1998) (holding that record was insufficient to reverse because spectators wore buttons with the victim’s photograph. The court noted that there was no indication in the record, “where the individuals [wearing the buttons] were sitting, whether they were seated together, or if the jurors did in fact see the buttons from where they were seated.”); *Kenyon v. State*, 946 S.W.2d 705, 710-711 (Ark.App. 1997) (refusing to reverse defendant’s conviction because spectators wore badges with the victim’s photograph because appellate record was incomplete on this issue: “In the present case, it has not been demonstrated that the jury saw the badges being worn by some spectators or, if they did, that this affected their ability to be fair jurors.” *Id.* at 710.)

¹¹⁷ *Flynn*, 475 U.S. at 570 (uniformed police officers present in the courtroom for security purposes).

the paramount consideration was whether the conduct deprived the other party of a fair trial. While orchestrating spectator conduct should be taken into consideration when deciding upon the appropriate remedy, such direct involvement is not relevant to whether the other party was prejudiced by the conduct. If a trial is rendered unfair because of spectator conduct, it should not matter whether the conduct was planned by a party or performed *sua sponte* by courtroom spectators.

Second, although all of the reported cases dealing with spectator conduct are criminal cases,¹¹⁸ a criminal venue is not and should not be a prerequisite for relief. Prejudice from spectator courtroom conduct could, obviously, occur as easily in a civil trial as in a criminal case. One need only imagine a products liability case where family members of the person killed because of the alleged product defect, hold up photographs of the victim when she was alive, beautiful, and smiling.

Third, although in almost all of the reported cases (which, as noted, are criminal cases) it is the defendant seeking relief, the prosecution just as well as the defendant, could suffer prejudice from spectator trial conduct. Such prejudice would occur if, for example, courtroom spectators held up in front of a predominantly African-American jury pictures of the prosecutor in a Klu Klux Klan robe. The off-duty activities of the prosecutor, however unsavory, are irrelevant to the trial of the case and could certainly prejudice it.

Fourth, the only remedy courts apparently have considered in reported cases is reversal of the judgment. As discussed *infra*, there are less draconian remedies available.

Fifth, in the reported cases, the courts have uniformly held that the burden was on the complaining party to make a record of the conduct at issue. These courts did discuss what this burden is. This Article suggests what that burden should be.

¹¹⁸ See note 116 *supra*.

Sixth, and lastly, the reported cases suggest that courtroom spectator conduct is most logically viewed as character evidence because most spectator conduct seeks to convey something about a party's character.

In summary, by synthesizing the principles already developed by the courts when dealing with courtroom conduct by spectators, this Article suggests the following procedure for dealing with such conduct.

B. Overview of Law on Character Evidence

As noted, a review of the reported cases on courtroom spectator conduct suggests that spectator conduct is logically viewed as a form of character evidence because almost all spectator conduct seeks to convey something about a party's general character, not the merits of the case.¹¹⁹ The basic rule regarding character evidence is simple: introduction of character evidence is rarely permitted.¹²⁰ The major rule on point, Federal Rule of Evidence (FRE) 404 (supplemented by various additional evidentiary rules depending upon the circumstances¹²¹), provides rare exceptions to this prohibition. Rule 404(a) states that if character is an "essential" fact in the case, such as an element of the crime, then character evidence *as to that fact* is admissible. This applies in criminal and civil cases and to all parties.¹²² When character evidence is permitted under this exception, the

¹¹⁹ See note 116 *supra*.

¹²⁰ See note 116 *supra*.

¹²¹ The following rules supplement FRE 404 depending on the circumstances: Fed. R. Evid. 403, 405, 607, 608 and 609.

¹²² As Weinstein noted:

"A person's possession of a particular trait of character may be a material, consequential fact which under the substantive law determines the rights and

party seeking to introduce it is permitted to introduce *specific acts* of conduct as well as *reputation* or *opinion* testimony about character.¹²³ Thus, for example, in a tort case where the question is whether a defendant was negligent in causing an automobile accident, evidence of the defendant's character for carelessness and sloppiness may be relevant to the essential fact of the case. In such a situation, specific examples of the defendant's carelessness and sloppiness as well as his reputation for both would be admissible.

Crumpton v. Confederation Life Ins. Co.,¹²⁴ demonstrates this rule. Titus Crumpton, the deceased, held a life insurance policy that named his daughter, Vicki Crumpton, as the beneficiary. The policy applied only in instances of accidental death. The question was whether Titus Crumpton's death was accidental (as Crumpton's daughter argued) or due to Crumpton's behavior (as argued by the insurer). Crumpton had been shot by a female neighbor who alleged that on a prior occasion Crumpton raped and sodomized her and threatened to kill her children if she told anyone about his sexual assaults. The neighbor testified that when she shot Crumpton, she thought he was about to assault her again. The insurer argued that Crumpton's behavior toward the neighbor, not an accident, caused his death.

Viewing the neighbor's testimony as an attack on Crumpton's character, the trial court ruled

liabilities of the parties. Character evidence in such a case does not fall under the prohibition of Rule 404. It is being offered not to prove that a person 'acted in conformity therewith on a particular occasion' but rather because the character traits themselves are of significance as an element of a crime, claim or defense."

JACK B. WEINSTEIN, MARGARET A. BERGER, JOSEPH M. McLAUGHLIN, WEINSTEIN'S EVIDENCE, § 404[2] (Matthew Bender - watch out may be an old edition)

¹²³ Fed. R. Evid. 405(b):

"In cases in which character or a trait of character of a person is an essential element of a charge, claim or defense, proof may also be made of specific instances of that person's conduct."

¹²⁴ 672 F.2d 1248 (5th Cir. 1982).

that Crumpton's character was at issue¹²⁵ and admitted the evidence of Crumpton's "good" character offered by his daughter.¹²⁶ The appellate court affirmed, ruling that the requirement of FRE 404(a) had been met.

Rule 404(b) provides additional exceptions to the general prohibition of character evidence. It provides that even when character is not an essential fact to a case, character evidence may be admitted in: (1) a criminal case when introduced by the accused about his own character or that of the victim, (2) a criminal or civil case when introduced by either party to attack the credibility of a witness, or (3) a criminal or civil case to show motive, intent, purpose, and the like, but not to prove that a party acted in conformity with his character.

The first of the exceptions in Rule 404(b) is particularly narrow. As noted, it provides that a defendant in a criminal case is entitled to introduce evidence about his own character or a "pertinent" character trait of the victim.¹²⁷ There is a limit on the evidence admissible under this exception, however: the accused may present only *reputation or opinion* testimony;¹²⁸ *specific instances* of character are not admissible.¹²⁹ Thus, this exception would allow a defendant charged

¹²⁵ Id. at 1251.

¹²⁶ Id. at 1251-52. "The pastor of a church, . . . testified that Crumpton did not have a violent temper, did not use profanity, and did not make passes at women; the church secretary . . . testified similarly; a 'good friend' . . . testified that Crumpton did not use profanity or make obscene gestures or indecent proposals to women, was not violent, and did not drink; Crumpton's sister-in-law . . . testified similarly; and the beneficiary . . . testified that her father was not violent and did not use threats."

¹²⁷ Fed. R. Evid. 404(a)(1)(2); See, e.g., JOSEPH W. COTCHETT, FEDERAL COURTROOM EVIDENCE 9-9 (5th ed. 2005); PAUL C. GIANNELLI, UNDERSTANDING EVIDENCE 137-142 (Lexis Nexis 2003)

¹²⁸ Fed. R. Evid. 405(a) ("In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion.")

¹²⁹ The rationale is that while specific instances of character would constitute powerful testimony of character, they also divert a trial from the facts at issue, and can be overly prejudicial. COTCHETT, *supra* note 127; GIANNELLI, *supra* note 127.

with theft to introduce reputation or opinion evidence about his honesty. It would allow a defendant charged with assault to introduce reputation or opinion evidence about his gentle nature, or the victim's belligerent nature.¹³⁰ Once the accused has presented character evidence about himself or the victim, the prosecution is allowed to respond with evidence of *specific instances* of conduct.¹³¹

The next exception to the general prohibition against character evidence provided in Rule 404(b) is available to either party, in a criminal or civil case, for one reason only: to attack the credibility of a witness.¹³² This exception is limited to evidence on the issue of truthfulness only, and such evidence may be introduced only after the witness's character for truthfulness has been attacked.¹³³ As with the prior Rule 404(b) exception, evidence admissible under this 404(b)

¹³⁰ United States v. Angelini, 678 F2d. 380 (1st Cir. 1982), is an apt example of this exception when the accused seeks to introduce evidence of his own character. Angelini was convicted after a jury trial of possession with intent to distribute and distribution of methamphetamine. *Id.* at 381 (check name of drug). The bulk of the government's evidence consisted of testimony from an undercover federal agent who stated that on one occasion he negotiated with Angelini the details of future methaqualone (check drug) purchases. There was no further government evidence of Angelini's involvement with methaqualone. The defense case consisted of Angelini who testified that while he, along with others, was present on the occasion described by the agent, he did not discuss drug trafficking and was not involved in it. Angelini's wife testified, corroborating Angelini's claim that he was not involved in drug trafficking. In addition, Angelini sought to introduce testimony from three character witnesses who would have testified that Angelini was law-abiding and truthful. The trial court refused to allow the witnesses to testify on the ground that "law-abidingness was not relevant to the case." *Id.* at 381. Angelini claimed error. The First Circuit agreed and reversed Angelini's conviction, ruling as follows:

"Evidence that Angelini was a law-abiding person would tend to make it less likely that he would knowingly break the law. ... We hold, therefore, that the trait of law-abidingness was relevant and admissible under Rule 404(a). *Id.* at 381-82.

¹³¹ Fed. R. Evid. 404(a)(1). In addition, in one narrow circumstance the prosecution may offer character evidence even if character is not first raised by the accused. In a homicide case, the prosecution may offer evidence of the victim's character for peacefulness if the accused has argued that the alleged victim was the first aggressor. Fed. R. Evid. 404(a)(2).

¹³² Fed. R. Evid. 607, 608, 609.

¹³³ Fed. R. Evid. 608(a). United States v. Watson, 669 F2d 1374 (11th Cir. 1982), is an apt example. Six defendants were convicted of conspiring to possess marijuana with intent to distribute. One of the key government witnesses was Patrick Campbell who testified that he had conversations with several of the defendants regarding the arrival of plane loads of marijuana at the air field where Campbell lived. *Id.* at 1381-82. The Eleventh Circuit reversed the convictions and remanded for a new trial because the trial court improperly ruled that the defendants could not present four character witnesses who would have testified that in their opinion Campbell was not a truthful

exception is limited to reputation or opinion testimony.¹³⁴

The last exception provided in Rule 404(b) is the most heavily litigated rule of evidence.¹³⁵ Rule 404(b) permits introduction of *specific acts* of character (“crimes, wrongs, or acts”) not to prove that a party’s conduct at issue in a case was in conformity with his character, but for “other purposes,” such as “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”¹³⁶

Thus, to summarize Rule 404(a) and (b): introduction of character evidence is restricted: it is admissible only when character is a direct issue in a case (404(a)), or falls within one of three narrow exceptions (404(b)). When character evidence is admissible under either 404(a) or (b), it is restricted. The party seeking to introduce character evidence is allowed to introduce only reputation or opinion evidence, not specific acts allegedly showing character. When a party has introduced character evidence, the other party is entitled to respond with evidence of specific acts of character.

C. Overview of Law on “Curative Admissibility”

person. *Id.* at 1392, 1382. The Eleventh Circuit noted:

“Campbell ... was the lynchpin to the government’s case. His ... was the only testimony to link all appellant’s in a single conspiracy.... The excluded testimony would certainly be essential to a jury’s decision whether to believe [Campbell’s] testimony.” *Id.* at 1383.

The court found that proper foundation had been laid for the character witnesses offered by the defendants and thus, the witnesses should have been allowed to testify. *Id.* at 1382.

¹³⁴ Fed. R. Evid. 608(b), 609 (Other than a conviction of a crime, specific instances of conduct may not be proven by extrinsic evidence, but may be inquired into on cross-examination of the witness.)

¹³⁵ Edward J. Imwinkelried, *An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-Character theory of Logical Relevance, The Doctrine of Chances*, 40 U. RICH. L. REV. 419, 433 (2006) citing Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character reasoning from Other Crime Evidence*, 17 REV. LITIG. 181, 194-95 (1998).

¹³⁶ Fed. R. Evid. 404(b).

Three existing legal doctrines: “opening the door,” “invited error,” and “curative admissibility,” while distinct to jurisprudential purists,¹³⁷ are used interchangeably¹³⁸ to remedy the situation when one party improperly introduces evidence.¹³⁹ Under the rubric of “curative admissibility,” this doctrine gives trial courts considerable flexibility to “right the wrong” that occurs in a courtroom when a party improperly presents information to a jury. The remedies include allowing the injured party to introduce evidence that otherwise would be inadmissible. Thus, for example, a party injured by information improperly presented to a jury by the other party may be permitted to introduce evidence without a proper foundation, exceed the scope of a witness’s direct examination on cross examination, or introduce evidence without presenting a full chain of custody. Before the curative admissibility doctrine permits an injured party to respond, however, that party must show that the inadmissible evidence reached the jury through no fault of the prejudiced party;¹⁴⁰ the evidence sought to be admitted is relevant to the improperly presented facts or behavior;¹⁴¹ and, admission of the sought evidence is proportional to the injury. The proportionality of the “cure” is

¹³⁷ See, e.g., CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5039.3 (Thomson/West 2006)[hereinafter WRIGHT & GRAHAM]; GRAHAM C. LILLY, *AN INTRODUCTION TO THE LAW OF EVIDENCE* § 11.5 (3rd ed. West 1996)[hereinafter LILLY].

¹³⁸ WRIGHT & GRAHAM, *supra* note 137 at § 5039.3; LILLY, *supra* note 137 at § 11.5.

¹³⁹ According to academics, “opening the door” applies when one party introduces *admissible* evidence that allows the other side to introduce *inadmissible* evidence. WRIGHT & GRAHAM, *supra* note 137 at § ROGER C. PARK, DAVID P. LEONARD, STEVEN H. GOLDBERG, *EVIDENCE LAW* § 1.10 (Thomson/West)[hereinafter PARK, LEONARD & GOLDBERG]; “Curative admissibility” applies when one party introduces *inadmissible* evidence that allows the other side to also introduce *inadmissible* evidence. WRIGHT & GRAHAM, *supra* note 137 at § 5039.3. “Invited error” could apply to either of the above situations or even beyond them to the instance when a party solicits evidence that causes error in the party’s case or in the other side’s case. *Id.* The courts use the doctrines interchangeably. As Professors Wright and Graham note, “writers routinely conflate ‘curative admissibility’ with one or more of the related doctrines, making it difficult to follow their analysis.” WRIGHT & GRAHAM, *supra* note 137 at § 5039.3. See, e.g., LILLY, *supra* note 137 at § 11.5;

¹⁴⁰ *Id.*

¹⁴¹ WRIGHT & GRAHAM, *supra* note 137 at § 5039.3.

particularly important. As Professors Wright and Graham have noted: “tossing a stink bomb into the jury box does not justify nuking the offender in retaliation.”¹⁴²

United States v. Lum,¹⁴³ demonstrates application of the curative admissibility doctrine. Lum was on trial for allegedly distributing heroin.¹⁴⁴ The key government witness was George Dorsey, a Special Agent with the U.S. Drug Enforcement Agency. Dorsey testified on direct examination about a conversation he had when acting in an undercover capacity with Clarence Brisco. According to Dorsey, while he was in the living room of Clarence Brisco’s apartment, Brisco told Dorsey that although he (Brisco) did not have as much heroin as Dorsey wanted to purchase, Lum could get it. Dorsey testified that Lum did not participate in the conversation but was present; that after Brisco’s reference to Lum, Brisco and Lum spoke in an adjacent room in a conversation Dorsey could not hear; and that after conferring together, Lum left Brisco’s apartment to return in fifteen minutes. According to Dorsey, when Lum reentered Brisco’s apartment, Lum handed a clear plastic bag containing white powder to Brisco who immediately sold the powder to Dorsey. Later tests showed the powder to be heroin.¹⁴⁵

Prior to trial, the trial court instructed the prosecutor that Agent Dorsey could not testify that Brisco had told him that Lum could obtain the heroin. The trial court viewed the statement as a co-

¹⁴² The party prejudiced, while allowed to introduce inadmissible evidence in retaliation, does not, by doing so, waive the right to object to the initial introduction of the inadmissible evidence but pursuant to Federal Rule of Evidence 103, the response may make the initial violation “harmless.” WRIGHT & GRAHAM, *supra* note 137 at § 5039.3.

Federal Rule of Evidence 103 provides, in relevant part: “Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected....” WRIGHT & GRAHAM, *supra* note 137 at § 5039.3; See, e.g., *United States v. Winston*, 447 F.2d 1236, 1239-1240 (D.C. Cir. 1971).

¹⁴³ 466 F. Supp. 328 (D. Del. 1979).

¹⁴⁴ *Id.* at 330.

¹⁴⁵ *Id.* at 330-31.

conspirator's statement,¹⁴⁶ and ruled that because the evidence did not show the foundation necessary for admission of the statement (that a conspiracy existed between Lum and Brisco when the statement was made) the statement was inadmissible.¹⁴⁷

At trial, defense counsel asked Agent Dorsey on cross examination whether he had discussed "hot stereos" with Brisco, apparently in an effort to show that Lum was present at Brisco's apartment not because of drug transactions but to purchase stereo equipment Brisco was selling.¹⁴⁸ Once the defense brought out the "hot stereo" conversation, however, the trial court allowed the government to ask Agent Dorsey about the rest of the conversation, including Brisco's comment to Dorsey that Lum could obtain the heroin Dorsey sought.¹⁴⁹ In this sense the trial court employed the curative admissibility doctrine: it permitted the government to introduce a statement that otherwise was inadmissible because it was unfair to the government for the defense to bring out some, but not all, of the conversation containing the key statement.

D. A Proposal for Analyzing Courtroom Conduct by Spectators: Combining Legal Doctrines on Character Evidence and Curative Admissibility

Together, the "curative admissibility" and character evidence rules provide a helpful structure for dealing with courtroom conduct by spectators. The following example demonstrates how they

¹⁴⁶ Under Fed. R. Evid. 801(d)(2)(E); *Lum*, 466 F. Supp. at 335.

¹⁴⁷ *Id.* at 333-34.

¹⁴⁸ *Id.* at 334.

¹⁴⁹ *Id.* The trial court explained its ruling: "Having utilized hearsay statements on direct with respect to the conversations between Agent Dorsey and Brisco, the defendant cannot object to the usage of hearsay testimony on cross-examination that explains the related subject matter of those conversations.....[T]he interests of fairness were served by permitting the government to cross-examine Agent Dorsey about his conversations with Brisco even though the conversations took place prior to the time when the conspiracy was established." *Id.* at 335.

work together. Assume a defendant, the principal of a high school, is criminally charged with sexual abuse of female students who attend the high school. The defendant is in his mid-forties, has been married for twenty years, and is the parent of two school-age children. As noted *supra*, Federal Rule of Evidence 404(a) permits a defendant to introduce some evidence about his character (in criminal cases the accused is permitted to introduce opinion or reputation evidence of his character but not of specific instances of his character.)¹⁵⁰ In our hypothetical the defendant calls his pastor as a witness. The pastor testifies that he has known the defendant for fifteen years, the defendant and his family have been active members of the church during that time, the pastor has a basis for knowing the defendant's reputation within their church community for character, and the defendant's reputation for character is impeccable.

Because the defendant "opened the door" to the issue of his character, the prosecutor is entitled to present evidence of specific instances regarding the defendant's character. Assume, in this instance, the prosecution calls a Division of Family Services (DFS) caseworker who testifies that in response to reports submitted to DFS by Emergency Room personnel at the local hospital, she has been to the defendant's home to investigate suspected sexual abuse by the defendant of his two children, and that the children were removed temporarily from the home by DFS after her investigation.

Clearly, because of its prejudicial impact and little relevance to the specific charges regarding the high school students at issue in the criminal case, the prosecution would not be allowed to introduce evidence of the DFS investigation during its case in chief.¹⁵¹ Under FRE 404, such

¹⁵⁰ Fed. R. Evid. 404(a)(1) provides that "evidence of a person's character or a trait of character is not admissible . . . except evidence of a pertinent trait of character offered by an accused"

¹⁵¹ See FRE 404(b), 403.

evidence becomes admissible, however, in rebuttal to the pastor's testimony. In all likelihood, defense counsel would recognize the consequence of introducing the pastor's character testimony (opening the door to volatile rebuttal testimony about the DFS investigation) and not present evidence about the defendant's character.

However, the defense could present to the jury somewhat equivalent information about the defendant's "good" character and avoid opening the door to rebuttal evidence. The defense could do so by creating a "wholesome family picture" in the courtroom in front of the jury by having both children and the defendant's wife present in court, sitting close to the defendant, and interacting with him in an adoring and loving way. The defense could also seek to have the family pastor also present in court, interacting in a supportive and friendly manner with the defendant and his family. In this way the defendant presents the equivalent of character evidence without giving the prosecution the chance to rebut such evidence with the DFS caseworker. But, what if the courtroom conduct presents a false picture? And, what if the false picture prejudices the rights of the government, and the victims, to a fair trial? What recourse does the prosecution have to expose the falsity?¹⁵²

This Article suggests that the "unfair prejudice" threshold of the "curative admissibility" doctrine should be the basis for allowing a party to respond, with evidence, under the FRE 404 paradigm, to courtroom conduct by spectators. Under this suggestion, a party that wishes to respond to courtroom conduct by spectators bears the burden of demonstrating that "unfair prejudice" has occurred. The following indicia would be relevant to meeting this burden: (1) whether the

¹⁵² It is possible that a court would permit a prosecutor to introduce evidence of DFS visits and action under the exception in 404(b) (other acts that show "modus operandi") but given the prejudicial impact of such evidence it is also likely that a court would not permit the prosecution to introduce it when character has not been directly raised by the defendant. The point is that it is much more likely that the prosecution could present the DFS evidence once the defendant has opened the door.

“message” conveyed by the courtroom spectator conduct was relevant to the case; (2) whether the “message” presented by the conduct was clear; (3) whether the “message” misrepresented facts; (4) whether a party planned or directed the courtroom conduct by spectators; (5) the extent to which permitting an evidentiary response to the conduct would distract the trial; (6) the significance of the case; and (7) whether remedies other than permitting rebuttal evidence could repair the prejudice.

a. *Relevance.*¹⁵³ The relevance of the message conveyed by spectator courtroom conduct to the case is one of the most important criteria to weigh when deciding whether to allow a party to respond to the courtroom conduct by introducing evidence. Only if the conduct by spectators is directly relevant to the case should a party be allowed to respond. Spectator courtroom conduct could be relevant to a case in two ways: (1) to an issue in the case, or (2) to the presumed sensibilities of the jurors. An example helps demonstrate the latter type of relevance. For example, if a number of jurors are military veterans, it is reasonable to think that the presence of a highly decorated war hero in court and visiting in a friendly manner with the defendant in full view of jurors could be relevant to such jurors.

b. *Clarity of the Message.* The clarity of the message conveyed by courtroom spectator conduct is the second consideration for a court when deciding whether the conduct has opened the

¹⁵³ Fed. R. Evid. 403 (Evidence must be relevant and its probative value cannot be outweighed by its prejudicial impact); *See, e.g., United States v. Ruiz*, 446 F.3d 762, 771-772 (8th Cir. 2006); *United States v. Thompson*, 76 F.3d 166, 169-170 (7th Cir. 1976); *United States v. Skoczen*, 405 F.3d 537, 548-549 (7th Cir. 2005).

door to a response.¹⁵⁴ If the message is muddled, there is no reason to allow a response. Thus, for example, in a personal injury case involving a car accident where the defendant's alleged negligence caused the accident, the defendant may seek to show her cautionary character by her manner of dress and conduct in the courtroom. Such a courtroom demonstration would not warrant a response from the other party, even if it were an act just for the trial for its message is not that clear (or relevant or important). The clarity of the message conveyed by the courtroom dramatization should be judged objectively from the view of a reasonable person.

c. Degree of Misrepresentation and Intent.¹⁵⁵ If it can be shown that courtroom spectator conduct conveyed a false impression to jurors, a court should consider allowing the other party to introduce evidence correcting the misrepresentation. For example, in the prior hypothetical of a war

¹⁵⁴ Clarity of the evidence sought to be admitted is relevant in deciding whether the evidence should be admitted. *United States v. Saldana*, 427 F.3d 298 (5th Cir. 2005), provides an apt example. Twin brothers, Samuel and Saul Saldana, were convicted for corruptly endeavoring to impede the administration of Internal Revenue laws and for filing false statements. *Id.* at 301. They sent to the IRS false Forms 8300 (Report of Cash Payments Over \$10,000 Received in a Trade or Business). When the Saldana brothers were angry at someone (the judge presiding of an acquaintance's drug trafficking trial, for example), they would file a "Form 8300" falsely reporting that the person had paid cash in amounts such as \$213 quintillion or \$1,955,000,000,000,000." *Id.* at 302. As part of their defense the brothers sought to introduce "black manuals" ("plastic three-ring binders containing a random assortment of Xerox copies of statutes, cases, printed-out emails . . . and various bizarre papers . . .") *Id.* The brothers argued that they did not "corruptly" file false Forms 8300 because they relied in good faith on the manuals which they allegedly received in a "tax class." *Id.*

Noting the confusing nature of the manuals, the Fifth Circuit affirmed the trial court's decision that they were not admissible:

"Rule 403 of the Federal Rules of Evidence . . . permits a trial court to exclude evidence if its probative value is substantially outweighed by the danger of . . . confusion of the issues In this case . . . [t]he manuals' potential to confuse the jury . . . was quite high. They contain inaccurate legal advice and an assortment of strange and unrelated documents that have nothing to do with taxes or with this case."

Id. at 307. See also, *United States v. Insaugarat*, 378 F.3d 456, 466 (5th Cir. 2004); *United States v. Flitcraft*, 803 F.2d 184, 186 (5th Cir. 1986).

¹⁵⁵ See, e.g., *United States v. Dowthitt*, 180 F. Supp. 2d 832, 865-866 (S. D. Tx 2000) (whether prosecutor misrepresented DNA evidence during closing argument); *State v. Briggs*, 886 A. 2d 735, 748 n.3 (R.I. 2005) (cross examination corrected false testimony by government witness); *Washington v. Hofbauer*, 228 F.3d 689, 700-702 (6th Cir. 2000) (conviction reversed because of prosecutor's misstatement of facts before the jury).

hero visiting the courtroom and interacting in a friendly way with the defendant in the presence of jurors, the message may well be conveyed to jurors by such association that the defendant is a patriotic citizen who respects military service. If the defendant is not a patriotic citizen respectful of military personnel, the courtroom behavior by the war hero creates a false impression. For example, what if the defendant had been dishonorably discharged from the military for dereliction of duties, convicted repeatedly for yelling at and spitting on military personnel, and had paid the “war hero,” whom he had never met prior to the trial, to appear in court solely to create a false impression and garner sympathy from jurors? Given such facts, the misrepresentation conveyed by the war hero’s courtroom conduct may well favor admission of such facts.

*People v. Attiya*¹⁵⁶ provides another example. Attiya, charged with possession of a controlled substance, took the stand at his trial. The prosecutor waved an “exhibit” (a document never admitted into evidence) when cross-examining Attiya. The prosecutor’s antics and questions impeached Attiya’s testimony as to where he lived.¹⁵⁷ (The defendant’s residence was relevant to the charge that the defendant constructively possessed the controlled substance.)¹⁵⁸ On appeal, Attiya’s conviction was reversed because of the false impression created by the prosecutor’s document-waving theatrics.¹⁵⁹

In *Attiya*, the trial record does not indicate that the defense, in response to the prosecution’s misleading theatrics, sought to introduce evidence to correct the misimpression. Instead, as the

¹⁵⁶ 488 N.Y.S. 2d 954 (NY.Sup.Ct. 1985).

¹⁵⁷ *Id.* at 456.

¹⁵⁸ *Id.* at 452-459.

¹⁵⁹ The court noted: “The use of a false exhibit which had the full impact of evidence and the prosecutor’s failure to disclose its falsity compels the conclusion that the trial was unfair.” *Id.* at 459.

reported appellate opinion reflects, the defense sought, and obtained, a reversal and a new trial. Allowing the defense to respond by introducing evidence may have been a very effective response in *Attiya*. It would have corrected the misimpression created by the prosecutor and revealed the prosecutor's duplicity. It could also have made the more draconian remedy of reversal unnecessary.

d. Participation of a Party in Directing the Spectator Courtroom Behavior. A court should consider whether a party orchestrated, arranged or directed the courtroom conduct by spectators, or participated in it, when deciding whether to permit an evidentiary response to the conduct. Such involvement by a party would be especially relevant if the conduct misrepresents facts. By the same token, if a party has no culpability whatsoever for courtroom conduct by spectators, it may not be fair to penalize that party by allowing the other party to present evidence in response. In extreme cases where unfair prejudice is created by *sua sponte* courtroom drama, a new trial may be the only fair remedy for the parties.

e. Distraction To a Trial By Allowing Rebuttal Evidence. There are two issues a court should consider when deciding whether permitting an injured party to respond to courtroom conduct with evidence inappropriately diverts the trial. The first is the rebuttal evidence proffered: the amount of it, the number of witnesses needed to present it, the number of exhibits needed.

The second consideration is whether the rebuttal evidence proffered introduces collateral issues into the trial.¹⁶⁰ Since the rebuttal evidence under consideration in response to courtroom

¹⁶⁰ See, e.g., *United States v. Curtis*, 485 F.3d 179, 184-185 (1st Cir. 2007) (court properly limited admission of training for correctional officers because it was irrelevant to the litigation, would have confused or even misled the jury and would have unduly consumed time); *United States v. Libby*, 475 F. Supp. 2nd 73, 88-90 (D.D.C. 2007) (trial court properly restricted defense presentation of evidence because such evidence was not relevant).

conduct which was not evidence at all, the potential for introducing collateral matters could be considerable.

The following example may help demonstrate how the distraction criterion might be examined by trial courts when deciding whether to allow rebuttal evidence to spectator courtroom conduct. Assume a defendant charged with distribution of marijuana appears at trial clean-cut, clean-shaven, and wearing conservative clothes. When arrested, however, this defendant had long, unkempt hair and beard, and wore a shirt saying, “*I Scored HIGH on my Drug Test.*” the defendant’s courtroom appearance obviously is an attempt to convey that he is law-abiding and not likely to be a “pot head.” Although there may be other reasons not to allow the arrest photograph (prejudice), diversion into collateral issues would *not* be a reason to disallow it. The courtroom conduct and rebuttal evidence are all relevant to the issue at trial: the defendant’s prior history with marijuana. This would be especially obvious if the arresting officer was already a witness at trial and thus no additional witnesses were needed. By comparison, in the trial of the high school principal charged with sexual assault of teenage girls, it would divert the trial considerably to permit DFS caseworkers to testify about sexual assault allegations against the defendant solely to rebut the “wholesome family man” image presented by the courtroom presence of his pastor and family.

f. Significance of the case. Assessing the significance of the case when deciding whether to permit a party to respond to courtroom spectator conduct is an appropriate consideration of judicial economy. If the case is a petty offense punishable by fine only with no consequences for repeat offenders and no collateral consequences, there is less reason for a court to permit a party to respond to spectator courtroom conduct, especially when the response would require additional

witnesses or exhibits. On the other hand, when a case involves significant criminal or civil liability, courts should be more receptive to allowing an injured party to rebut a message conveyed by courtroom spectator conduct.

g. Conclusion. To conclude: when spectators engage in courtroom conduct that prejudices the right of the other party to a fair trial, trial courts should consider permitting the injured party to respond to the message conveyed by the conduct with rebuttal evidence, even though the courtroom conduct is not evidence, if the proponent of the rebuttal evidence demonstrates: (1) the courtroom conduct is relevant to the issues in the case or to reasonably perceived sensitivities of the jurors, (2) the message conveyed by the conduct is clear, not muddled, (3) the courtroom conduct misrepresented facts, (4) the other party is responsible for directing the conduct, (5) there is little distraction to the trial by allowing evidence to rebut the message conveyed by the conduct, and (6) the case is significant enough to warrant rebuttal evidence.

PART III. APPLICATION OF PROPOSAL TO UNITED STATES v. SCRUSHY

The fraud trial of Richard Scrushy is a helpful case for applying the proposal suggested herein. According to trial observers, the courtroom spectator conduct in the case was orchestrated by the defense and conveyed a strong message that affected the outcome of the trial: “Richard Scrushy’s lawyers are using his character as a defense, highlighting [his] generous involvement with churches and charities to rebut government claims that he orchestrated a massive corporate

accounting fraud.”¹⁶¹

A. The “Relevance” Factor.

The courtroom presence of Bible-toting, publicly praying, African-American pastors and parishioners as supporters of Richard Scrushy was in no way relevant to the fraud charges at issue in the trial. Race and religion had nothing to do with whether the net profits of HealthSouth had been intentionally overstated. However, the presence of African-American religious leaders may have been relevant to jurors, black and white, in Birmingham, Alabama. If so, consideration of this factor weighs in favor of permitting the prosecution to respond to the dramatized support.

B. The “Clarity” Factor.

From an objective point of view, it appears that a favorable message about Richard Scrushy was successfully communicated to the jurors by the courtroom presence and support of the African-American pastors and parishioners. They appeared daily,¹⁶² in significant numbers (as many as two dozen some days),¹⁶³ interacted significantly with Scrushy during trial (holding Scrushy’s hands and praying together),¹⁶⁴ had at least some connection to jurors (while the trial was ongoing, Scrushy preached at one juror’s church and gave money to it).¹⁶⁵ Consideration of these facts would appear

¹⁶¹ Associated Press, *Defense Portrays Scrushy as Churchgoer*, NY TIMES, Apr. 29, 2005.

¹⁶² Woolner, *Congregate*, *supra* note 82; Woolner, *Amen Corner*, *supra* note 78.

¹⁶³ Woolner, *Congregate*, *supra* note 82; Gates, *Beat the Heat*, *supra* note 67 at 21.

¹⁶⁴ *Id.*

¹⁶⁵ Bloomberg News, *Details of Scrushy Trial Emerge*, WA POST, July 20, 2005 at D2.

to weigh in favor of allowing the prosecution to introduce evidence as to the genuineness of Scrushy's alliance with his African-American courtroom supporters.

C. The "Misrepresentation" and "Participation" Factors.

The third factor, whether the courtroom conduct misrepresented facts, and the fourth factor, whether Scrushy directed the conduct, are difficult to assess in the Scrushy trial. Essentially the prosecution would have to argue that Scrushy's relationship with the African-American religious leaders who frequented the courtroom was a charade he orchestrated, and in which African-American religious leaders participated, either wittingly or unwittingly. The sensitivity of such an allegation may weigh in favor of permitting rebuttal evidence. Efforts to manipulate the religious sentiment of jurors could be viewed as egregious and worthy of exposure. Also, disallowing rebuttal evidence simply because of its sensitivity would encourage litigants to present the most offensive, emotionally-charged courtroom theatrics they could get away with. For these reasons, the prosecution in the *Scrushy* trial should have been able, at a minimum, to make an in camera proffer of rebuttal evidence it would present in response to the message conveyed by the courtroom conduct of trial spectators.

D. The "Distraction" Factor.

The fifth factor, distraction to the trial issues in allowing the government to introduce evidence of defense efforts to manipulate jurors through race and religion, would be significant. From publicly available information, the following may well be have been available as rebuttal evidence: (1) the timing of Scrushy's departure from his white, suburban church and his

membership in an African-American church (upon disclosure of massive fraud at HealthSouth), (2) Scrushy's level of involvement, financial gifts, and participation history at his white, suburban church, and at his African-American church, and (3) cash payments allegedly made by Scrushy to some of the African-American pastors who appeared in court and who allegedly solicited other African-American pastors to appear in court.¹⁶⁶ To present such evidence, multiple witnesses, tracing monetary contributions, and extensive cross examination would be likely. A detailed, in camera, proffer would be needed. This would be a significant distraction. Thus, the distraction factor weighs against permitting the government to address through rebuttal evidence the message presented by the courtroom presence and apparent allegiance of African-American religious leaders.

E. The "Significance" Factor

The sixth factor, the significance of the case, weighs in favor of permitting an evidentiary response to any message conveyed by the courtroom conduct in the *Scrushy* matter. This was a significant prosecution, both for the government and the defendant. Scrushy was charged with eighty-five federal felonies alleging that he master-minded a \$2.7 billion fraud. His charges included conspiracy, securities fraud, wire fraud, mail fraud, money laundering, and the first prosecution under Sarbanes-Oxley. At age 55, Scrushy faced the rest of his life in prison, as well as forfeiture of millions of dollars of assets. The case was significant for HealthSouth, the company Scrushy founded and whose financial status he was accused of falsifying. At the time of Scrushy's indictment, HealthSouth was the largest rehabilitation hospital in the United States. HealthSouth

¹⁶⁶ Jay Reeves, *Writer Says Scrushy Paid Her for Articles*, WA POST, Jan. 20, 2006 at D1; Associated Press, *Freelancer Says Scrushy Paid Her for Favorable Stories During Trial*, LA TIMES, Jan. 20, 2006 at C3.

shareholders, creditors, employees, vendors and business partners were jeopardized by the fraud allegedly perpetrated by Scrushy. The case also was significant for the United States Department of Justice. Scrushy's trial generated considerable publicity and required a large expenditure of DOJ resources.

F. Weighing All the Factors

Five of the six factors suggested herein weigh in favor of allowing the prosecution in the *Scrushy* trial to introduce at least some evidence in response to the impression conveyed by the courtroom conduct of African-American religious leaders that they were aligned with Richard Scrushy. Presumably the evidence would have questioned the sincerity of the bond between Scrushy and the religious leaders, raising the possibility that Scrushy was attempting to manipulate jurors. The five factors weighing in favor of permitting rebuttal evidence are relevance (to perceived juror bias), clarity, potential for misrepresentation, role of the defendant in orchestrating the courtroom conduct, and significance of the case. Notably, the relevance factor (the courtroom conduct was not relevant to the issues in the case) also weighs against permitting rebuttal evidence as does the factor of distraction. Weighing all factors together may well lean toward allowing the prosecution to introduce some evidence questioning Scrushy's sincerity in affiliating with African-American religious leaders.

CONCLUSION

This Article has proposed the following protocol for recognizing and dealing with courtroom conduct by spectators. When such conduct occurs, the party claiming prejudice should address the

following six factors to demonstrate that it has suffered unfair prejudice and is entitled to present evidence in rebuttal to the message conveyed by the courtroom conduct: (1) relevance of the courtroom conduct to the trial, either to the issues in the case or to reasonably perceived biases of the jurors, (2) clarity of the message conveyed by the conduct, (3) whether the conduct misrepresented facts about a party or about issues in the case, (4) whether one of the parties intentionally directed the conduct, (5) distraction to the proceedings by allowing evidence pertaining to the message communicated by the conduct, (6) significance of the case. The moving party bears a heavy burden in proving that it has been unfairly prejudiced by the courtroom spectator conduct and that the appropriate remedy is introduction of evidence addressing the message conveyed by such conduct.