IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA,

v. **Case No. 2:05-cr-119-MEF**

DON EUGENE SIEGELMAN
Defendant.

MOTION FOR NEW TRIAL
BASED ON NEWLY DISCOVERED EVIDENCE[1]

COMES NOW Defendant Don Eugene Siegelman, by and through his undersigned counsel of record and, pursuant to Fed. R. Crim. P. 33(b)(1), and files this motion requesting a new trial and in support thereof states the following:

1. On June 29, 2006, a jury found the defendant guilty on seven (7) counts of the thirty-four count indictment. This Court sentenced Siegelman to 88 months imprisonment on June 28, 2007. Siegelman was released on appeal bond pending the outcome of his appeal.

2. On March 3, 2009, the Eleventh Circuit affirmed Siegelman's convictions on "honest services" mail fraud, 18 U.S.C. §666 bribery and conspiracy relating to his reappointment of Richard Scrushy to the State's Certificate of Need Board. The Seventh (Count 17) was an obstruction of justice under 18 U.S.C. §1512(b)(3). The Eleventh Circuit vacated Siegelman's conviction on Counts Eight and Nine and vacated his sentence. *United States v. Siegelman*, 561 F.3d 1215 (11th

[1] This motion is taken in large part and, at times, verbatim, from the Motion for New Trial filed on June 27, 2009 by co-defendant Richard Scrushy. The sequence of issues has been changed and some language modified to make the issues and arguments fact-specific to Defendant Siegelman. The motion is being filed with the same details as Defendant Scrushy's because of this Court's policy against the wholesale adoption of co-defendant's motions. The use of Defendant Scrushy's motion was with permission. Siegelman concedes that he has not participated nor has his defense team in the investigation conducted by the Scrushy camp. The Scrushy motion was filed June 27, 2009 and Siegelman has had time limitations restricting his ability to independently verify any of the claims in Scrushy's motion for new trial which has been adopted by Siegelman in this pleading. Siegelman, to avoid a procedural bar, is adopting almost all of Scrushy's new trial issues.

Cir. 2009). On May 14, 2009, that Court denied Scrushy's petition for rehearing and rehearing en banc. On May 14, 2009, the Eleventh Circuit denied Defendant Siegelman's Petition for Rehearing and Rehearing en banc. A motion to stay the mandate was filed and granted pending the outcome of his Petition for Certiorari to be filed in the United States Supreme Court .

3. On June 27, 2009 co-defendant Richard Scrushy filed a motion for new trial alleging that considerable facts concerning this case have been revealed. Scrushy argues that, "the newly discovered evidence has come to light as a result of disclosures by the Department of Justice, information developed through an ongoing investigation by the Judiciary Committee of the House of Representatives, facts and witness statements uncovered by various journalists and published in the media, as well as documents, witness statements, and sworn declarations obtained through investigation by attorneys and investigators working on behalf of Scrushy". None of this information was available prior to the conclusion of Siegelman's trial, nor could it have been obtained by the exercise of reasonable diligence. " (Scrushy's Motion for New Trial, Doc. 953, pages 1 & 2)

This newly discovered evidence falls into five major categories and as Scrushy argued, "any one of which justifies granting Scrushy a new trial". (Scrushy Motion for New Trial, Doc. 953, pages 1 & 2)

ISSUE I. THE GOVERNMENT'S FAILURE TO PRODUCE EXCULPATORY AND IMPEACHING INFORMATION IN ITS POSSESSION AS TO KEY WITNESSES AND CORRECT FALSE OR MISLEADING TESTIMONY DURING TRIAL VIOLATED SIEGELMAN'S RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND THE GOVERNMENT FAILED TO COMPLY WITH ITS OBLIGATIONS UNDER THE JENCKS ACT.[2]

[2] Defendant Scrushy attached to his motion for new trial exhibits documenting the allegations made in his motion for new trial. These include, but are not limited to, letters, affidavits, and critical documents in support of Rule 33 relief. As noted earlier, Siegelman has not had the time or resources to do an independent investigation of the matters contained in the Scrushy motion. He is, however, in respect of time adopting the Scrushy motion with the disclaimer that wholesale adoption may later be addressed. The filing deadline is today and Siegelman is left with no choice but to give pause to the Scrushy issues as raised in the event they

1. The Middle District of Alabama's Standing Order on Criminal Discovery (CR.MISC. #534) provides in relevant part:

> INITIAL DISCLOSURES
>
> (1) Disclosures by the Government.
>
> * * *
>
> (B) *Brady* Material. All information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment, without regard to materiality, within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963).
>
> * * *
>
> (C) *Giglio* Material. The existence and substance of any payments, promises of immunity, leniency, preferential treatment, or other inducements made to prospective witnesses, within the scope of *United States v. Giglio*, 405 U.S. 150 (1972)
>
> * * *
>
> (2) Obligations of the Government.
>
> * * *
>
> (B) The government shall advise all government agents and officers involved in the case to preserve all rough notes.

2. On February 27, 2006, the Government filed a response in which the Government represented to the Court that it had fulfilled its discovery obligations under the Standing Order. (Doc. 168.) On that same date, the Government filed a response in which it represented to the Court that it had complied with its obligation under the Standing Order to advise all government agents and officers involved in the case to preserve all rough notes. (Doc. 167.)

3. In Defendant's trial, during the cross-examination of the Government's key witness Nick Bailey, Bailey was being questioned about who and when he met with the Government, AUSA Steve Feaga stated *in the presence of the jury*: "Your Honor, I would just like to say Mr. Leach [counsel for Defendant Scrushy] has every statement we've taken from him, which should indicate who was there and when, if that helps." (Tr. at 1017.) However, after Bailey was cross-examined further,

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can be verified and are true. Counsel relies in part in filing this motion on the credibility of Scrushy's able and well-respected counsel. Defendant Siegelman has not attached the same documents in an effort to avoid duplication and overburdening an already voluminous record. Given Defendant Siegelman's assumption that this Court will likely consider both his motion and Defendant Scrushy's motion for new trial together, Siegelman adopts the Exhibits filed by Scrushy and attached to his motion for new trial. Pretrial and trial adoption of co-defendant motions, arguments, and objections was permitted.

AUSA Feaga, again in the presence of the jury, stated: "We'll stipulate that there were [other meetings where Bailey met with just Government lawyers and no agents]." (Tr. at 1018.)

4. Further cross-examination of Bailey revealed that he had at one point become uneasy about the details of his memory of the date of a meeting between Scrushy and Siegelman and the delivery of the first $250,000 check. Bailey testified that he notified the Government of this change in his memory. (Tr. at 1024.) The next morning, counsel for Scrushy advised the Court that his change in testimony was not reflected in any of the reports that the Government had furnished to the defense. (Tr. 1032.) Counsel went on to make a renewed, and detailed, *Brady* request relating to the testimony of the Government's key witness against Scrushy:

> What I'm going to request here today is, number one, whether there was any sort of memorandum or document, even if it's just notes of an AUSA, Judge. It doesn't matter what form it takes, it's producibleto the defendant…. So I ask, number one, under *Brady*, that the government be directed – and that is, ordered, Judge – to produce that information to us instanter; that is, immediately…. even if it's just knowledge in their head, *Brady* runs to just knowledge.

(Tr. at 1032-33.) The Court made the following findings and issued its Order:

> Here is the ruling from the Court on this point. As to the material that deals with the date of the first meeting for the purposes of the testimony of Mr. Bailey, first of all I find that that material or that information and that discrepancy is certainly known to you, Mr. Leach. And if there are other *Brady* material discoverable evidence that has not been produced to you involving Mr. Bailey, I'm ordering the government to review their records, to include every agent that has been involved, every attorney that has been involved, and every agency that has been involved and to make a report back to the defense before we begin trial on Monday....
> And lastly, to the extent that there are other *Brady* discoverable matters by any witness, I would also order the government to review those – agents, agencies, attorneys, investigators, any classification who had any involvement with any witness in this case, and to turn over those materials to the defense before court starts on Monday….
> My order would include any correspondence – written, verbal, electronic – by or between any agency, any agent within that agency, whether state or federal.

(Tr. at 1037-39.) AUSA Feaga responded: "Your Honor, what I just want to say is as far as we know, we've turned over everything to them that we have. And we will double-check." (Tr. at 1039-40.) The Court responded:

> I'm just ordering that you make a review of your documents, review of your agency's memorandum, their knowledge of the testimony of these witnesses. *If there are any*

> *discrepancies that have been discussed in any form or fashion*, and if those have not been disclosed to the defense, do so before Monday.

(Tr. at 1040) (emphasis added).

5. That Monday (May 8, 2006) the following colloquy occurred at the start of proceedings:

> THE COURT: First of all, I need to confirm whether the government has had the opportunity to confer with all of the investigative agencies, law enforcement officials who were involved in the investigation of each of the defendants in this case, and has discovered that there has not been exculpatory material that would be available to the defendants pursuant to the *Brady* opinion.
> [Acting U.S. Attorney] MR. FRANKLIN: Your Honor, we did. We checked with all the agents. They have no other reports that have not been turned over in this matter. The agents even contacted the IRS agents who participated early on in this investigation and who were not participating at some of the instances where Mr. Bailey was being interviewed. They have no additional reports. The AG's office has also confirmed by going through its file that there are no additional reports regarding Mr. Bailey.

(Tr. at 1214-15.)

6. During his testimony, Bailey gave conflicting and confusing answers in regard to the number of meetings he had with agents or prosecutors regarding his knowledge and testimony:

a) Bailey estimates he had been in U.S. Attorney's Office "half dozen times" (Tr. at 1018);

b) less than two dozen meetings at any location where AUSA's were present (Tr. at 1019);

c) met with the Government "many, many times" that are not reflected in reports (Tr. at 1089);

d) "at least two dozen meetings [with the Government], perhaps three" since 2001 (Tr. at 1090).

Additionally, Bailey testified that he spent "a few hours discussing [the July 14, 1999 meeting between Governor Siegelman and Richard Scrushy] on a number of occasions." (Tr. at 724.)

7. During his testimony, Bailey explicitly denied that he had discussed his brother Shane Bailey's criminal exposure with the Government:

> MR. DEEN [counsel for Defendant Hamrick]: Were there any other agreements made with you if you plead guilty, like your brother wouldn't be charged?
> MR. BAILEY: My brother was never a discussion in my conversations with the government.

(Tr. at 1000.)

8. Bailey also denied any knowledge of what sentence he would receive due to his cooperation:

> MR. DEEN: …What do you anticipate getting?
> MR. BAILEY: At this moment, Mr. Deen, I have no idea.

(Tr. at 1000.)

9. Bailey also denied that his testimony had been scripted:

> MR. LEACH: Mr. Bailey, throughout the course of your contacts with the government – and in that I include the state folks, the FBI folks, the retired FBI agents, everyone – isn't it fair to say that your testimony in this courtroom has been scripted?
> MR. BAILEY: No, it isn't fair.
> Q: Have you ever said that your testimony was scripted?
> A: No.
> Q: Is it fair to say that you know your testimony in this courtroom by heart?
> A: What does by heart mean?
> Q: That you've got it memorized front to back.
> A: No, sir, I wouldn't say that at all.
> Q: Have you ever said that to anyone?
> A: Have I ever said that I know what by heart?
> Q: That you've got your testimony memorized or you know it by heart.
> A: No, I don't recall ever saying that to anyone, sir. But as these questions become more and more repetitive, I am learning it by heart.

(Tr. at 1163-64.)

10. In discovery relating to Nick Bailey, the Government provided five FBI 302 Reports, four Attorney General Reports, and three grand jury transcripts. The Government did not provide any notice of any promises or threats made to Bailey, nor did it ever provide a single bit of *Brady* material.

11. As set out in the Declaration of Brad Garrett, a former FBI Agent with 21 years of experience with the FBI (*see* Garrett resume attached to the Declaration), there are written regulations specifying when FBI Agents are required to generate an FBI 302 report and also requiring retention of all interview notes. Section 7-13 of the Legal Handbook of Special Agents provides:

> In any interview of a subject, suspect or witness, where the preparation of an FD-302 is required, that is, where the results of the interview may become the subject of court testimony, the original handwritten notes of the Agent conducting the interview are to be retained in the 1-A Section of the case file. The retention of notes is required whether the person interviewed is in custody or not.

Similarly, the Manual of Investigative Operations and Guidelines provides, in Section 6-1.4.9:

> Generally an oral statement by a witness is recorded contemporaneously on Form FD-302, and this form will be producible under Rule 26.2 FED.R.CRIM. P., once the witness has testified. In some jurisdictions, the Government may also be required to produce the investigative notes of the Agent who interviewed the witness and prepared the FD-302. Accordingly, Agents are required to retain all interview notes in the I-A portion of the investigative file.

The Garrett Declaration concludes: "Therefore there should be a 302 for every interview that goes to the merits of the case…." *Id.* at ¶ 10.

12. On February 24, 2008 CBS News broadcast a story on its "*60 Minutes*" program, titled "Did Ex-Alabama Governor Get a Raw Deal?"

At one point in the story, correspondent Scott Pelley states:

> 60 Minutes went to talk to [Nick] Bailey. The Justice Department wouldn't let our cameras into the prison, but we met with him for hours.
>
> Bailey told 60 Minutes that before the Siegelman trial, he spoke to prosecutors more than 70 times, and he admitted that during those conversations he had trouble remembering details. He told 60 Minutes the prosecutors were so frustrated, they made him write his proposed testimony over and over to get his story straight.

Id. at 3.

13. Amy Methvin was interviewed on videotape for a documentary relating to this case in August 2006. In this taped interview, Methvin describes a conversation with Nick Bailey during trial, shortly before Bailey testified:

> And then he said, you know, I really feel bad about what's getting ready to happen, I really do. He said, the Governor does not deserve this, he's a good man. I've never seen him take anything personally. And he gave and he gave and he was the best Governor we ever had.
>
> And I said, Nick, what are you going to do if the lawyers ask you that under oath? And this is what happened. We were engaged in a conversation and all of a sudden he just gazed off over my shoulder and his eyes just stared straight ahead. And he said – he just went into this speech. He said, it was pay for play, it was pay for play, that's all it was. Money exchanged for favors. And he went into this long speech without looking me in the eye.
>
> And I just – my mouth dropped open because it was absolutely – it was just the opposite of what he had just said.
>
> So I let him finish. And I said, Nick, you sound like a robot, like you have this thing memorized. And this is what he said to me, he said, you would have it memorized, too, if you've heard the answers as many times as I've heard the

answers.

14. Scrushy attached to his motion a Declaration of Luther Stancil Pate, IV, who is Bailey's current employer and was in constant contact with Bailey during his cooperation and testimony, during his incarceration and after his release from prison. Pate states in his Declaration:

> According [to] my personal observations and to Nick, the government used both "carrot-and-stick" techniques to convince him to provide more and more cooperation in the various prosecutions in which he was required to participate. The "carrot" was performance-based: the better Nick's performance, the less time in his sentence. Nick expressed to me many times I have to give them "what they want." Nick said they continuously encouraged him to cooperate with the promised [sic] of a lighter sentence, a "downward departure."
>
> The "stick" that the government used with Nick was to threaten, expressly or implicitly, actions that would profoundly affect his personal life…. These comments had a dramatic effect on Nick and, in my observation, added significantly to the pressure he felt to go along with whatever the prosecutors wanted him to say.

Pate states that Bailey told him that the prosecutors overtly shaped his testimony as to allegations that were central to their theory of prosecution:

> Nick has also spoken to me from time to time about how the agents and prosecutors would convince him gradually to modify his testimony. For instance, when Nick would tell them what he knew in his own words, they would say "wouldn't it be all the same if you just said it this way." Nick remembers one example of this particularly well, and that involves the term "absolute agreement." Nick said to me "I don't use that word that way or they convinced him to say it was an absolute agreement." Nick told me that he doesn't use that phrase in his everyday speech, but he learned to use it after practicing his testimony over and over in the way the prosecutors wanted him to say it. Nick told me that Louis Franklin was particularly relentless in trying to get him to answer questions the way he wanted him to, to the point that Nick eventually refused to deal with Franklin any more and would only talk to Steve Feaga.

Pate goes on to describe the role of a notebook in this process:

> Nick has described in great detail the method by which the prosecution coached him to testify at trial in order to keep his answers consistent. Nick said the prosecutors would ask him questions; he would give his answer. At first, Nick spoke the answers. The prosecutors became frustrated that his answers were inconsistent with previous ones. Nick remembers some members of the prosecution team recording his answers on their laptops. Unable to achieve the desired consistency with spoken answers, the prosecutors shifted to a written method. Written versions of the answers would be produced; Nick would be asked the same questions again and his answers would be compared to the written ones. This also did not work because Nick still was unable to give consistent answers that satisfied the prosecutors. They then asked Nick to write down the answers. Nick said he did that, and that his notes were kept in a 3-ring binder.

According to Pate, the effect of this process was clearly observable:

> Based on my discussion with Nick, I have no doubt that the pressure, persuasion, and rehearsals to which Nick was exposed by the agents and prosecutors had a significant effect on the testimony he gave at the trials in which he testified, including the Siegelman/Scrushy trial. A week ago, Nick told me that he had just reread his testimony in the Siegelman/Scrushy trial and said, "I can't even believe I said those things."

15. Scrushy also attached to this motion the Declaration of Harrison Hickman, who came to know Bailey well over a period of years, beginning in 2001. Hickman's Declaration details statements by Bailey as to the techniques used by the Government to enhance his need to cooperate, including an implicit threat of prosecution of Bailey's brother, Shane Bailey (who was involved in the transactions surrounding the ADECA warehouse deal), as well as the revelation of personal information:

> Bailey explained that the prosecutors consistently told him he needed to be "more cooperative." He also said they encouraged his increased "cooperation" by saying things that frightened him. For example, Nick said the prosecutors told him that his brother, Shane Bailey, was in a "situation." The implied threat was implicit as the government apparently never said they would prosecute Shane if Nick did not say what they wanted him to say. Nick told me, however, that the import of what the prosecutors were saying about his brother was clear, and that it made a difference in his willingness to go along with what the prosecutors wanted him to say. Nick also told me that one federal prosecutor threatened to cause purported information of a highly personal nature about Nick to be disclosed. Nick said that while this threat was not made in the form of an explicit quid pro quo exchange for cooperative testimony, it was clear to him that his "cooperation" was required if he did not want the information disclosed and affected the level of his "cooperation" with the government.

Hickman's Declaration echoes Pate regarding the dealings between Bailey and Acting U.S. Attorney Franklin:

> Bailey told me that during the period of his cooperation, he ultimately refused to talk to First Assistant U.S. Attorney Louis Franklin because of Franklin's threatening comments. Nick said that Franklin often implied that if Nick did not cooperate more fully, Franklin would "turn up the heat" on Nick, his family and friends and/or attempt to embarrass Nick publicly.

Hickman also describes Bailey telling of the procedure used in his preparation to ensure answers which were consistent and supportive of the prosecution theory:

> According to Bailey, Feaga became frustrated with Nick's inability to answer questions consistently in a manner that met Feaga's approval. Finally Feaga told him, "I'll write down the questions, you write down the answers," so Bailey could study them. Nick said that he kept these Q's and A's in a loose-leaf binder, made notes on the sheets in the binders, and referred to them in preparation for his interviews and testimony.
>
> Nick recently told me that he was "amazed" when he had a chance to read his testimony in the Scrushy/Siegelman trial. He said that a number of things in the testimony that he knows not to have been true, including the number of interviews with investigators and prosecutors at which Siegelman was discussed. Nick was at a loss to explain the discrepancy between what he knows to be true and the testimony he provided except for the intense pressure he felt at the time of trial to "say the right thing, the right way."

Bailey told Hickman about the shaping of testimony concerning the crucial Siegelman/Scrushy meeting:

> In a similar manner, Nick has told me on multiple occasions that his representation of a critical meeting between Siegelman and Scrushy has evolved over time. Nick attributed some changes in his statements about the meeting to his attempt to accommodate "facts" presented to him by the prosecutors and their investigators when they told him that other evidence and witness statements conflicted with his recollection. One example he gave of this change was whether or not Siegelman had an actual check from Scrushy after the meeting.
>
> With regard to that same meeting between Scrushy and Siegelman, Nick has recently said to me that he is "not exactly sure what happened that day," and that it is "likely" that Siegelman was surmising what Scrushy might want from the administration. Nick told me that it would not have been consistent with Siegelman's pattern and practice to have made and kept a specific commitment to a supporter or a contributor.

16. As set out above, Tamarah Grimes, who was a paralegal in the U.S. Attorney's Office and was assigned to the Siegelman/Scrushy case from April 2005 until December 2005, wrote to Attorney General Eric Holder on June 1, 2009. This letter details her first-hand observations of improper conduct by the U.S. Attorney's Office in the course of the Siegelman/Scrushy investigation and trial preparation.

17. Grimes's letter describes AUSA Feaga's witness preparation techniques:

> I discussed my concerns with [First Assistant U.S. Attorney] Mrs. Watson on numerous occasions in 2005. My initial concerns involved the overt negotiation of proposed testimony of key cooperating witnesses Nick Bailey and Lanny Young. The lead prosecutor, Assistant U.S. Attorney Stephen P. Feaga, instructed the investigators to meet with the cooperating witnesses frequently, at least a couple times a week, to go over the specific content of upcoming grand jury testimony. Mr. Feaga instructed the

> investigators how to approach a cooperating witness on a particular subject and specify what he needed to say in order to support his prosecutorial theory. For instance, Mr. Feaga would say, "See if you can get him to say it like this…," "Ask him if he is comfortable saying it like this…., Or "I need him to say it like this…" The investigators would return from meeting with the cooperating witnesses to report to Mr. Feaga, who would send the investigator back with new instructions.
>
> Mr. Feaga frequently complained that the constraints imposed by existing versions of witness testimony, or the decisions of Main Justice and Public Integrity were "like sending a General into battle with his arms tied behind his back." Once Mr. Feaga committed to his vision of the scenario necessary to support the basis for the allegations, the focus was on molding the testimony of the witness to fit the selected scenario. The stakes were high for the cooperating witnesses and for the prosecutors who were ultimately responsible to Mrs. Canary for their success or failure on The Big Case.

Grimes' testimony is substantiated by the attached affidavit of Kenneth Marshall who states that Joseph Fitzpatrick, an Assistant State Attorney General, who was a member of the prosecutorial team, stated:

> "OPR is going in the wrong direction with their investigation, they need to look at the Grand Jury deliberations, if they only knew boy, they shaved witness testimony to fit what they needed". (Siegelman Exhibit 1)

The Grimes' letter continues:

> "I was not the only person who noticed the prosecutors' creative approach to the facts of the case. I recall one of the investigators, FBI agent Keith Baker commented on the conduct by saying, there is the truth, there are facts, and then there are 'Feaga facts'. … Unfortunately, the lines between fact and fiction became hopelessly blurred as a result of these tactics".

18. Grimes relates that this process was used on witness Nick Bailey in regard to the critical meeting between Richard Scrushy and Governor Siegelman:

> I particularly recall one meeting in which cooperating witness Nick Bailey was persuaded to recall something that he claimed he did not actually recollect. The matter concerned an alleged meeting between Governor Siegelman and Richard Scrushy, a check and a supposed conversation, which eventually led to the convictions in The Big Case. Mr. Bailey repeatedly said he did not know and he was not sure. The prosecutors coaxed and pressured Mr. Bailey to "remember" their version of alleged events. Mr. Bailey appeared apprehensive and hesitant to disappoint the prosecutors.

19. The Grimes letter also details threats to another Government witness who testified against Defendant Scrushy:

> The prosecutors also threatened to revoke the plea agreement of another cooperating witness, Loree Skelton, unless the witness agreed to testify in a certain manner to support Nick Bailey's meeting-check-conversation testimony. The prosecutors told the attorney for Ms. Skelton that under the plea, she was required to provide "full cooperation" and it was within their discretion to decide what constituted "full cooperation." If Ms. Skelton did not testify in the desired manner, her testimony would not be considered "full cooperation." The prosecutors threatened to revoke the plea unless Ms. Skelton testified in the desired manner. Loree Skelton was a lawyer and there was discussion of filing a Bar complaint as leverage to obtain the desired testimony.

20. As set out in the Declaration of defense investigator David Richardson, attached to the Scrushy motion as EXHIBIT V-G, during an interview of Nick Bailey:

> Mr. Bailey recalls that, on a number of occasions, prosecutors and agents asked him questions or made statements that he came to realize were implied threats to disclose potentially embarrassing details about his personal life or to intensify investigations of his friends and relations….Mr. Bailey told us that he was acutely aware of and worried about the fact that his brother, Shane, was under investigation by the government. Bailey said that [Alabama Attorney General Agent] Bill Long told him that Shane was "ok – for now," and that he understood the implicit threat in the "for now" qualification.

21. According to the Richardson Declaration, Bailey stated that he rejected one of the Government's key theories as to how Governor Siegelman benefitted personally from Richard Scrushy's contribution of the final $250,000 to the lottery campaign, and that he advised the Government of that fact:

> Mr. Bailey also explained to us some of the theories advanced by the prosecutors that he could not go along with. For example, he remembers the prosecutors and agents suggesting repeatedly to him that Governor Siegelman's motive for soliciting contributions to the Alabama Educational Lottery Fund from Richard Scrushy was that the Governor had personally guaranteed a loan to the fund – in other words, that the contributions to retire the AELF's debt would benefit Don Siegelman personally. Bailey told us that he did not believe that Don Siegelman worried even for an instant that he would ever have to pay back any of that debt out of his own pocket, *and he told one of the investigators his view on that.*

22. As set out in a Declaration of Art Leach, during discussions with the Government regarding a possible resolution of the charges against Defendant Scrushy, Leach consistently advised the Government of Scrushy's memory of the alleged quid pro quo in this case. The Government

repeatedly rejected Scrushy's memory of the discussion with Governor Siegelman and the contribution to the lottery fund, and specified what the Government expected Scrushy's testimony to be on this point. According to Leach:

> During the meeting on October 4, 2005, I had a discussion with Mr. Pilger [of Public Integrity] in front of all those present to include several representatives for Mr. Scrushy and several representatives for the government. Mr. Feaga did not attend this meeting. During this conversation Mr. Pilger set out a factual scenario which essentially equated to Mr. Scrushy entering into a quid pro quo with the Governor for the CON seat. He went on to say that if Mr. Scrushy could not say exactly what he had set out then Mr. Scrushy would have a problem. I asked what would happen if Mr. Scrushy's statement did not completely correspond to the scenario that Mr. Pilger had outlined. Mr. Pilger responded that Mr. Scrushy would be indicted. This brought on a heated response from me to Pilger in which I asked whether he wanted the truth or his version of the events.

The Leach Declaration details other meetings, including plea negotiations, in which the Government tried to negotiate a version of Scrushy's testimony to fit the Government's theory of the case. According to Leach:

> In retrospect, and with the knowledge of the evidence at trial and the affidavits submitted with this motion, I believe that the government never had a strong factual basis for the charges against Richard Scrushy nor Governor Siegelman. The efforts by prosecutors Pilger, Feaga and Franklin, along with Mr. Lourie of Public Integrity were all calculated to get Richard Scrushy to present facts at trial which were not true and which would have, without question, resulted in the conviction of Governor Siegelman and a reduced sentence for Mr. Scrushy. Mr. Scrushy would not do it.

These conversations shed considerable additional light on the Government's practices and techniques with the critical witnesses in this case, especially Nick Bailey and Loree Skelton.

23. As set out in the Declaration of Nick Bailey, attached as EXHIBIT V-H to the Scrushy motion, Bailey states that:

> Altogether, I would estimate that I spoke with government prosecutors or agents approximately 60 to 70 times – although a number of those meetings and conversations did not involve Governor Siegelman or Mr. Scrushy.

Additionally, Bailey's Declaration provides a detailed listing of meetings with the Government by date, participants and subject matters discussed. As shown in Bailey's Declaration, many of these meetings focused on issues at the core of the allegations against Scrushy.

24. Because of the Government's conduct in shaping the testimony of key Government witness Nick Bailey, the use of implied and express threats against Government witnesses Bailey and Loree Skelton, the failure of the Government to disclose exculpatory and impeaching evidence, and the Government's failure to correct false or misleading testimony, Defendant Siegelman was deprived of his rights as guaranteed by the due process clause of the Fifth Amendment.

Issue II: BECAUSE OF PROSECUTORIAL MISCONDUCT IN THIS CASE, INCLUDING IMPROPER CONTACTS WITH JURORS, IMPROPER *EX PARTE* COMMUNICATION WITH THE COURT, AND IMPROPER CONDUCT IN PREPARING GOVERNMENT WITNESSES TO TESTIFY AT TRIAL AND FAILURE TO PROVIDE *BRADY* MATERIAL, SIEGELMAN WAS DEPRIVED OF HIS FIFTH AMENDMENT RIGHT TO A FAIR TRIAL AND HIS SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY.

25. Defendant Siegelman's right to a fair trial was compromised by prosecutorial misconduct in three areas: failure to advise the Court and the defense of improper contacts with the jury; participation by employees of the DOJ (the U.S. Marshals Service) in an *ex parte* communication with Chief Judge Fuller concerning material facts on a motion filed by Defendant that was pending before the Court; and improper witness coaching and withholding exculpatory and impeaching evidence.

26. The House Judiciary Committee has expressed its concern to Attorney General Holder about prosecutorial misconduct in a letter dated November 7, 2008 ("Conyers/Mukasey Letter"). A bipartisan group of 75 former state attorneys general wrote to Attorney General Holder on April 13, 2009 to express their concern over "gravely troublesome facts concerning the prosecution of Governor Siegelman." Professor Bennett L. Gershman, a nationally recognized expert and author in the area of prosecutorial misconduct (and former prosecutor) has written to Attorney General Holder expressing his concern about "several disturbing irregularities in this case that appear to dwarf irregularities in other recent federal prosecutions that have received attention not just in the media but from the Department of Justice." "Indeed, I have never encountered another prosecution in

which it appears so clearly that the prosecutors were zealously bent on pursuing an individual, rather than on a crime...As an example of bad faith prosecution, Siegelman may be without parallel. And there is no better example of the corrosive effect on the reputation of the Department of Justice, in my opinion, than the prosecution of Don Siegelman." A copy of this letter, dated May 1, 2009, was attached to Defendant Scrushy's motion as EXHIBIT IV-B. The Office of Professional Responsibility, which has had an ongoing investigation into the claim that this case was a product of selective prosecution is apparently broadening that investigation into issues concerning the preparation of the testimony of key Government witness Nick Bailey, as confirmed by a May 21, 2009 letter from Lisa G. Howard, Assistant Counsel in the OPR to Bailey's attorney.

27. There is troubling evidence that there were improper communications between jurors and the Government during and after trial, none of which were reported to either the Court or the defense. As set out in the letter of John Conyers, Jr., Chairman of the House Committee on the Judiciary and Linda Sanchez, Chair of the Subcommittee on Commercial and Administrative Law to then-Attorney General Mukasey, Tamarah Grimes, an employee of the U.S. Attorney's Office in Montgomery, provided to the Committee an "email chain raising serious questions about the prosecution team's apparent failure to disclose important information about possible jury contacts to the Court or the defense." The letter continues:

> This email chain is dated June 15, 2006 – the day the Siegelman/Scrushy case was submitted to the jury for its decision. The key email in the chain was written by Ms. Patricia Watson, who was at this time the First Assistant Attorney for the Middle District of Alabama….
>
> In this email, Ms. Watson writes: "I just saw Keith in the hall. The jurors kept sending out messages through the marshals. A couple of them wanted to know if he was married." Apparently, the "Keith" referenced in this email is FBI Special Agent Keith Baker, a member of the Siegelman prosecution team who reportedly sat at or near the prosecution's counsel table throughout the trial. Ms. Grimes responded to this email, writing "Yeah, that's what Vallie said. He said one girl was a gymnast and they called her 'Flipper,' because she apparently did back flips to entertain the jurors. Flipper was very interested in Keith." "Vallie" refers to another member of the prosecution team in this case.

Conyers/Mukasey Letter at 2 (footnotes omitted). Copies of the two e-mails referenced were attached as EXHIBIT IV-D to the Scrushy motion.

28. Tamarah Grimes, in her June 1, 2009 letter to Attorney General Holder, detailed the same improper contacts with at least one juror:

> There was questionable conduct relating to jurors during the trial. I received information from [contract employee] Vallie Birdsong that one of the jurors was sending messages through the Marshals asking if a member of the prosecution team was married. The prosecution team jokingly nicknamed the juror "Flipper" because she was a gymnast who entertained the other jurors by doing backflips in the jury room. This information was passed along by senior USAO-ALM management in e-mail communications from Mrs. Patricia Watson, but was never reported to the Judge or defense counsel. How did members of the prosecution know what this particular juror did in the jury room to entertain the other jurors? What became of her messages to the prosecution team?

29. There is evidence of a second improper jury contact. Again, as summarized in the Conyers/Mukasey Letter:

> In addition, a complaint filed by Ms. Grimes with the Office of Professional Responsibility on July 30, 2007, includes a quotation from the Acting United States Attorney for this case, Louis Franklin, allegedly stating about this juror that another member of the prosecution team "talked to her. She is just scared and afraid she is going to get in trouble."

Grimes, in her letter to Attorney General Holder provided more details:

> Finally, in the fall of 2007, I heard Mr. Franklin state that his legal assistant (Debbie Shaw) *had spoken with a juror*, whom he described as, "just a kid…she is afraid she is going to get in trouble." *This was immediately prior to a hearing on potential juror misconduct at which the juror testified.* To the best of my knowledge, this contact was never reported to the Court or to defense counsel.

(emphasis added). Again, this contact was not reported to the defense, and if it was reported to the Court, the Court did not report it to the defense. The timing of that conversation is highly significant. That conversation clearly occurred after subpoenas had been issued by the Court for the November 17, 2006 evidentiary hearing into jury misconduct, in which Juror 40 and her apparent e-mails were a central concern. The impropriety of such contact is both obvious and significant.

30. There is also evidence of a third improper contact between the Government and the same juror. According to an account published in the Montgomery Advertiser on July 13, 2006 (less than a month after the verdict in this case), headlined "Siegelman juror wants to talk shop with prosecutors":

> A juror in the case against former Gov. Don Siegelman and three others likely will meet soon with federal prosecutors to discuss the judicial process of the trial….
>
> "I'm just trying to get some questions answered about the process," she said. "I would like to hear the attorney's perspective."...
>
> Assistant U.S. Attorney Steve Feaga also said the government "would avoid discussing the deliberations of the jury."
>
> Prosecutors would be open to answering questions about the trial and the law, he said.
>
> Feaga said court rules allow prosecutors to meet with a juror after trial so long as the juror requests the meeting, but that he would ask the judge just to be certain.

A copy of this news article (with the juror's name redacted) was attached as EXHIBIT IV-C to Scrushy's motion. The juror mentioned in this news report is the same juror discussed in paragraph 46, *supra.* Local Rule 47.1 provides:

> Post-verdict Interrogation of Jurors Prohibited.
> Attorneys, parties, or anyone acting for them or on their behalf shall not, without filing a formal motion therefore with the court and securing the court's permission, interrogate jurors in civil or criminal cases, either in person or in writing, in an attempt to determine the basis for any verdict rendered or to secure other information concerning the deliberations of the jury or any members thereof. The court may itself conduct such interrogation in lieu of granting permission to the movant.

Additionally, the Court entered an Order in this case which provided, in pertinent part:

> The identities of the jurors shall not be revealed to the public or the press. *Any contact with jurors*, whether by party, counsel, press, or public will be deemed an act of contempt of this Order. In the event of any contact with any juror, the Court will make inquiry into how the juror information became available. *Anyone violating this Order will be subject to criminal contempt proceedings*. *See* 18 U.S.C. § 401; 18 U.S.C. § 402….

(Doc. 255 at 3) (emphasis added). Since there was no motion seeking permission to meet with this juror ever filed by the Government, if the news article correctly quoted the juror and/or AUSA Feaga, and the meeting went forward as discussed, two events may have occurred. First, if no prior permission of the Court was obtained, either Local Rule 47.1 or the Court's explicit Order barring any contact with jurors, or both, were violated. If AUSA Feaga did fulfill his stated intention "to ask the judge just to be certain", defense counsel was never apprised of this meeting or what was discussed, so any such meeting was yet another *ex parte* communication with the judge concerning

this case, and never reported by the Government or the Court. By contrast, when counsel for co-Defendant Siegelman submitted an affidavit obtained from a lawyer representing a juror, the Court entered an Order to "conduct an evidentiary hearing on issues relating to possible post-trial contact with Juror # 5 at 9:00 a.m. on October 31, 2006…. " (Doc. 480.)

31. According to the July 8, 2008 letter of the Chief of the Appellate Section (Scrushy EXHIBIT II-A), agents of the Government (representatives of the U.S. Marshal's Service) had an *ex parte* meeting with Chief Judge Fuller in April of 2007. At the time of this *ex parte* meeting, Defendant's renewed motion for new trial was pending before Chief Judge Fuller, and the authenticity of the e-mails was a central fact in determining that motion. (Doc. 519, 532.) Chief Judge Fuller denied Defendant's motion approximately two months after this *ex parte* meeting. (Doc. 611.) The Government never notified Defendant or his counsel of this meeting, and the occurrence only came to light when the DOJ Appellate Chief decided to notify counsel in July 2008, after Defendant's initial brief had been filed in the Eleventh Circuit.

32. The occurrence of any other *ex parte* meetings between the Government and the Court is information exclusively in the possession of the Government (and the Chief Judge). Based on the events described in the preceding paragraphs, Defendant is entitled to be advised of any other *ex parte* meetings touching in any way on this case between the Government or any agents of the Government and the Chief Judge. This information should be provided under oath, either in an affidavit or at an appropriate evidentiary hearing.

33. As set forth in detail in this motion, the Government engaged in improper witness preparation of chief Government witness Nick Bailey; failed to reveal exculpatory and impeaching materials and information concerning witnesses Nick Bailey and Loree Skelton (and possibly other currently unknown to Defendant); and failed to correct testimony of Government witnesses which was either untruthful or misleading to the jury. This constituted additional prosecutorial misconduct.

Issue III. FAILURE TO DISCLOSE *EX PARTE* COMMUNICATIONS AND THE EXISTENCE OF A SECRET INVESTIGATIVE REPORT ON THE AUTHENTICITY OF JUROR EMAILS, A CRITICAL MATERIAL FACT IN A MOTION THEN PENDING BEFORE THE COURT, VIOLATED SIEGELMAN'S SIXTH AMENDMENT RIGHT TO COUNSEL AND HIS FIFTH AMENDMENT RIGHT TO DUE PROCESS.

Based solely on the July 8, 2008 Stemler letter (which contains the only notice and information on this subject that has been provided to Defendant), it is apparent that unnamed representatives of the Government, the U.S. Marshals, conducted an *ex parte* meeting with the Chief Judge Fuller in April of 2007. According to the Stemler letter, during this *ex parte* meeting, the Government informed the Court that based on a secret investigation, Postal Inspectors "had concluded that the purported e-mails were not authentic." (Scrushy EXHIBIT II-A at 2-3.) At the time of this *ex parte* communication, Defendant's renewed motion for new trial, which was premised on the authenticity of the e-mails, was pending before the Court. (Doc. 519.) This motion was denied without a hearing on June 22, 2007 (Doc. 611), approximately two months after the *ex parte* meeting. Defendant had no knowledge of the occurrence of the *ex parte* meeting, the existence of the secret investigative report, or what was discussed in that *ex parte* meeting.

"*Ex parte* proceedings, particularly in criminal cases, are contrary to the most basic concepts of American justice and should not be permitted except possibly in most extraordinary cases involving national security." *United States v. Presser*, 828 F.2d 330, 335 (6th Cir. 1987). The court held: "[W]e do not approve the practice of government counsel in a criminal prosecution approaching the trial judge *ex parte* in any matter relating to the pending case." *Id.*

In *United States v. Barnwell*, 477 F.3d 844 (6th Cir. 2007), the Sixth Circuit reversed a defendant's conviction in a *second* trial due to *ex parte* communications between the government and the trial court regarding possible jury tampering which occurred during jury deliberations in defendant's *first* trial which ended in a hung jury: "We hold that these *ex parte* conversations

violated Barnwell's constitutionally prescribed rights to due process, effective assistance of counsel, and trial by an impartial judge and jury." 477 F.2d at 850. Similarly, in *Haller v. Robbins*, 409 F.2d 857 (1st Cir. 1969), the First Circuit granted habeas relief based on an *ex parte* communication between the state prosecutor and the trial judge after trial but before sentencing regarding defendant's sordid behavior toward his kidnapping victim. The court held:

> Our single holding is that it is improper for the prosecutor to convey information or to discuss any matter with the judge in the absence of counsel… [N]ot only is it a gross breach of the appearance of justice when the defendant's principal adversary is given private access to the ear of the court, it is a dangerous procedure…. It also may give the prosecutor an unfair advantage.

Id. at 859.

There are prejudicial consequences – all to defendant – that flow from such *ex parte* communications. First, the prosecution gains an unfair advantage by being able to place evidence or argument before the judge on a pending matter where a defendant and his counsel, unaware of the *ex parte* proceeding, are unable to challenge the evidence or argument, or to submit contrary evidence. As the court stated in *United States v. Earley*, 746 F.2d 412 (8th Cir. 1984):

> In *Haller*, the court found a lack of due process in an *ex parte* communication by the prosecutor to the judge of information relating to a sentencing hearing because of the possible advantage gained by having the "first word." The presentation was from an advocate and could not be expected to be impartial; and to permit only a tardy rebuttal, the court held, would be a "substantial impairment of the right to the effective assistance of counsel to challenge the state's presentation."

746 F.2d at 416 (quoting *Haller*, 409 F.2d at 860). As the Supreme Court held in *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175 (1968):

> The value of a judicial proceeding … is substantially diluted where the process is ex parte, because the Court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate.

Id. at 183.

Just such a version of existed here. The Government was able to present its conclusion and, presumably, its evidence, that the e-mails were forgeries without Defendant's knowledge or ability to question the evidence or submit contrary evidence. That Defendant could have

discredited that conclusion and presented contrary evidence is demonstrated by Defendant Scrushy's submission to the Eleventh Circuit, promptly upon being advised of the *ex parte* meeting, "Richard M. Scrushy's Motion for Appointment of Special Master Pursuant to Rule 48, Federal Rules of Appellate Procedure," filed July 21, 2008. A copy of the affidavit of Defendant's forensic computer expert setting out the problems with the Government's investigation and describing the appropriate avenues to determine authenticity of the e-mails, filed as Exhibit C to that motion is attached to Scrushy's motion as EXHIBIT II-B. Defendant Siegelman submits that, absent the *ex parte* communications and with knowledge of the email investigation, he would have hired a forensic expert to conduct an independent investigation into the authenticity of the emails at issue.

As the *Barnwell* court noted:

> Due to their continued ignorance about the trial judge's *ex parte* communications and collaborative efforts with the prosecution and other governmental officers, defense counsel was also prevented from petitioning for the recusal of the trial judge or from seeking other remedies. In the absence of any disclosure that *ex parte* communications and *in camera* interviews of the jury foreperson had taken place, there was continuing prejudice to Barnwell.

477 F.2d at 853. In the instant case, there were significant rulings and hearings by Chief Judge Fuller subsequent to his undisclosed *ex parte* meeting concerning the e-mails, including the Court's ruling on Defendant's jury misconduct motion (Doc. 611). Failure to disclose the existence of the forensic report conducted by the postal inspectors and of the *ex parte* meeting placed Siegelman at a major disadvantage denying his constitutional rights.

Additionally, as noted by the *Barnwell* court, the impropriety and prejudice flowing from such *ex parte* proceedings is exacerbated by the failure of the government or the court to inform defense counsel that the proceedings occurred until the passage of a significant period of time:

> What strikes us as most disconcerting is that the Government and trial judge kept all five *ex parte* communications from defense counsel during the entire second trial. Defense counsel only truly found out about these conversations in March 2005, six months *after* Barnwell was convicted in a second trial and nearly eighteen months after the communications had occurred.

477 F.2d at 853. Here, the Government and the Court kept the *ex parte* meeting secret until the Department of Justice found it necessary to disclose it during Defendant's appeal – some fourteen months after the *ex parte* meeting and twelve months after the court denied Defendant's motion. And, significantly, the *ex parte* meeting was revealed not by the U.S. Attorney's office in the Middle District or by Chief Judge Fuller. It was only revealed by the Department of Justice and, according to the Stemler letter, "out of an abundance of caution" after it allegedly "came across the … information in the course of preparing the government's answering brief in this appeal,…." (Scrushy EXHIBIT II-A at 3.)

Had the DOJ not found it necessary "out of an abundance of caution" to reveal the April of 2007 *ex parte* meeting, the defendant would have never had knowledge of such a meeting.

Ex parte proceedings "can only be justified and allowed by compelling state interests." *In re Taylor*, 567 F.2d 1183. 1188 (2d Cir. 1977). While there are some limited circumstances (such as national security) where an *ex parte* communication may not rise to the level of a constitutional violation they are limited:

> We do not, of course, say that in no circumstance could an ex parte communication by the prosecutor be overlooked. There being, however, an invasion of a constitutional right, the burden of proving lack of prejudice is on the state, and it is a heavy one.

Haller, 409 F.2d at 860 (citing *Chapman v. California*, 386 U.S. 18 (1967). *Accord Barnwell*, 477 F.3d at 850-51; *Minsky*, 963 F.2d at 860; *United States v. Hackett*, 638 F.2d 1179, 1188 (9th Cir. 1980).

The *ex parte* communication in this case violated Defendant's right to a fair trial and his right to effective assistance of counsel, as well as the Model Code of Judicial Conduct. This Court must hold an evidentiary hearing at which all aspects of this *ex parte* communication can be explored and a proper record made, as well as appropriate inquiry to determine whether or not there are additional unrevealed *ex parte* proceedings or communications. Thereafter, it will be the Government's burden to demonstrate a compelling state interest for the event or events and to

meet its "heavy" burden of proving that Defendant was not prejudiced. If the Government is not able to meet this burden, then Defendant is entitled to a new trial.

ISSUE IV: THE FAILURE OF U. S. ATTORNEY LEURA CANARY TO ABIDE BY HER ANNOUNCED RECUSAL DEPRIVED SIEGELMAN OF HIS ENTITLEMENT TO A DISINTERESTED PROSECUTOR

34. On March 25, 2002, attorney David Cromwell Johnson, who at that time was representing co-Defendant Siegelman in relation to the investigation which led to his indictment in this case, wrote to Deputy Attorney General Larry D. Thompson and Director of the Executive Office for the United States Attorneys ("EOUSA") Kenneth L. Wainstein. In this letter, attached to Scrushy's motion as EXHIBIT III-A, attorney Johnson requested the disqualification of U.S. Attorney Leura G. Canary and the entire office of the U.S. Attorney for the Middle District of Alabama based on allegations of a political and financial conflict of interest due to the relationship of U.S. Attorney Canary's husband, William J. Canary, as a paid consultant to the political campaigns of Republican opponents of Governor Siegelman, as well as the campaign of then-Alabama Attorney General Bill Pryor, who at that time was involved in the ongoing investigation of Governor Siegelman. *Id.* at 3-5.

35. On May 16, 2002, U.S. Attorney Canary issued a statement that "[O]ut of an abundance of caution, I have requested that I be recused to avoid any question about my impartiality[.]" pertaining to "any investigations regarding state officials or matters of state government…." A copy of this press release was attached to Scrushy's motion as EXHIBIT III-B. The statement goes on to indicate that supervision of any such investigation had been turned over to First Assistant U.S. Attorney Charles R. Niven, and that the Public Integrity Section of the DOJ Criminal Division "will play a significant role in the conduct of such investigation." *Id.* at 2.

36. On July 18, 2007, Acting U.S. Attorney Louis V. Franklin, Sr. issued a press release stating:

> I, Louis Franklin, Sr. was appointed Acting U.S. Attorney in the case after Charles Niven retired in January 2003. I have made all decisions on behalf of this office in the case since my appointment as Acting U.S. Attorney. *U.S. Attorney Canary has had no involvement in the case, directly or indirectly,* and has made no decisions in regards to the investigation or prosecution since her recusal. Immediately following Canary's recusal, appropriate steps were taken to ensure that she had no involvement in the case. Specifically, a firewall was established and all documents relating to the investigation were moved to an off-site location.

A copy of this press release was attached to Scrushy's motion as EXHIBIT III-C (emphasis added). On October 5, 2007, Acting U.S. Attorney Franklin issued another statement, in which he claimed:

> As the Acting United States Attorney in the case, I made all decisions about the case after consultation with other career prosecutors. [Leura Canary's] recusal was scrupulously honored by me.

WSFA 12 News Montgomery, Alabama, October 5, 2007. A copy of this article was attached to Scrushy's motion as EXHIBIT III-D.

37. On September 21, 2007, U.S. Attorney Canary was quoted in a news article published in the Mobile Press Register as stating: "I have been recused from the case by the U.S. Department of Justice since May of 2002 …. I haven't had any involvement in the case since I was recused in May of 2002." A copy of this news article was attached to Scrushy's motion as EXHIBIT III-E.

38. On April 14, 2006, the Government filed a motion titled "Government's Motion in Limine to Bar Defendants From Presenting Testimony, Evidence, or Argument Concerning Alleged Political Motivation for the Prosecution and Supporting Memorandum of Law." (Doc. 348.) In this pleading, the Government stated repeatedly that "Ms. Canary has not been involved in this case since 2002." (*Id.* at 2 n.1.)

39. On February 6, 2006 attorney John Aaron filed a request under the Freedom of Information Act ("FOIA") seeking information regarding the recusal of U.S. Attorney Canary in regard to the investigation of State of Alabama employees or former employees. Two out of 514

identified pages were initially produced,[3] despite numerous requests and appeals of decisions by the Office of Information and Privacy and the EOUSA. On April 30, 2009, the EOUSA released 187 pages of newspaper articles. As a result of this pattern of obfuscation and delay, on May 6, 2009, a Complaint for Declaratory Judgment and Injunctive Relief was filed in the United States District Court for the District of Columbia (Case No. 1:09-cv-00831). A copy of this complaint, which sets out the Government's actions in obstructing timely production of these materials, was attached to Scrushy's motion as EXHIBIT III-F.

40. As set out in a letter from U.S. Representative John Conyers, Jr. and U.S. Representative Linda Sanchez to then-Attorney General Michael B. Mukasey dated November 7, 2008, in July 2007,Tamarah Grimes, at that time an employee of the U.S. Attorney's Office for the Middle District of Alabama who had sought whistle blower status, reported to the Office of Professional Responsibility ("OPR") that notwithstanding her alleged recusal, "[U.S. Attorney] Leura Canary kept up with every detail of the [Siegelman/Scrushy] case through Debbie Shaw and Patricia Watson." *Id.* at 7. [4] A copy of the November 7, 2008 letter to Attorney General Mukasey was attached as EXHIBIT III-G to Scrushy's motion.

41. Grimes also provided copies of e-mails to the House Judiciary Committee. The first, dated September 19, 2005, was from U.S. Attorney Canary to Acting U.S. Attorney Franklin, Assistant U.S. Attorneys Feaga and Perrine, First Assistant U.S. Attorney Patricia Watson, and chief legal assistant Debbie Shaw.[5] In the e-mail, U.S. Attorney Canary forwarded a letter from the Siegelman campaign, with the following message:

> Heaven only knows how I got on this e-mail list. Ya'll need to read because he refers to a "survey" which allegedly shows that 67% of Alabamians believe the investigation of him to be politically motivated. (Perhaps grounds not to let him

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[3] The only document produced consisted of the two-page press release dated May 16, 2002, which was attached as EXHIBIT III-B to Scrushy's motion.

[4] Debbie Shaw was the chief legal assistant on the Siegelman/Scrushy case; Patricia Watson (formerly Snyder) was the First Assistant U.S. Attorney and Ethics Officer for the District.

[5] Franklin, Feaga and Perrine were all prosecutors on the Siegelman/Scrushy case.

> discuss court activities in the media?) He also admits to making "bad" hires in his last administration. Also, it shows that it was sent last Thursday night, though I didn't receive it until late Friday. Leura

A copy of this e-mail was attached as EXHIBIT III-H to Scrushy's motion. This e-mail proves beyond any dispute that U.S. Attorney Canary was not only following the case, but was providing advice to the Siegelman/Scrushy trial team on litigation strategy.

42. A second e-mail from U.S. Attorney Canary, dated September 27, 2005 was sent to the same individuals (minus Debbie Shaw), forwarding a letter to the editor from an Ivan Shaw claiming that the grand jury in the Siegelman investigation seems to be convening in response to activities in Governor Siegelman's political campaign. A copy of this e-mail was attached as EXHIBIT III-I to Scrushy's motion.

43. A third e-mail from First Assistant Watson (Snyder) to Stephen Doyle and dated April 6, 2005 discusses the fact that Tamarah Grimes has agreed to work on "the big case," noting that the case has "ACE [Affirmative Civil Enforcement] potential." The e-mail additionally states: "Leura and Louis both liked the concept." A copy of this e-mail was attached as EXHIBIT III-J to Scrushy's motion.

44. As set out her June 1, 2009 letter of Tamarah Grimes to Attorney General Eric Holder, attached to Scrushy's motion as EXHIBIT III-K, First Assistant U.S. Attorney Watson told Grimes that "The Big Case was the most important case in the office and that U.S. Attorney Leura Canary would grant prosecutors virtually unlimited latitude to obtain a conviction." *Id.* at 1. Grimes states in the same letter: "Despite the fact that Mrs. Canary had recused herself from the case, she monitored the Big Case continuously and closely." *Id.* at 2. And:

> Mrs. Canary publically [sic] stated that she maintained a "firewall" between herself and The Big Case. In reality, there was no "firewall." Mrs. Canary maintained direct communication with the prosecution team, directed some action in the case, and monitored the case through members of the prosecution team and Mrs. Watson.

Id. at 2. Significantly, according to Grimes, "Mrs. Canary and [First Assistant U.S. Attorney Patricia] Watson wrote all the press releases released under the signature of Mr. Franklin." *Id.* at

5. Additionally, U.S. Attorney Canary demonstrated her continuing interest and involvement in the Siegelman/Scrushy case by rewarding individuals involved with the prosecution with special incentives and material rewards. This included cash payments to lead prosecutor AUSA Feaga, prime office space in the new U.S. Attorney's Office, new furniture and flat screen televisions, paid time off, and trips to conferences. *Id.* at 5. According to the Grimes letter, rewards were also given to FBI agents participating in the case. *Id.*

45. These three e-mails and the statements of Grimes to Attorney General Holder demonstrate a clear pattern of U.S. Attorney Canary's continued involvement in this case notwithstanding her alleged recusal. Based on the existence of these three e-mails, it is reasonable to infer that many other e-mails were written or received by U.S. Attorney Canary which would prove her continued involvement in this case, and demonstrate further the false statements of the Government intended to cover up this continued involvement. It is also reasonable to infer that truthful testimony by members of the Siegelman/Scrushy prosecution team at an evidentiary hearing would confirm receipt of these and other e-mails from U.S. Attorney Canary, as well as the possibility that conversations with U.S. Attorney Canary occurred in which the case and matters involving proof and/or litigation strategy were discussed.

46. In light of all these facts, Defendant Siegelman submits that he was deprived of his[3] entitlement to a disinterested prosecutor and, in the alternative, that he is entitled to discovery and an evidentiary hearing in order to develop additional evidence in support of this claim which is currently unavailable to him.

ISSUE V: SIEGELMAN WAS SELECTIVELY PROSECUTED FOR POLITICAL PURPOSES IN VIOLATION OF HIS FIFTH AMENDMENT RIGHT TO EQUAL PROTECTION OF THE LAWS AND HIS FIRST AMENDMENT RIGHT TO RECEIVE

[3]Again, Siegelman is adopting the evidence obtained by defendant Scrushy and will need to conduct an independent investigation into the issues raised. Siegelman does, however, argue that the cumulative effect of the issues raised herein denied him a fair trial, one unworthy of confidence in the verdict. The issues raised by co-defendant Scrushy tend to support this premise. If true, the defendant is due a new trial or dismissal of the charges.

A CONTRIBUTION TO AN EDUCATION LOTTERY FOUNDATION HE SUPPORTED.

47. Defendant Siegelman was a victim of selective prosecution in violation of his Fifth Amendment right to equal protection. The prosecution in his case was initiated for political purposes, to ensure that Siegelman was defeated by his Republican opponent, Bob Riley, who was running for re-election in the 2006 Alabama governor's race. Defendant Siegelman was selectively prosecuted in this same case for his exercise of his First Amendment right to receive a political contribution for an issue-advocacy group in a referendum on establishment of an educational lottery in Alabama which he supported.

48. Defendant is setting out a summary of the evidence currently available to him[3] in support of this claim, and specifically requests (in a separate motion) an Order granting discovery. Defendant also requests an evidentiary hearing at which he has the opportunity to subpoena witnesses and other evidence to support his claim. The evidence to prove, or disprove, the existence of selective prosecution is peculiarly under the control of the U.S. Attorney's Office for the Middle District of Alabama and the Department of Justice ("DOJ"). Without an opportunity to obtain discovery and to exercise his constitutionally guaranteed right to compulsory process to produce testimony and other evidence, Defendant cannot access all the information that is relevant to prove his claim of selective prosecution. According to Hon. John Conyers, Chairman of the House Judiciary Committee, DOJ has been uncooperative with the House Judiciary Committee which has been investigating the issue of selective prosecution in this and other cases by refusing to produce documents or allow DOJ employees to be interviewed or testify.

49. Defendant is aware of at least two ongoing but not yet completed investigations into whether this prosecution was politically motivated and Defendants were selectively prosecuted.

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[3]Again, Siegelman is adopting the evidence obtained by defendant Scrushy and will need to conduct an independent investigation into the issues raised. Siegelman does, however, argue that the cumulative effect of the issues raised herein denied him a fair trial, one unworthy of confidence in the verdict. The issues raised by co-defendant Scrushy tend to support this premise. If true, the defendant is due a new trial or dismissal of the charges.

Beginning in July 2007, the Committee on the Judiciary of the House of Representatives and its staff have been investigating allegations of selective prosecution in Defendants' case and in three other cases that are unrelated, but have similar allegations. *See* Report of Majority Staff, Committee of the Judiciary, "Allegations of Selective Prosecution in Our Federal Criminal Justice System" April 17, 2008 ("Conyers Report") at I. A copy of this report is attached as EXHIBIT I-A to Scrushy's motion. The investigation of this Committee has not concluded: "Because the Department of Justice has largely refused to cooperate with the Committee's investigation, key facts remain unknown and reliable final judgments cannot be made." *Id*. at I. Additionally, the Office of Professional Responsibility of the Department of Justice ("OPR") "has pending investigations involving, among others, allegations of selective prosecution relating to the prosecutions of Don Siegelman, Georgia Thompson, and Oliver Diaz and Paul Minor." Letter from H. Marshall Jarrett, Counsel to OPR to John Conyers, Jr., Chairman, Committee on the Judiciary. A copy of this letter was attached as EXHIBIT I-B to Scrushy's motion. Attached also is a May 21, 2009 letter from Lisa G. Howard, OPR Assistant Counsel, indicating that this investigation is still ongoing. A copy of this letter is attached as EXHIBIT I-C. Defendant reasonably anticipates that additional evidence will be forthcoming from these ongoing investigations and reserves the right to amend this motion when and if such additional evidence becomes available.

50. The Executive Summary of the Conyers Report states, in relevant part:

> 44 former state Attorneys General of both parties, former federal prosecutors, and Republican former Attorney General Richard Thornburgh have all expressed concern about what Attorney General Thornburgh has referred to as "apparent political prosecution[s]." …
>
> There is extensive evidence that the prosecution of former Governor Don Siegelman was directed or promoted by Washington officials, likely including former White House Deputy Chief of Staff and Advisor to the President Karl Rove, and that political considerations influenced the decision to bring charges. Several witnesses have corroborated testimony before two Judiciary Subcommittees that the investigation against Governor Siegelman was "coming to a close" without charges until Washington officials directed local prosecutors to go back over the matter from top to bottom, and that decisions regarding the Siegelman case were being made at the very highest levels of the Administration. That testimony in turn corroborates the sworn statements of a

> Republican attorney that the son of the Republican Governor of Alabama told her that Karl Rove had pressed the Department to bring charges. The issue of the involvement of Mr. Rove or others at the White House in the Siegelman case remains an important open question.
>
> There is also significant evidence of selective prosecution in the Siegelman case. Department investigators pursued leads relating to Governor Siegelman but appear to have ignored similar leads involving similar conduct by Republican politicians.

Scrushy EXHIBIT I-A at I-ii (footnotes omitted).

51. The October 23, 2007 testimony before a subcommittee of the Judiciary Committee by Doug Jones, former U.S. Attorney for the Northern District of Alabama, who represented Governor Siegelman prior to trial in this case shows that by mid-2004, shows that Jones had been told by federal prosecutors in Alabama that most of the charges under investigation had been "written off" and were not expected to lead to charges. Testimony of Doug Jones, October 23, 2007, as cited in Conyers Report, Scrushy EXHIBIT I-A at 12. A copy of the transcript of the Jones testimony is attached to Scrushy's motion as EXHIBIT I-D. "Mr. Jones testified that, based on his discussions with the prosecutors at this time, he and his colleagues 'Felt like [the] case was coming to a close.'" Scrushy's EXHIBIT I-A at 12. "In late fall, however, the lead Alabama prosecutor substantially changed his message, telling Mr. Jones that 'there had been a meeting in Washington and the lawyers in Washington had asked him to go back and look at the case, review the case top to bottom.… The charges that we were told had been "written off" were obviously now back on the table and for the first time it appeared that agents were not investigating any allegations of crime, but were fishing around for anything they could find against an individual.'" *Id.* at 12-13.

52. Another witness, Republican attorney Jill Simpson has provided an affidavit and sworn testimony to the Committee. A copy of that affidavit was attached to Scrushy's motion as EXHIBIT I-E. A copy of the transcript of the Simpson testimony was attached as Scrushy EXHIBIT I-F. [4] As summarized in the Conyers Report:

[4] As of the filing of this motion, both Karl Rove and Rob Riley (the son of Governor Bob Riley) have failed to testify or be interviewed by the Committee under oath. *See* http://judiciary.house.gov/news/073008.html; Scrushy EXHIBIT I-A at 12.

> In May 2007, a Republican attorney from Northern Alabama named Jill Simpson wrote an affidavit stating that, in November 2002, she heard a prominent Alabama Republican operative named Bill Canary say that Karl Rove had contacted the Justice Department about bringing a prosecution of Don Siegelman. Mr. Canary is married to the United States Attorney in the Middle District of Alabama, Leura Canary, and Ms. Simpson states in the affidavit that Mr. Canary also said that "my girls would take care of" Mr. Siegelman. Ms. Simpson asked Mr. Canary who "his girls" were and Mr. Canary said they were his wife and Alice Martin, the U.S. Attorney for the Northern District of the state.
>
> On September 14, 2007, Committee staff conducted a sworn, on-the-record interview of Ms. Simpson in which she reaffirmed the statements in her affidavit and offered additional information. Most significantly, Ms. Simpson described a conversation in early 2005 in which Governor Riley's son Rob, a colleague and friend of Ms. Simpson, told her that his father and Mr. Canary had again spoken to Karl Rove who had in turn communicated with the head of the Department's Public Integrity Section about bringing a second indictment against Don Siegelman since the first case in Birmingham had been dismissed. According to Ms. Simpson, Mr. Riley also told her that Mr. Rove had asked the Department to mobilize additional resources to assist in the prosecution effort. Mr. Riley also said that the case would be in the Middle District of Alabama and would be heard by Chief Judge Mark Fuller, a judge who Mr. Riley stated could be trusted to "hang Don Siegelman." *And Mr. Riley claimed that the prosecution would try Mr. Siegelman and Mr. Scrushy together, in hopes that Mr. Scrushy's unpopularity in the state would affect the proceedings against Mr. Siegelman.*

Scrushy EXHIBIT I-A at 9-10.[5] (emphasis added). As summarized by the Conyers Report:

> Thus, according to the sworn testimony of two different witnesses – who did not know each other and who were not aware of the other's testimony when they spoke – at the same time that Karl Rove was pressing Justice Department leadership to indict Don Siegelman, Washington officials informed the line prosecutors working on the case, who had just recently expressed real doubts about bringing charges, to go back over the entire matter. And as a result of that direction from Washington, the prosecution did in fact launch an aggressive new effort to find indictable charges against Mr. Siegelman.

Id. at 13.

53. Additional evidence of high-level political involvement in the prosecution of Scrushy and Siegelman is set out in the Declaration of attorney Art Leach, which was attached to Scrushy's motion as EXHIBIT I-G. As detailed in that Declaration, in April 2006, Leach, who was lead counsel for Scrushy, had worked out a plea agreement for Scrushy which was acceptable

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[5] Significantly, the initial indictment naming Scrushy and Siegelman was returned on May 17, 2005, but remained sealed until October 26, 2005. (Doc. 2, 3 & 6.)

to the prosecutors handling the case and appeared to be acceptable to Andrew Lourie, the then-acting head of DOJ's Public Integrity Section. A week later the settlement was rejected. When Leach called Lourie for an explanation, Lourie stated that "the decision was made over his head." Leach asked if Lourie meant that the head of the Criminal Division, Assistant Attorney General Alice Fisher, had made the decision. Lourie replied that "the decision had been made higher than the AAG for the Criminal Division." As the Conyers Report concluded from this information:

> Needless to say, the only "higher" levels of government than the office of the Assistant Attorney General for the Criminal Division for an issue such as this would be the offices of the Attorney General (at that time occupied by Alberto Gonzales, his Chief of Staff Kyle Sampson, and Paul McNulty and his Deputy Mike Easton) and the White House itself.

Scrushy EXHIBIT I-A at 14.

54. Lanny Young, a political lobbyist, was a key witness for the Government at trial concerning political contributions made to Governor Siegelman. When Young was interviewed by the FBI on May 8, 2002, according to the FBI 302, Young stated that "he made similar contributions to Governor Siegelman via NICK BAILEY." A copy of this FBI 302 was attached to Scrushy's motion as EXHIBIT I-H. According to the 302, Young stated:

> With regard to campaign contributions made by YOUNG on the part of [then-Attorney General and Republican Bill] Pryor, Bedford, Freeman and [then-Republican Senator] Sessions, YOUNG advised that he personally provided Sessions with cash campaign contributions during Session's 1996 campaign.
>
> YOUNG noted that on one occasion he provided Session [sic] with $5,000 to $7,000 in cash. The money was given to Session [sic] via Armond DeKyser or Clair Austin at the accounting office of YOUNG's parents in Jacksonville, Alabama.
>
> The second occasion occurred in Gadsden, Alabama at the office of Attorney Cliff Callis. Young provided $10,000 to $15,000 to Session [sic]. YOUNG had his secretaries and friends write checks to Sessions campaign and YOUNG reimbursed the secretaries and friends for their contributions.
>
> YOUNG advised that during Pryor's 1998 campaign that he contributed money through other individuals. YOUNG noted that Kelly Fadori, Beth Crane, Matt Gaver, and Pam LNU all wrote checks to Pryor's campaign and were reimbursed by YOUNG for their contributions. YOUNG noted that Clair Austin was responsible for soliciting the contributions.

Id. at 3-4. In regard to these allegations, the Conyers Report credits a *Time Magazine* report from October 15, 2007 that "suggests that these charges against Republicans were not

investigated." Scrushy EXHIBIT I-A at 15. The Conyers Report goes on to note: "Also troubling is that these charges were made while U.S. Attorney Leura Canary was still responsible for the investigation, but they involved Republican politicians that her husband was very close to and for whom he had worked." *Id.* The Conyers Report concludes as to this evidence:

> It is difficult to assess whether Mr. Young's assertions regarding Republicans were investigated or fairly evaluated without access to prosecution files and personnel, and the existing public record, and in particular the many statements on the subject by Acting U.S. Attorney Franklin, can only be described as confusing…. The issue of potential selective prosecution remains of significant concern.

Id. at 16.

55. As summarized in other sections of the Conyers Report, there are other cases under investigation by the Committee which support, along with the instant prosecution, a conclusion that the Republican administration in office at that time, through its appointees at the top levels of DOJ, was engaged in the use of criminal prosecutions to gain political advantage in key states with contested political races. These other cases being investigated by the Committee include: the prosecution of Georgia Thompson, a Wisconsin state procurement officer, whose conviction was reversed by the Seventh Circuit which stated that the "evidence [was] beyond thin" and described the prosecution's legal theories as "preposterous." *Id*. at 19, quoting *United States v. Thompson*, 484 F.3d 877 (7th Cir. 2007) (Scrushy EXHIBIT I-A at 19-23); the prosecution of Allegheny (Pennsylvania) County Coroner Dr. Cyril Wecht (*id*. at 23-26); and the prosecution of Mississippi Supreme Court Justice Oliver Diaz, Judges Wes Teel and John Whitfield, and attorney Paul Minor. *Id.* at 26-30.[6] All of these cases parallel the pattern of politicized prosecutions against prominent Democrats or supporters of Democratic candidates or their causes based on questionable facts and/or aggressive legal theories, timed to have maximum impact on political races in progress, just as occurred in the instant case.

56. An academic study published in February 2007 concluded that federal prosecutors during the Bush Administration have investigated Democratic office holders far more frequently

[6] The Conyers Report notes four additional cases that appear to fit this same pattern. *Id.* at 30-32.

than their Republican counterparts. Shields & Cagan, "The Political Profiling of Elected Officials: When Rhetorical Vision Participation Runs Amok (2007), http://www.epluribusmedia.org/columns/2007/20070212_political_profiling.html. As set out in the Conyers Report:

> The authors expanded and updated this study during the course of 2007, and further results were presented to the Subcommittee on Crime, Terrorism, and Homeland Security … at a joint hearing on allegations of selective prosecution held on October 23, 2007. The updated findings – based on a sample of 820 reported cases and investigations – determined that, during the Bush Administration, 80% of federal public corruption investigations have involved Democratic officeholders and only 14% have involved Republican officeholders. Based on these data, the author testified that the Administration's investigations of Democrats are "highly disproportionate," and that there was "less than one chance in 10,000" that the over-representation of Democrats was by chance, concluding that selective prosecution of Democrats must have occurred.

Scrushy EXHIBIT I-A. at 2-3.

57. The trial judge in Governor Siegelman's first trial, now-retired Judge U.W. Clemon wrote to Attorney General Eric Holder on May 13, 2009, urging the Attorney General to investigate the instant prosecution. A copy of this letter was attached as EXHIBIT I-I to Scrushy's motion. In this letter former Judge Clemon states, "In my view, the United States Attorney's Office undertook considerable judge-shopping...Two of the AUSA's rather blatently attempted to poison the jury pool...There was absolutely no basis for a conspiracy charge...The 2004 prosecution of Mr. Siegelman in the Northern District of Alabama was the most unfounded criminal case over which I presided in my entire judicial career. In my judgment, his prosecution was completely without legal merit; and it could not have been accomplished without the approval of the Department of Justice." *Id*. at 2. The letter concludes:

> I have no personal knowledge of the facts and circumstances surrounding Mr. Siegelman's subsequent prosecution and conviction in the Middle District of Alabama. But given my experience with his unwarranted prosecution in the Northern District, and in the interest of ensuring that Justice Department cases are handled fairly and consistent with its commitment to justice, I strongly support a thorough investigation by your office of allegations of prosecutorial misconduct in Mr. Siegelman's prosecution in the Middle District.

58. There is additional evidence of similarly situated individuals who were not prosecuted

by the Republican-controlled Department of Justice:

a. Dr. Swaid N. Swaid donated $3,000 on July 16, 2002 to the gubernatorial campaign of Governor Riley. Exhibit I-J. In November 2002, Governor Riley was elected to the Office of Governor for the State of Alabama. Exhibit I-K. On December 19, 2002, after the election, Dr. Swaid contributed $10,000 to the gubernatorial campaign of Governor Riley. Exhibit I-L. On January 20, 2003, Governor Riley was sworn into Office. Exhibit I-M. In February of 2003, Governor Riley appointed Dr. Swaid as the Chairman of the Certificate of Need Board. Scrushy Exhibit I-N;

b. On August 17, 2001, Guice Slawson donated $50,000 to Governor Riley's campaign. Exhibit I-O. In April, 2003, Governor Riley appointed Guice Slawson as the Administrator of the Alabama Alcoholic Beverage Control Board. Scrushy Exhibit I-P;

c. In 2008, Raymond Harbert of Harbert Management Company donated $10,000 to Governor Riley's campaign. In March 2009, Harbert was appointed to the Auburn University Board of Trustees. Scrushy Exhibit I-Q**;**

d. Michael Scanlon, a lobbyist convicted in the Abramoff lobbying scandal worked with Jack Abramoff to funnel millions of dollars from the Choctaw Indians into Alabama during the 2002 governor's race according to the McCain Report. *See* http://indian.senate.gov/public/_files/Report.pdf. An e-mail exchange between Abramoff and Scanlon on December 3, 2002 indicated that Abramoff had spoken with "Nell" (Rogers) of the Choctaws and that "she definitely wants Riley to shut down the Poarch Creek operation, including his announcing that anyone caught gambling there can't qualify for a state contract or something like that." A copy of this e-mail is attached as EXHIBIT I-R. According to a Birmingham News story dated December 9, 2004, the Poarch Creek Indians are complying with federal regulators who objected to two-thirds of their gaming machines. A copy of that article is attached as Scrushy EXHIBIT I-S. The article quotes U.S. Attorney Leura Canary as stating, "the Poarch Creek tribe has been extremely cooperative." *Id.*

e. On December 19, 2005, Jim Hudson, the President of Hudson-Alpha Institute for Biotechnology, along with Board Members Lonnie McMillan and Dr. Milton Harris, each gave $100,000 to the Alabamians for Biotechnology PAC. Scrushy Exhibits I-T and I-U. On this same date, the Alabamians for Biotechnology PAC gave a contribution in the amount of $300,000 to the "Riley for Governor" campaign. Exhibit I-U. In August 2005, Hudson-Alpha Institute announced that the State of Alabama had pledged $50 million to their project. Scrushy Exhibits I-V. Governor Riley was quoted in August of 2005 as saying "With a $50 million commitment from the state…". Exhibit I-W. On October 18, 2006, Jim Hudson gave $100,000 to the Alabamians for Biotechnology PAC. Scrushy Exhibits I-X. On October 18, 2006, the Alabamians for Biotechnology PAC gave $25,000 to the "Riley for Governor" campaign. *Id*. On October 30, 2006, the Alabamians for Biotechnology PAC gave $20,000 to the Riley for Governor campaign. *Id.*

f. According to an article published in the Mobile Press Register on April 21, 2008, "At least 86 individuals will enjoy access to Alabama Governor Bob Riley, thanks to their pledges of $40,000 each to a Republican fundraising committee designed to gain control of the Legislature." Scrushy Exhibits I-Y. The article goes on to say that

> "members of the Circle have pledged $10,000 a year over the next four years as part of the fundraising program called Campaign 2010. In return, the donors have been promised access to exclusive events and conference calls with Riley". *Id.*

59. For all of these reasons, Defendant submits that he was selectively prosecuted as a result of a politically motivated investigation and prosecution, in violation of his Fifth Amendment right to equal protection, and that this Court should order discovery in this case and conduct an evidentiary hearing.

ARGUMENT AND AUTHORITIES

In *United States v. Ramos*, 179 F.3d 1333 (11th Cir. 1999), the Eleventh Circuit set out the standard for a motion for new trial based on newly discovered evidence under Rule 33(b)(1):

> To succeed on a motion for new trial based on newly discovered evidence, the movant must establish that (1) the evidence was discovered after trial, (2) the failure of the defendant to discover the evidence was not due to a lack of due diligence, (3) the evidence is not merely cumulative or impeaching, (4) the evidence is material to the issues before the court, and (5) the evidence is such that a new trial would probably produce a different result.

Id. at 1336 n. 1 (citing *United States v. Schlei*, 122 F.3d 944, 991 (11th Cir. 1997). In *United States v. Jernigan*, 341 F.3d 1273 (11th Cir. 2000), the Court noted:

> Indeed, we have held that motions for a new trial are highly disfavored, and that district courts "should use 'great caution' in granting a new trial based on newly discovered evidence."

Id. at 1287 (citing *United States v. Garcia*, 13 F.3d 1464, 1472 (11th Cir. 1994) (quoting *United States v. Johnson*, 713 F.2d 654, 661 (11th Cir. 1983)).

As set out below, Defendant Scrushy meets this standard and is entitled to a new trial on five different grounds.

I. THE GOVERNMENT'S FAILURE TO PRODUCE EXCULPATORY AND IMPEACHING INFORMATION IN ITS POSSESSION AS TO KEY WITNESSES AND CORRECT FALSE OR MISLEADING TESTIMONY DURING TRIAL VIOLATED SIEGELMAN'S RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND THE GOVERNMENT FAILED TO COMPLY WITH ITS OBLIGATIONS UNDER THE JENCKS ACT.

"*Brady* requires the prosecution to turn over to the defense any exculpatory evidence in its possession or control." *United States v. Jordan*, 316 F.3d 1215, 1226 n.15 (11th Cir. 2003) (citing *Brady v. Maryland*, 373 U.S. 83 (1963)). The Government must disclose evidence that could, in the eyes of a neutral and objective observer, alter the outcome of the proceeding. *Jordan*, 316 F.3d at 1252. "*Giglio* requires the prosecution to turn over to the defense evidence in its possession or control which could impeach the credibility of an important prosecution witness." *Jordan*, 316 F.3d at 1226 n.16 (citing *Giglio v. United States*, 405 U.S. 150 (1963). "When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule." *Giglio*, 405 U.S. at 154.

"The Supreme Court has held that 'regardless of request, favorable, exculpatory or impeachment evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.'" *United States v. Noriega*, 117 F.3d 1206, 1218 (11th Cir. 1997) (quoting *Kyles v. Whitley*, 514 U.S. 419, 433 (1995). A reasonable probability of a different result is demonstrated when the Government's evidentiary suppression undermines confidence in the outcome of the trial. *Kyles*, 514 U.S. at 434.

In regard to impeachment evidence, a constitutional error may be shown from the Government's failure to assist the defense by disclosing information that might have been helpful in conducting cross-examination. *United States v. Bagley*, 473 U.S. 667, 678 (1985). There is no distinction between impeachment evidence and exculpatory evidence in the *Brady* context. *United States v. Scheer*, 168 F.3d 445, 452 (11th Cir. 1999) (citing *Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.").

In *Scheer*, the Eleventh Circuit summarized the law relative to materiality in this context:

> In *Hayes v. Alabama*, 85 F.3d 1492 (11th Cir. 1996), we explicitly set forth the factors, as established by the Supreme Court in *Kyles*, that necessarily must guide our determination as to the materiality of evidence. First, "'a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal,'" *id.* at 1498 (quoting *Kyles*, 514 U.S. at 434, 115 S.Ct. at 1566). "Thus, undisclosed evidence can require a new trial even if it is more likely than not that a jury seeing the new evidence would still convict." *Id.* Second, "a defendant need not show there was insufficient evidence to convict in view of the suppressed evidence." *Id.* Third, "there is no harmless error review of *Bagley* errors." *Id.* Fourth, "materiality is to be determined collectively, not item-by-item." *Id.* (internal citation and quotation marks omitted).

Scheer, 168 F.3d at 452. In the context of a *Brady* challenge, a Rule 33(a) motion is to be evaluated under the same standards set out in *Kyles. United States v. Fernandez*, 136 F.3d 1434, 1438 (11th Cir. 1998).

It is apparent from the newly discovered evidence presented in support of this motion that *Brady/Giglio/Napue* violations occurred during Siegelman's trial. Siegelman submits that based on the showing in this motion, (adopted from Scrushy's motion for new trial) Defendant is entitled to the evidence identified in his motion for discovery in order to fully reveal and document these violations. Where material evidence and knowledge of these violations is not otherwise available to Defendant because it is within the possession or control of either the Government or a third party, this Court must order either discovery and an evidentiary hearing based on Defendant's substantial showing that the material exists, so that Defendant is able to exercise his right to compulsory process to obtain access to this evidence and testimony.

As set out in the summary of evidence submitted in support of this motion, there are at least four areas where exculpatory or impeaching evidence appears to have been withheld from Defendant, notwithstanding this Court's standing Order on Discovery, Defendant's explicit request for all exculpatory materials relative to witness Nick Bailey (TR. 1032-33), and this Court's specific direction to the Government during trial to review all materials once again for exculpatory information. (Tr. 1037-39). This Court should also authorize Defendant to subpoena the Bailey notebook pursuant to Fed. R. Crim. P. 17(c). Finally, there is substantial evidence of a

Napue violation in regard to some of this material, as well as the Government's failure to comply with its obligations under the Jencks Act.

1. The Shaping and Scripting of Nick Bailey's Testimony[7]

From the declarations of Stancil Pate, Harrison Hickman and the taped interview of Amy Methvin, it is apparent that Nick Bailey made statements to all three of these individuals, on multiple occasions, that the Government shaped and modified his testimony over the course of multiple meetings. Pate relates how the Government would take Bailey's own words and "then tell him the words they wanted him to use." Scrushy EXHIBIT V-E at ¶ 10-11. Hickman relates statements by Bailey to the same effect, including Bailey's description of how AUSA Feaga "became frustrated with Nick's inability to answer questions consistently in a manner that met Feaga's approval. Finally Feaga told him, 'I'll write down the questions, you write down the answers,' so Bailey could study them." Scrushy EXHIBIT V-F at ¶ 12. The "60 Minutes" story reported the same thing from Bailey himself: "He told 60 Minutes the prosecutors were so frustrated, they made him write his proposed testimony over and over to get his story straight." Scrushy EXHIBIT V-C at 3.

The end result of this process was that Bailey gave scripted testimony that was contrary to his original version as told to the Government and contrary to his real memory. As described by Methvin: "And he said – he just went off into a speech….So I let him finish. And I said, Nick, you sound like a robot, like you have this thing memorized….he said, you would have it memorized, too, if you've *heard the answers* as many times as I've *heard the answers*." Scrushy EXHIBIT V-D-2 at 2 (emphasis added). And both Pate and Hickman report virtually the same statement by Bailey. In Pate's Declaration: "A week ago, Nick told me that he had just reread his testimony in the

[7]Siegelman acknowledges that the declarants would be subject to cross examination if an evidentiary hearing was granted. However, at this juncture, he only has the benefit of Scrushy's investigation into the newly discovered evidence.

Siegelman/Scrushy trial and said, 'I can't believe I said those things.'" Scrushy EXHIBIT V-E at ¶ 19. In Hickman's words: "Nick recently told me that he was 'amazed' when he had a chance to read his testimony in the Scrushy/Siegelman trial. He said that he said a number of things in the testimony he knows not to have been true, including the number of interviews with investigators and prosecutors at which Siegelman was discussed. Nick was at a loss to explain the discrepancy between what he knows to be true and the testimony he provided except for the intense pressure he felt at the time of trial to 'say the right thing, the right way.'" Scrushy EXHIBIT V-F at ¶ 13. The Government has never disclosed that it scripted Bailey's testimony, or the conflicts between Bailey's original version and his trial testimony.

Further, based on Bailey's Declaration, there is considerable evidence that the changes over time in his testimony wrought by the Government's techniques would be reflected in the notes of the various people attending his interviews and practice sessions:

> I recall that one or more of the government representatives took notes at each and every one of these meetings. When Assistant U.S. Attorney Julia Weller was present, she typed constantly on her laptop….After Assistant U.S. Attorney Steven Feaga was assigned to the case, he was generally accompanied to the interviews by J.B. Perrine, another AUSA, who took notes. Other government representatives generally took notes, on laptops or written by hand, at all of these meetings. When only agents were present (and such meetings almost always include Keith Baker and Bill Long), one or both of them took notes, and Keith Baker was usually the one who did so.

Scrushy EXHIBIT V-H at ¶ 6.

Based on the statements by Bailey to Pate, Hickman, Methvin and "60 Minutes," it is apparent that Bailey's testimony morphed over a period of time. Given Bailey's description of the note-taking in the interview process, it is more than highly likely that a careful review of these notes would reveal considerable contradictory statements from Bailey's trial testimony, and would also show how this testimony changed – *i.e.*, was shaped – over time by the agents and the prosecutors. *See United States v. Harrison*, 524 F.2d 421, 427 (D.C. Cir. 1975) (holding that "it is too plain for argument" that notes can contain *Brady* material and: "If the witness does testify, the notes might reveal a discrepancy between his testimony on the stand and his story at a time when the events were fresh

in his mind. The discrepancy would obviously be important for use in impeaching the witness' credibility. The possible importance of the rough notes for these purposes is not diminished in cases where the prosecutor turns over to the defense the 302 reports.").

Therefore, the notes of the prosecutors and agents reflecting the contradictions and subsequent changes in Bailey's testimony – during the process of creating what amounts to a script – would have also been invaluable impeachment material that should have been turned over to the defense. Although none of the following cases resulted in reversal, largely because their circumstances did not indicate that the "scripted" testimony was in any way inaccurate, each of them clearly stands for the proposition that the failure to disclose scripted trial preparation can give rise to a *Brady* violation: *LeCroy v. Secretary, Florida Department of Corrections*, 421 F.3d 1237, 1267 (11th Cir. 2005) ("Even assuming arguendo that such evidence constitutes *Brady* material, there is no allegation that any of the testimony of the government's witnesses … was false" and the evidence of guilt was found by the state courts to have been overwhelming); *Pederson v. Fabian*, 491 F.3d 816 (8th Cir. 2007) (inferring that scripting of testimony could be impeachment material, but rejecting claim because witness's testimony at trial exceeded the scope of the summary "script"); *Mills v. Singletary*, 63 F.3d 999, 1018 (11th Cir. 1995) (holding that lists of questions accompanied by "one- or two-word prompts" used by prosecutor in witness preparation were not "improper scripts," thus suggesting that when "improper scripting" does exist, if undisclosed, can constitute a *Brady* violation). Here there is evidence not just of "scripting" but also of shaping of testimony so that the end result was not the same as the information provided by the witness at the outset.

The Government's most important evidence in its case against the defendants related to a meeting between Siegelman and Scrushy in June of 1999. An examination of the 302 where this subject was discussed (Scrushy V-A-2 at 3), and Bailey's trial testimony (Tr. 1013-15), shows that Bailey's version of this event, especially as to its date and the claim that the Governor showed Bailey a check for $250,000 immediately after Scrushy's departure, evolved from a clear claim that the check was delivered on the day of the meeting to a much more nuanced version to accommodate the

subsequent discovery of the fact that the check was not written until a week after the meeting. The dispute over this change in testimony was the focus of Scrushy's specific *Brady* claim that was made by counsel during Bailey's cross-examination (Tr. 1032-33), and the Court's explicit Order for the Government "to review their records, to include every agent that has been involved, every attorney that has been involved, and every agency that has been involved and to make a report back to the defense before we begin trial on Monday…." (Tr. 1037-38.) On that Monday, Acting U.S. Attorney Franklin reported that the Government had conducted its review and had no exculpatory material to turn over. (Tr. at 1214-15.)

The Hickman Declaration details statements by Bailey that support the conclusion that Bailey's testimony on this key point was shaped by the Government's preparation techniques so that the end result was materially changed, and significantly less vulnerable to effective cross-examination. It also indicates that Bailey knew, and probably stated in one or more interviews, that it would have been unlikely that the Governor would have discussed any specific request with Scrushy in return for any contribution, the key explicit *quid pro quo* testimony necessary to obtain Scrushy's conviction:

> Nick told me on multiple occasions that his representation of a critical meeting between Siegelman and Scrushy has evolved over time. Nick attributed some changes in his statements about the meeting to his attempt to accommodate "facts" presented to him by the prosecutors and their investigators when they told him that other evidence and witness statements conflicted with his recollection. One example he gave of this change was whether or not Siegelman had an actual check from Scrushy at the meeting.
>
> With regard to that same meeting between Scrushy and Siegelman, Nick has recently said to me that he is "not exactly sure what happened that day," and that it is "likely" that Siegelman was surmising what Scrushy might want from the administration. Nick told me that it would not have been consistent with Siegelman's pattern and practice to have made and kept a specific commitment to a supporter or a contributor.

Scrushy EXHIBIT V-F at ¶¶ 15-16.

Based on Bailey's description of the note-taking practices of the Government during all of the meetings with Bailey (Scrushy EXHIBIT V-H at ¶ 6), and especially the fact that AUSA Weller (who Bailey stated in his Declaration "typed constantly on her laptop," *id.*) was present at the Bailey interview on dates when the Siegelman/Scrushy meeting was discussed (July 15, 2003; July 29, 2003;

November 29, 2003, *id.* at ¶ 10, sub-headings 6, 7, 8), it is impossible to conclude without an independent review of the Government's notes of these meetings that there was no exculpatory or impeaching material contained in these notes, and that the notes would have contained numerous and material discrepancies from Bailey's ultimate trial testimony.

2. The Government's Unrevealed Threats to Nick Bailey and Loree Skelton

As set out in the declarations described above, there is substantial evidence that the Government used threats against and promises to Nick Bailey to improperly shape what ultimately became his trial testimony, which was contrary to Bailey's original memory as told to the Government. The Pate Declaration (Scrushy EXHIBIT V-E) states that Bailey told him "that the better Nick's performance, the less time in his sentence. Nick expressed to me many times I have to give them 'what they want.'" *Id.* at ¶ 11. Pate also states that Bailey told him about: "The 'stick' the government used with Nick was to threaten, expressly and implicitly, actions that would profoundly affect his personal life…. These comments had a dramatic effect on Nick and, in my observation, added significantly to the pressure he felt to go along with whatever the prosecutors wanted him to say." *Id.* at ¶ 12.

The Declaration of Harrison Hickman details discussions with Bailey: "He said they encouraged his increased 'cooperation' by saying things that frightened him…. Nick also told me that one federal prosecutor threatened to cause purported information of a highly personal nature about Nick to be disclosed. Nick said that while this threat was not made in the form of a quid pro quo exchange for cooperative testimony, it was clear that his 'cooperation' was required if he did not want the information disclosed and affected the level of his 'cooperation' with the government." Scrushy EXHIBIT V-F at ¶ 10. Hickman also described statements by Bailey about explicit threats, "Nick told me that one federal prosecutor threatened to cause purported information of a highly personal nature about Nick to be disclosed." (*Id.*) And: "Nick said that [Acting U.S. Attorney Franklin] often implied that if Nick did not cooperate more fully, Franklin would 'turn up the heat' on Nick, his family and friends and/or attempt to embarrass Nick publicly." *Id.* at ¶ 11.

One threat involved the possibility of prosecuting Bailey's brother, Shane, who had been involved in the ADECA warehouse transaction which was involved in this prosecution:

> Nick said that the prosecutors told him that his brother, Shane Bailey, was in a "situation." The implied threat was implicit as the government never said they would prosecute Shane if Nick did not say what they wanted him to say. Nick told me, however, that the import of what the prosecutors were saying about his brother was clear, and that it made a difference in his willingness to go along with what the prosecutors wanted him to say.

Id. at ¶ 10. *See Scheer*, 168 F.3d at 451 (recognizing that there is no distinction between explicit and implicit threats).

As set out above in paragraph 69, Tamarah Grimes has advised Attorney General Holder that Government witness Loree Skelton was threatened with revocation of her plea agreement, and prosecutors discussed filing a Bar complaint against Skelton, a lawyer, to gain leverage for desired testimony. Scrushy EXHIBIT III-K at 3.

In *Scheer*, 168 F.3d 445, the Eleventh Circuit reversed a conviction due to the government's failure to disclose a prosecutor's intimidation of a key government witness. The threat in *Scheer* was made by an AUSA during a weekend break in the witness's testimony. The AUSA stated: "Now I know you are going to come through on that for us or for me. I know that you are going to come through on that, and if you don't come through on that, [FBI Agent] Tony [Yanketis] is going to put the cuffs on you and you are going to be out of there in 45 seconds." *Id.* at 449 (footnote omitted). The Eleventh Circuit held:

> Had Scheer been able to bring out in his cross-examination of Jacoby the fact that Jacoby had been intimidated by the assistant U.S. Attorney prosecuting this case, the value of Jacoby's testimony would have been considerably diminished.

Id. at 450. The Court concluded that the threatening remark constituted material impeachment evidence that would have made a different result reasonably probable, acknowledging that while Jacoby was a crucial prosecution witness, he was not the only witness who testified against Scheer. *Id.* at 452, 456. The Court reversed Scheer's conviction and granted him a new trial, based on its conclusion that:

> [W]e are convinced that Scheer's knowledge of the incident between Gage and Jacoby, at which Gage intimated that Jacoby's failure to testify in a "cooperative" fashion might result in his return to prison, was material information that might have substantially undermined the critical value of Jacoby's testimony. As a result, the government's failure to communicate this information to Scheer undermines our confidence in the integrity of the verdict.

Id. at 458.

Here, Bailey was the most crucial witness against Siegelman, as the Government relied on Bailey's recounting of the Governor's description of the critical meeting with Scrushy when the alleged explicit *quid pro quo* was supposedly communicated. While there were, in fact, other witnesses against Scrushy (including witness Skelton, who was also threatened, according to the Grimes letter to Attorney General Holder (Scrushy EXHIBIT III-K at 3)), none could provide testimony even remotely comparable to Bailey's as to the key element of the offenses charged. Additionally, based on Bailey's statements to at least two witnesses, the threats the Government used to shape Bailey's testimony and encourage his "cooperation" far exceeded the single implied threat in *Scheer*. As argued by Scrushy, the Government threatened Bailey in numerous ways and on numerous occasions, both implicitly and explicitly. None of these were ever revealed to the defense, nor was what appears to have been an explicit or implicit promise of a sentence that was proportional to the prosecutors' definition of Bailey's cooperation, which was that Bailey told the Government what it wanted to hear, using the words the Government wanted him to say.

3. The Number of Meetings Bailey Had With the Government

As set forth above, Bailey gave conflicting answers as to the number of meetings which he had with the Government. The highest number he ever revealed was "at least two dozen meetings, perhaps three" since 2001. (Tr. at 1090.) Bailey also testified that he has less than two dozen meetings at any location where AUSAs were present. (Tr. at 1018.) Bailey told "60 Minutes" that he spoke to *prosecutors* more than 70 times." Scrushy EXHIBIT V-C at 3. In his Declaration, Bailey states: "Altogether, I would estimate that I spoke with government prosecutors or agents approximately 60 to 70 times – although a number of those meetings and conversations did not involve Governor Siegelman or Mr. Scrushy." Scrushy EXHIBIT V-H. This would have been

effectively used to impeach Bailey's testimony. Yet the true number of meetings was never revealed to the defense.

4. The "Missing" FBI 302s

The defense was provided only five FBI 302s relating to interviews of Nick Bailey. Scrushy EXHIBITS V-A-1 through 5. One of these 302s was a "composite" 302, purporting to cover six meetings. Scrushy EXHIBIT V-A-2 at 1.[8] As set out above, the FBI's Legal Handbook for Special Agents and the Manual of Investigative Operations and Guidelines require the generation of an FBI 302 in circumstances "where the results of the interview may become the subject of court testimony." Scrushy EXHIBIT V-B.

The Bailey Declaration lists, by date, at least seventeen meetings where at least one FBI Agent was present. Scrushy EXHIBIT V-H at ¶ 10. Bailey also confirms that extensive notes were taken by many of the participants in those interviews. Yet the Government only furnished five FBI 302s covering only ten meetings. In this regard, the Fifth Circuit's handling of the identical situation in the case of *United States v. Skilling*, 554 F.3d 529 (5th Cir. 2009), is instructive. In *Skilling*, the defense complained that although Government agents took 420 pages of notes as to their key witness Fastow, the Government only compiled two FBI 302s which summarized the interview notes. The trial court, despite being furnished with a notebook containing most of the interview notes, did not turn over any of the notes. However, on appeal, the Fifth Circuit ordered the Government to turn over *all of* the notes to Skilling's lawyers, and the defense was able to document and argue on appeal that the notes contained exculpatory and impeachment evidence that the Government should have turned over. *Id.* at 578.

Siegelman submits that just such a procedure should be employed here. The Government should be required to turn over all of its notes of its meetings with Bailey (with the exception of meetings unrelated to the Scrushy/Siegelman prosecution) so that Siegelman has a full and fair opportunity to document and brief any and all exculpatory or impeaching information contained in

[8] The Attorney General interview memos (Scrushy EXHIBITS V-A-6 through 8), did not contain any information pertaining to Defendant Siegelman.

those notes. Defendant has shown that the notes exist; that the 302s do not cover all the meetings that Bailey had concerning this case; and the likelihood that there is exculpatory or impeaching material in those notes, especially in light of the evidence that Bailey's testimony evolved and changed over time. In the alternative, Defendant requests that this Court order the Government to provide to the Court all of its notes (by agents, prosecutors and paralegals) for an *in camera* inspection, and that the Court turn over to Defendant all exculpatory and impeaching materials in those notes, and place in the sealed record all notes that are not produced to Defendant.

5. The Bailey Notebook

Multiple sources, including Nick Bailey himself, confirm the existence of a notebook which Bailey used during his interviews and trial preparation. Scrushy EXHIBITS V-E, F, G & H. Through counsel, Bailey has voluntarily provided a limited number of pages of that notebook, as well as discussed its contents during interviews with Defendant's investigators at which the notebook was present and in the custody of Bailey's attorney, as set out in the Declaration of David Richardson, attached to this motion as Scrushy EXHIBIT V-G. Richardson's Declaration describes the notebook in detail. *Id*. at ¶ 13.

According to the Richardson Declaration:

> Mr. Bailey also informed me that, in his review of the binder, he had noticed a page from a 302, which he recalled as being the 302 dated June 30, 2003, on which he had written the word "bullshit."

Id. at ¶ 16. According to the Bailey declaration, one of the topics of the June 30, 2003 interview was "Appointment of Richard Scrushy to CON Board." Scrushy EXHIBIT V-H at ¶ 10, subsection 7.

It is self-evident that the entire Bailey notebook is of great significance to Defendant's motion for new trial. As Bailey told Richardson:

> Mr. Bailey said that, following Mr. Feaga's direction and to prevent the prosecutors from becoming irritated, he began to make notes so as to remember the key words they wanted him to use, and to study and memorize the right answers and words before his next meeting with the government. *Bailey is confident that the government was aware of the practice.*

Scrushy EXHIBIT V-G at ¶ 12 (emphasis added). The notebook certainly contains evidence of the Government's activities in shaping and changing Bailey's testimony from its original version to the version that was used in trial. (See affidavit of Kenneth Marshall in support of witness testimony being shaped.) Nick Bailey is a private citizen, and the constitutional requirements of *Brady* and *Giglio* do not apply to him. However, *Brady* is not limited to written reports or notes. It encompasses knowledge in the possession of prosecutors or agents that has not been reduced to writing, as this Court acknowledged. (Tr. at 1033.) *See also Calley v. Callaway*, 519 F.2d 184, 224 (5th Cir. 1975) (referencing the need "for disclosure of *information* known or available to the prosecution" under *Brady* (emphasis added)). The simple fact that Bailey was writing down answers given to him by the Government and then memorizing those answers, which Bailey states the Government was aware of, would be powerful impeachment material, and a fact that the Government was constitutionally required to provide to the defense.

Finally, it appears based on Scrushy's argument that the Bailey notebook would provide extensive evidence of the alleged improper activities that occurred here as the Government coached and cajoled and threatened Bailey to provide a version of the facts which powerfully supported their theory of the case, even when that version was different from the version originally provided by Bailey. As a consequence, as Defendant has set out in his contemporaneously filed motion for discovery, this Court should enter an Order authorizing a Rule 17(c) subpoena to permit Defendant to gain access to this notebook and, upon its review, file a supplemental pleading to this motion.

6. The *Napue* Violations

The Government has an affirmative duty to correct false testimony, even when that testimony goes only to the credibility of the witness. *Napue*, 360 U.S. at 269.

In his testimony at trial, Bailey explicitly denied that his testimony had been "scripted" or that he had "memorized" his testimony, or that he had never told anyone that he had his testimony memorized or knew it by heart. (Tr. at 1163-64.) Needless to say, multiple prosecutors and their agents who participated in the process of shaping Bailey's testimony were present in the courtroom

when Bailey gave this testimony, and the falsity of it was never corrected by the Government.

During trial, Bailey testified: "My brother was never a discussion in my conversations with the government." Bailey also testified that "At this moment … I have no idea [what sentence he anticipated]." (Tr. at 1000.) Once again, multiple prosecutors and agents were in the courtroom during this testimony and failed to correct these false statements. The Government never revealed any threats or promises made to Bailey.

Once again, numerous prosecutors and agents were present in the courtroom when Bailey testified concerning the number of meetings occurred, yet there was no correction. This was yet another *Napue* violation.

7. Evidence of a Jencks Act Violation

In his declaration, Nick Bailey states: "When Assistant U.S. Attorney Julia Weller was present, she typed constantly on her laptop. My opinion is that Ms. Weller took verbatim notes because she was the 'eyes and ears' of [recused U.S. Attorney] Leura Canary at these meetings." (Scrushy EXHIBIT V-H at ¶ 6.) Title 18 U.S.C. § 3500(b) required the Government to turn over any statement of a witness upon conclusion of direct examination. Section (e)(2) defines a "statement" for purposes of this requirement to include:

> a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a *substantially verbatim* recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement;…

Id.(emphasis added). *Jordan*, 316 F.3d at 1255 ("As used in the Jencks Act, 'substantially verbatim' means using the nearly exact wording or phrasing the witness uttered during the interview, if only some of the exact wording is used it is not Jencks material.").

Paragraph 10 of the Bailey statement lists six meetings that AUSA Weller was present at by date and subject matter. Defendant submits that this Court should Order the Government to produce all notes taken by AUSA Weller for an *in camera* inspection to determine if the notes are "substantially verbatim" as indicated by witness Bailey. If the Court determines that the notes meet this definition, the Court should provide those notes to Defendant for use in this motion. If there is

a question as to whether or not the notes are substantially verbatim, Defendant submits that excerpts from those notes should be made available so that both sides may brief the question of whether the notes are "substantially verbatim" within the meaning of the Jencks Act. Additionally, if the Court does not provide all the prosecutors' and agents' notes to Defendant for his review, the Court should examine *in camera* those notes to determine if they are "substantially verbatim" recitals of Bailey's statements, and if so, provide them to Defendant.

Conclusion – *Brady* and Related Violations

A straight-forward application of the principles of materiality as summarized in *Scheer*, 168 F.3d at 452, to the facts here presented – prior to discovery and prior to any evidentiary hearing – demonstrates that Siegelman has met the requirements to show the materiality of the withheld information. The evidence showing how Bailey's testimony was shaped, how Bailey was allegedly threatened (as was Skelton), how Bailey's memory of events was manipulated and eventually scripted to present testimony that was different from Bailey's initial information and different from his true memory, all demonstrate there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. *Kyles*, 514 U.S. at 433. A reasonable probability of a different result is demonstrated when the Government's evidentiary suppression undermines confidence in the outcome of the case. *Id.* at 434. Moreover, materiality is to be determined collectively, not item-by-item, and there is no harmless error review of such errors. *Scheer* at 452. In light of the nature and extent of the evidence withheld from the defense as to what was undeniably the absolutely essential witness in the Government's case against Siegelman, if a new trial is not granted outright, this Court must, at a minimum, order the Government to produce its notes and other documents necessary to determine with certainty the existence of the exculpatory and impeaching evidence that Defendant's showing in this motion points to with little room for doubt.

Scrushy argued in light of all the indications of the Government's improper actions vis-à-vis its critical witnesses, this Court should not and cannot take a chance that a significant injustice has occurred in this case due to the Government's failure to understand or fulfill its obligations under

Brady and *Giglio* and *Napue.* The past six months has seen a cascade of cases in which courts and/or the Attorney General have found it necessary to act to grant relief due to the withholding of such evidence. On April 7, 2009, the District Court for the District of Columbia granted Attorney General Holder's motion to dismiss the conviction of Alaska Senator Ted Stevens (Docket No. 08-231), based on flagrant and willful violations of *Brady* by prosecutors from the Public Integrity Section. On April 28, 2009, the District Court for the District of Montana struck the testimony of the key Government witness, mid-trial, in *United States v. W.R. Grace* (CR 05-07-M-DWM) due to flagrant *Brady* and *Giglio* violations, leading to acquittals of all defendants. On April 9, 2009, the District Court for the Southern District of Florida entered a Hyde Act award against the Government to an acquitted defendant, in the amount of $601,795.88 based on a finding of prosecutorial misconduct, including flagrant *Brady* violations, in *United States v. Ali Shaygan*, Case No. 08-20112-CR-Gold. In his Order, Judge Gold stated: "Our system of criminal justice cannot long survive unless prosecutors strictly adhere to their ethical obligations; avoid even the appearance of partiality, and directly obey discovery obligations and court orders." (Doc. 315 at 5.) There are too many indications of just such violations in the Defendant Siegelman's case to ignore. This Court must act to determine whether such violations did in fact occur.

II. BECAUSE OF PROSECUTORIAL MISCONDUCT IN THIS CASE, INCLUDING IMPROPER CONTACTS WITH JURORS, IMPROPER *EX PARTE* COMMUNICATION WITH THE COURT, AND IMPROPER CONDUCT IN PREPARING GOVERNMENT WITNESSES TO TESTIFY AT TRIAL AND FAILURE TO PROVIDE *BRADY* MATERIAL, DEFENDANT SIEGELMAN WAS DEPRIVED OF HIS FIFTH AMENDMENT RIGHT TO A FAIR TRIAL AND HIS SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY.

A. IMPROPER JURY CONTACTS

The Sixth Amendment guarantees the right to a trial before an impartial jury. To protect this right, the Supreme Court held in *Mattox v. United States*, 146 U.S. 140 (1892):

> Private communications, possibly prejudicial between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least until their harmlessness is made to appear.

Id. at 150. In *Remmer v. United States*, 347 U.S. 227 (1954), the Supreme Court held:

> In a criminal case, any private communication, or contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial,… The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Id. at 229 (citations omitted).

As developed by co-defendant Scrushy, the allegation is based on e-mail traffic inside the U.S. Attorney's office indicating that a juror had expressed an interest in the FBI case agent who sat at or near the prosecution table during Defendant's trial. Even though the currently available facts appear to indicate that the contacts were not related to the substance of the case, the mere existence of such communications, if they occurred, are more than sufficient to trigger this Court's responsibility to inquire into the exact nature and extent of the contacts. As the Supreme Court held in *Remmer*:

> We do not know from this record, nor does the petitioner know, what actually transpired, or whether the incidents that may have occurred were harmful or harmless….The trial court should not decide and take final action ex parte on information such as was received in this case, but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate.

347 U.S. at 229-30.

Moreover, in this situation the Government's apparent failure to notify the Court and actual failure to notify the defense that contacts between a juror and members of the prosecution team was being discussed in intra-office e-mails adds weight to the need for a full inquiry. The potential for prejudice is manifest because of the danger that any such contact could affect the juror's analysis of the evidence or case. In *Pekar v. United States*, 315 F.2d 319 (5th Cir. 1963), the former Fifth Circuit granted a new trial to the defendant because the prosecutor engaged in a conversation with a juror about the juror's bonding business, with the court holding:

> Thus without even admonishing counsel as to the impropriety of his saying "Hello" to every member of the jury and sitting down and engaging in a conversation with

> one of them, presumably in the presence of any others who were passing through the corridors, the trial court permitted the case to go then to the jury, one of whose members at least had established a social contact with the prosecuting attorney. Such conduct is not only inexcusable, it is clear grounds for setting aside of a conviction.

Id. at 322. In *United States v. Betner*, 489 F.2d 116 (5th Cir. 1974), the same court granted a new trial where an AUSA who was not even involved in the defendant's trial "conversed and fraternized with members of the jury" outside the courtroom during a long recess just before the trial was to begin, agreeing with the defendant's argument that "the fraternizing by the U.S. Attorney's office with the jury created, intentionally or unintentionally, a relationship or common ground between the office of the U.S. Attorney and the jurors." *Id.* at 118. *See also United States v. Rutherford*, 371 F.3d 634, 645 (9th Cir. 2004) (remanding for evidentiary hearing to determine if jurors were intimidated by presence of IRS agents in courtroom who one juror described as "glaring" at the jurors).

Additionally, the fact that one of the trial jurors communicated her interest in one of the prosecution team during the trial of this case raises a real possibility of bias having infected the jury. Once again, the Government's failure to notify the Court or the defense that there was speculation about these contacts within the U.S. Attorney's office – to the extent that it made its way into intra-office e-mails – prevented Siegelman from taking timely action to protect his right to a verdict returned by an unbiased jury and prevented the Court from protecting this right. Had counsel been advised of the possible contacts between the juror and the prosecution team at the time it occurred, counsel would have been able to ask the Court to conduct a prompt and thorough inquiry into the communications and, if they occurred, remove the juror from the jury.

The possibility of bias is even clearer because this is the same juror who contacted the U.S. Attorney's office shortly after trial (Scrushy EXHIBIT IV-C), and who is alleged to have had contact with another prosecution team member, who "talked to her. She is just scared and afraid she is going to get in trouble." Scrushy EXHIBIT III-G at 3; Scrushy EXHIBIT III-K at 4. It is vitally important that this Court determine when this latter conversation occurred, who spoke with the juror and what was said. This Court conducted an evidentiary hearing on November 17, 2006 into whether this jury

was tainted by exposure to extrinsic evidence. Prior to this hearing there were press accounts detailing Defendant's allegations that jurors had improperly accessed the Internet and communicated with each other by e-mail concerning the case before and during deliberations. The very same juror was named as being the focal point of the e-mail communications. If this juror had contact with a member of the prosecution team and expressed concerns that she was "going to get in trouble," this contact was clearly in violation of Local Rule 47.1 and the Court's Order forbidding "any contact" with the jurors, and could have impacted the testimony of the juror at the November 17, 2006 hearing. If this in fact occurred, there was undeniable prosecutorial misconduct in both the contacts with the juror and the additional misconduct in the Government's failure to promptly report this contact to the Court and counsel for the Defendant.

The Government's conduct regarding all three of these alleged contacts with this juror is troubling, especially so because (with the exception of the request by the juror for a meeting with the prosecutors, which was reported in the press contemporaneously with its occurrence) the Government apparently failed to report these contacts – or even the discussion about the contacts – to the Court, and definitely did not report them to counsel for Siegelman. Siegelman submits that this Court must hold an evidentiary hearing to determine what contacts occurred, the precise nature and content of those contacts and why they were not revealed by the Government.

B. EX PARTE COMMUNICATION WITH COURT

As set out in the Stemler letter, in April 2007, unnamed U.S. Marshals conducted an *ex parte* meeting with Chief Judge Fuller during which they advised the Court that Postal Inspectors had concluded "that the purported emails were not authentic…." Scrushy EXHIBIT II-A at 2-3. At that time, Defendant's motion based on those same e-mails was pending before the Court. (Doc. 519.) Further, according to the Stemler letter, "The Marshals who spoke to Chief Judge Fuller have advised us that the Chief Judge did not solicit this report." Scrushy EXHIBIT II-A at 3. Therefore, if the Stemler letter accurately reflects what occurred, it was agents of the Government who initiated and executed the *ex parte* communication with the Chief Judge.

As the First Circuit held in *Haller*, 409 F.2d at 859, "Our single holding is that it is improper for the prosecutor to convey information or to discuss any matter with the judge in the absence of counsel…." And, as the Sixth Circuit held in *Presser*, 828 F.2d at 335: "[W]e do not approve the practice of government counsel in a criminal prosecution approaching the trial judge *ex parte* in any matter relating to the pending case."

In 1998 Congress passed the Citizen's Protective Act, which provides in pertinent part:

> **Ethical standards for attorneys for the Government**
> (a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.

28 U.S.C. § 530B. *See also United States v. Lowery*, 166 F.3d 1119, 1124 (11th Cir. 1999) (recognizing applicability of act, but holding that a state rule of professional conduct cannot provide an adequate basis for a federal court to suppress evidence that is otherwise admissible). The Alabama Rules of Professional Conduct provide as follows:

> **Alabama Rule 3.5 Impartiality and Decorum of the Tribunal**
> A lawyer shall not:
> (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law; or
> (b) communicate ex parte with such a person except as permitted by law; or
> (c) engage in conduct intended to disrupt a tribunal.

It appears the *ex parte* communication which occurred here by the U.S. Marshal, an agency which is part of the DOJ, is attributable to the U.S. Attorney's Office which initiated the investigation. The *ex parte* communication of allegedly factual findings of an investigation by the Postal Inspectors without any notice by the U.S. Attorney's office did not allow Siegelman, through counsel, to dispute this putative evidence which is critically important to the determination of Siegelman's motion for new trial then pending before the Court, and which the Court subsequently denied. The prejudice to Defendant is manifest and obvious. It is likewise apparent from the manner in which the defense finally learned of this *ex parte* communication that the U.S. Attorney's Office fully intended to cover up the existence of both the investigation and the *ex parte* meeting. The conduct of the U.S. Attorney's Office in regard to these events was illegal, unethical and inexcusable.

Siegelman should be granted a new trial based on this substantial and prejudicial prosecutorial misconduct.

C. PROSECUTORIAL MISCONDUCT IN THE PREPARATION OF KEY GOVERNMENT TRIAL WITNESSES AND FAILURE TO PRODUCE EXCULPATORY AND IMPEACHING EVIDENCE

Scrushy argued in his motion that the Government engaged in a pattern of misconduct in regard to key Government witnesses Nick Bailey and Loree Skelton, and failed to reveal exculpatory and impeaching evidence in the Government's possession. *Brady* violations and threats to witnesses can constitute prosecutorial misconduct. *See United States v. Scheer*, 168 F.3d 445, 449 (11th Cir. 1999).

ISSUE III. FAILURE TO DISCLOSE THE *EX PARTE* COMMUNICATIONS AND THE EXISTENCE OF A SECRET INVESTIGATIVE REPORT ON THE AUTHENTICITY OF JUROR EMAILS, A CRITICAL MATERIAL FACT IN A MOTION THEN PENDING BEFORE THE COURT, VIOLATED SIEGELMAN'S SIXTH AMENDMENT RIGHT TO COUNSEL AND HIS FIFTH AMENDMENT RIGHT TO DUE PROCESS.

Based solely on the July 8, 2008 Stemler letter (which contains the only notice and information on this subject that has been provided to Defendant), it is apparent that unnamed representatives of the Government, the U.S. Marshals, conducted an *ex parte* meeting with the Chief Judge Fuller in April of 2007. According to the Stemler letter, during this *ex parte* meeting, the Government informed the Court that based on a secret investigation, Postal Inspectors "had concluded that the purported e-mails were not authentic." (Scrushy EXHIBIT II-A at 2-3.) At the time of this *ex parte* communication, Defendant's renewed motion for new trial, which was premised on the authenticity of the e-mails, was pending before the Court. (Doc. 519.) This motion was denied without a hearing on June 22, 2007 (Doc. 611), approximately two months after the *ex parte* meeting. Defendant only learned of the occurrence of the *ex parte* meeting after filing an opening brief to the Eleventh Circuit. The notification came from main justice.

"*Ex parte* proceedings, particularly in criminal cases, are contrary to the most basic concepts of American justice and should not be permitted except possibly in most extraordinary cases involving national security." *United States v. Presser*, 828 F.2d 330, 335 (6th Cir. 1987). The court held: "[W]e do not approve the practice of government counsel in a criminal prosecution approaching the trial judge *ex parte* in any matter relating to the pending case." *Id.*

In *United States v. Barnwell*, 477 F.3d 844 (6th Cir. 2007), the Sixth Circuit reversed a defendant's conviction in a *second* trial due to *ex parte* communications between the government and the trial court regarding possible jury tampering which occurred during jury deliberations in defendant's *first* trial which ended in a hung jury: "We hold that these *ex parte* conversations violated Barnwell's constitutionally prescribed rights to due process, effective assistance of counsel, and trial by an impartial judge and jury." 477 F.2d at 850. Similarly, in *Haller v. Robbins*, 409 F.2d 857 (1st Cir. 1969), the First Circuit granted habeas relief based on an *ex parte* communication between the state prosecutor and the trial judge after trial but before sentencing regarding defendant's sordid behavior toward his kidnapping victim. The court held:

> Our single holding is that it is improper for the prosecutor to convey information or to discuss any matter with the judge in the absence of counsel… [N]ot only is it a gross breach of the appearance of justice when the defendant's principal adversary is given private access to the ear of the court, it is a dangerous procedure…. It also may give the prosecutor an unfair advantage.

Id. at 859.

There are a number of the practical consequences – all to the detriment of the charged individual – that necessarily flow from such *ex parte* communications. First and foremost, the prosecution gains an unfair advantage by being able to place evidence or argument before the judge on a pending matter where a defendant and his counsel, unaware of the *ex parte* proceeding, are unable to challenge the evidence or argument, or to submit contrary evidence. As the court stated in *United States v. Earley*, 746 F.2d 412 (8th Cir. 1984):

> In *Haller*, the court found a lack of due process in an *ex parte* communication by the prosecutor to the judge of information relating to a sentencing hearing because of the possible advantage gained by having the "first word." The presentation was from an advocate and could not be expected to be impartial; and

> to permit only a tardy rebuttal, the court held, would be a "substantial impairment of the right to the effective assistance of counsel to challenge the state's presentation."

746 F.2d at 416 (quoting *Haller*, 409 F.2d at 860). As the Supreme Court held in *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175 (1968):

> The value of a judicial proceeding … is substantially diluted where the process is ex parte, because the Court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate.

Id. at 183.

Just such a circumstance existed here. The Government was able to present its conclusion and, presumably, its evidence, that the e-mails were forgeries without Defendant's knowledge or ability to question the evidence or submit contrary evidence. That Defendant could have discredited that conclusion and presented contrary evidence is demonstrated by Defendant's submission to the Eleventh Circuit, promptly upon being advised of the *ex parte* meeting, "Richard M. Scrushy's Motion for Appointment of Special Master Pursuant to Rule 48, Federal Rules of Appellate Procedure," filed July 21, 2008. A copy of the affidavit of Defendant's forensic computer expert setting out the problems with the Government's investigation and describing the appropriate avenues to determine authenticity of the e-mails, filed as Exhibit C to that motion is attached to Scrushy's motion as EXHIBIT II-B.

As the *Barnwell* court noted:

> Due to their continued ignorance about the trial judge's *ex parte* communications and collaborative efforts with the prosecution and other governmental officers, defense counsel was also prevented from petitioning for the recusal of the trial judge or from seeking other remedies. In the absence of any disclosure that *ex parte* communications and *in camera* interviews of the jury foreperson had taken place, there was continuing prejudice to *Barnwell*.

477 F.2d at 853. In the instant case, there were significant rulings and hearings by Chief Judge Fuller subsequent to the government's undisclosed *ex parte* meeting concerning the e-mails, including the Court's ruling on Defendant's jury misconduct motion (Doc. 611), Defendant Scrushy's challenge

to the composition of the jury (Doc. 612), and, not inconsequentially, Siegelman's sentencing and application for release on bond pending appeal.

Additionally, as noted by the *Barnwell* court, the impropriety and prejudice flowing from such *ex parte* proceedings is exacerbated by the failure of notice to defense counsel that the proceedings occurred until the passage of a significant period of time:

> What strikes us as most disconcerting is that the Government and trial judge kept all five *ex parte* communications from defense counsel during the entire second trial. Defense counsel only truly found out about these conversations in March 2005, six months *after* Barnwell was convicted in a second trial and nearly eighteen months after the communications had occurred.

477 F.2d at 853. Here, the *ex parte* meeting was kept secret until the Department of Justice found it necessary to disclose it during Defendant's appeal – some fourteen months after the *ex parte* meeting and twelve months after the court denied Defendant's motion. And, significantly, the *ex parte* meeting was revealed not by the U.S. Attorney's office in the Middle District or by Chief Judge Fuller. It was only revealed by the Department of Justice and, according to the Stemler letter, "out of an abundance of caution" after it allegedly "came across the … information in the course of preparing the government's answering brief in this appeal,…." (Scrushy EXHIBIT II-A at 3.)

It appears that the U.S. Attorney's Office never intended to reveal the existence of this *ex parte* meeting or the existence of the secret investigative report regarding the juror emails. Had the DOJ not revealed the April, 2007 *ex parte* meeting and the existence of the secret investigative report on the emails, this information would have remained a secret known only to the government.

Ex parte proceedings "can only be justified and allowed by compelling state interests." *In re Taylor*, 567 F.2d 1183. 1188 (2d Cir. 1977). While there are some limited circumstances (such as national security) where an *ex parte* communication may not rise to the level of a constitutional violation they are limited:

> We do not, of course, say that in no circumstance could an ex parte communication by the prosecutor be overlooked. There being, however, an invasion of a constitutional right, the burden of proving lack of prejudice is on the state, and it is a heavy one.

Haller, 409 F.2d at 860 (citing *Chapman v. California*, 386 U.S. 18 (1967). *Accord Barnwell*, 477 F.3d at 850-51; *Minsky*, 963 F.2d at 860; *United States v. Hackett*, 638 F.2d 1179, 1188 (9th Cir. 1980).

The *ex parte* communication in this case violated Defendant's right to a fair trial and his right to effective assistance of counsel. This Court must hold an evidentiary hearing at which all aspects of this *ex parte* communication can be explored and a proper record made, as well as appropriate inquiry to determine whether or not there are additional unrevealed *ex parte* proceedings or communications. Thereafter, it will be the Government's burden to demonstrate a compelling state interest for the event or events and to meet its "heavy" burden of proving that Defendant was not prejudiced. If the Government is not able to meet this burden, then Defendant is entitled to a new trial.

IV. THE FAILURE OF U.S. ATTORNEY LEURA CANARY TO ABIDE BY HER ANNOUNCED RECUSAL DEPRIVED SIEGELMAN OF HIS ENTITLEMENT TO A DISINTERESTED PROSECUTOR.

In *Berger v. United States*, 295 U.S. 78 (1935), the Supreme Court declared:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer.

Id. at 88. As a consequence, federal prosecutors are barred from representing the Government in any matter in which they or their family have any interest. 18. U.S.C. § 208(a). *See also* 28 U.S.C. § 528 and 28 C.F.R. § 45.2, "Disqualification arising from personal or political relationship."

Finding that the appointment of a party attorney to prosecute a criminal contempt action was improper, the Supreme Court held:

> In modern times, procedures in criminal contempt cases have come to mirror those used in ordinary criminal cases. The requirement of a disinterested prosecutor is consistent with that trend, since [a] scheme injecting a personal

> interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecution decision.

Young v. United States ex rel Vuitton et Fils S.A., 481 U.S. 787, 808 (1987) (internal quotations and citations omitted). In *Wright v. United States*, 732 F.2d 1048, 1056 (2d Cir. 1984), the court noted that a claim of being deprived of the entitlement to a "disinterested" prosecutor "is not that the prosecutor had an interest in opposition to his proper one in securing an indictment and a conviction; it is rather that he had an additional and impermissible reason in forwarding the prosecution." The court further stated that a prosecutor "is not disinterested if he has, or is under the influence of others who have, an axe to grind against the defendant." *Id.*

Finally, the Supreme Court has held that the participation of an interested prosecutor is a structural error, one of those errors "so fundamental and pervasive that they require reversal without regard to the facts or circumstances of the particular case." *Young*, 481 U.S. at 809-810 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)). As a consequence, once a conflict has been found, reversal is required without any need to show prejudice:

> Furthermore, appointment of an interested prosecutor creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general. The narrow focus of harmless-error analysis is not sensitive to this underlying concern. If the prosecutor uses the expansive prosecutorial powers to gather information for private purposes, the prosecution function has been seriously abused even if, in the process, sufficient evidence is obtained to convict a defendant.

Young, 481 U.S. at 811. *Accord Clearwater-Thompson v. Grassmueck, Inc.* 160 F.3d 1236 (9th Cir. 1998) ("It is fundamental that the prosecutor of a criminal charge be disinterested. Where that is not the case, a judgment of conviction is to be reversed without the need of showing prejudice." (citing *Young*, 481 U.S. at 814)).

U.S. Attorney Canary stated that "the Department of Justice has advised me that no actual conflicts of interest exist." Scrushy EXHIBIT III-B at 1. Nonetheless, she stated, "However, out of an abundance of caution, I have requested that I be recused to avoid any questions about my impartiality." *Id.* at 1-2. Notwithstanding this claim and her subsequent recusal, it is beyond cavil that U.S. Attorney Canary had a substantial conflict of interest that, under applicable law, *required* her

recusal and demonstrated that she was far from the "disinterested" prosecutor required by law. U.S. Attorney Canary was married to William J. Canary, a well-known Republican political consultant in Alabama. As set out in the March 25, 2002 letter of attorney Johnson requesting U.S. Attorney Canary's disqualification (Scrushy EXHIBIT III-A), William Canary operated both William J. Canary & Company, Inc. and the Capitol Group LLC. In that capacity, Scrushy argues that William Canary received substantial income from the campaigns of Steve Windom and Bob Riley, both of whom were Republicans running to oppose Governor Siegelman in the 2002 governor's race. Scrushy EXHIBIT III-A at 3-5. Additionally, William Canary's consulting firm was paid in excess of $40,000 in conjunction with the 2002 re-election campaign of Attorney General William Pryor. Attorney General Pryor's office initiated the investigation leading to the indictment in this case. *Id.* at 5.

Title 28 U.S.C. § 528 provides:

> The Attorney General shall promulgate rules and regulations which *require* the disqualification of any officer or employee of the Department of Justice, including a United States attorney or a member of such attorney's staff, from participation in a particular investigation or prosecution if such participation may result in a personal, financial, or political conflict of interest, or the appearance thereof. Such rules and regulations may provide that a willful violation of any provision thereof shall result in removal from office.

Id. (emphasis added). The regulation subsequently enacted, 28 C.F.R. § 45.2(a) provides, in relevant part:

> (a) Unless authorized under paragraph (b) of this section, no employee shall participate in a criminal investigation or prosecution if he has a personal or political relationship with: …
>
> (2) Any person or organization which he knows has a specific and substantial interest that would be directly affected by the outcome of the investigation or prosecution.

Subsection (c) of the regulation provides that: "An employee is presumed to have a personal relationship with his father, mother, brother, sister, child *and spouse*." (Emphasis added).

Scrushy argues that even with Defendant's limited access to evidence of the internal dealings of the U.S. Attorney's office in regard to this prosecution, it is apparent that, despite her putative and publicly-announced recusal, U.S. Attorney Canary continued to participate in the prosecution of Defendants Scrushy and Siegelman and communicate her strong interest in the outcome of the

prosecution. The exhibits to Scrushy's motion appear to demonstrate that:

1) U.S. Attorney Canary communicated by e-mail with the trial team, forwarding materials of interest (Scrushy EXHIBITS III-H & I), suggesting specific litigation strategy (Scrushy EXHIBIT III-H), and indicating approval of additional personnel for the prosecution. Scrushy EXHIBIT III-J.

3) According to the letter of paralegal Tamarah Grimes to Attorney General Holder:

> Despite the fact that Mrs. Canary had recused herself from the case, she monitored the Big Case continuously and closely…. Mrs. Canary publically [sic] stated that she maintained a "firewall" between herself and The Big Case. In reality, there was no "firewall." Mrs. Canary maintained direct communication with the prosecution team, directed some action in the case, and monitored the case through members of the prosecution team and Mrs. Watson.

Scrushy Exhibit III-K at 2.

4) Significantly, according to Grimes's report to Attorney General Holder: "Mrs. Canary and [First Assistant U.S. Attorney] Watson wrote all the press releases released under the signature of Mr. Franklin." *Id.* at 5.

Scrushy contends the existence of this evidence, including e-mails authored by U.S. Attorney Canary, is more than sufficient to demonstrate that she did not, in fact, recuse herself from this case. It is also more than sufficient evidence to require both discovery and an evidentiary hearing through which Defendant can develop and present additional evidence not currently available to him. Unless this Court determines that the evidence submitted with this motion is sufficient proof that U.S. Attorney Canary continued to participate substantially in the case after her recusal, then this Court must permit a fair and reasonable opportunity for Siegelman to access any additional evidence that supports this ground for relief. Siegelman specifically requests the right to supplement this evidence should additional evidence become available through the pending FOIA action seeking records relating to U.S. Attorney Canary's recusal and/or any ongoing investigations by the U.S. Congress and the Department of Justice.

U.S. Attorney Canary's continued participation in the investigation and prosecution of the Siegelman/Scrushy case notwithstanding her recusal places Siegelman in the position of a defendant

who is prosecuted by a prosecutor who has a conflict of interest or is otherwise less than "disinterested." As the Supreme Court held in *Young*:

> *Heldt* would be analogous only if defendants in that case had obtained a trial court disqualification of the prosecutors in question on the ground that prosecution by them would violate [18 U.S.C.] § 208. If those prosecutors had nonetheless continued to participate in the prosecution, defendants would have been in the same position as defendants prosecuted in violation of the rule we establish today-they would have been subject to prosecution by prosecutors whose involvement *expressly* had been found an intolerable conflict of interest.

481 U.S. at 812 n.23 (emphasis in original).

Scrushy argues it it appears that the participation by U.S. Attorney Canary may very well have been a violation of 18 U.S.C. § 208(a), which provides in relevant part:

> (a) Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government,…participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding…in which, to his knowledge, he, [or] his spouse,…has a financial interest—Shall be subject to the penalties set forth in section 216 of this title.

Title 18 U.S.C. § 216 provides for up to one year imprisonment, with a five year sentence if the individual is found to have engaged in the conduct willfully. With the exception of the last element (knowledge of the financial interest), § 208(a) has been held to be a strict liability statute. *United States v. Hedges*, 912 F.2d 1397, 1402 (11th Cir. 1990).

If Scrushy is correct, and it is assumed without proof to the contrary that, the actions of U.S. Attorney Canary deprived Siegelman of his right to a disinterested prosecutor. Since this is a structural defect, Siegelman is not required to prove prejudice, and this Court should grant him a new trial on all counts of conviction.

V. SIEGELMAN WAS SELECTIVELY PROSECUTED FOR POLITICAL PURPOSES IN VIOLATION OF HIS FIFTH AMENDMENT RIGHT TO EQUAL PROTECTION OF THE LAWS AND HIS FIRST AMENDMENT RIGHT TO ACCEPT CONTRIBUTIONS TO AN ISSUE-ADVOCACY CAMPAIGN.

In 1886, the Supreme Court held:

> Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.

Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

In *United States v. Berrios*, 501 F.2d 1207 (2d Cir. 1974), the Second Circuit held:

> Nothing can corrode respect for a rule of law more than the knowledge that the government looks beyond the law itself to arbitrary considerations, such as race, religion, or control over the defendant's exercise of his constitutional rights, as the basis for determining its applicability. *See Oyler v. Boles*, 368 U.S. 448, 456, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962). *Selective prosecution then can become a weapon used to discipline political foe* and the dissident, *see, e.g., United States v. Falk*, 479 F.2d 616 (7th Cir. 1973); *United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972). The prosecutor's objective is then diverted from the public interest to the punishment of those harboring beliefs with which the administration in power may disagree.

501 F.2d at 1209 (emphasis added).

The test for selective prosecution set out by the Second Circuit in *Berrios* has been widely accepted. The former Fifth Circuit formally adopted it as the law of the Circuit in 1978. *United States v. Johnson*, 577 F.2d 1304, 1308 (5th Cir. 1978). As set out in *Berrios*:

> To support a defense of selective or discriminatory prosecution, a defendant bears a heavy burden of establishing, at least prima facie, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. These two essential elements are sometimes referred to as 'intentional and purposeful discrimination.'

501 F.2d at 1211 (citations omitted). *See also United States v. Armstrong*, 501 U.S. 456, 468 (1996) and *United States v. Smith*, 231 F.3d 800, 808 (11th Cir. 2000).

In regard to the first requirement, the Eleventh Circuit has held:

> [W]e define a "similarly situated" person for selective prosecution purposes as one who engaged in the same type of conduct, which means that the comparator committed the same basic crime in substantially the same manner as the defendant – so that any prosecution of that individual would have the same deterrence value and would be related in the same way to the Government's enforcement priorities and enforcement plan – and against whom the evidence was as strong or stronger than that against the defendant.

Smith, 231 F.3d at 810.

Defendant Siegelman submits that he has – at the very least – established a prima facie case of this element based on the documents currently available to him. Siegelman was prosecuted for accepting two contributions totaling $500,000 to an issue-advocacy campaign, the referendum for an education lottery fund, which was supported by then-Governor Siegelman. The Government contended at trial that in return for these contributions, Scrushy was appointed to Alabama's Certificate of Need Board ("CON Board"). The evidence at trial also showed that Scrushy, who was the acknowledged leader in the healthcare industry in Alabama, had been appointed to the CON Board by three previous governors. *Siegelman*, 561 F.3d at 1218, 1220. As set out above, even prior to Defendant being allowed discovery of documents and testimony in the Government's exclusive control, public documents demonstrate a significant number of similarly situated individuals, all with ties to the Republican Party and/or the Republican Governor of Alabama, Bob Riley, as set out in ¶¶ 12 and 16, *supra*, and accompanying exhibits. Additionally, in light of the comments of Public Integrity Acting Chief Lourie regarding who was involved in the decision to reject Scrushy's plea agreement (Scrushy EXHIBIT I-G at ¶¶ 16-20), and the Simpson testimony to the Conyers Committee concerning the discussion of the decision to indict Scrushy along with Siegelman to enhance the chance of convicting Siegelman (Scrushy Exhibit I-A at 10).

Defendant has also made a prima facie showing as to the second element, "that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights." *Berrios*, 501 F.2d at 1211.

First, there is significant evidence – even without the records and communications within the DOJ and U.S. Attorney's Office, all of which the Conyers Committee has been unsuccessfully seeking for a considerable period of time – that this prosecution was driven at the highest levels of the DOJ and/or the White House by political considerations, as a part of an orchestrated effort by the Bush Administration to eliminate or cripple Democratic candidates or their supporters. Scrushy EXHIBIT

I-A at i-ii, 12-13. Thus, this prosecution was a bad faith prosecution based on a desire of the Republican Administration to maintain control of the Alabama Governor's office in Republican hands. Defendant Siegelman, a Democrat, was elected Governor of Alabama in 1998. The inclusion of Scrushy in this prosecution in order to enhance the likelihood of gaining a conviction against Siegelman was selective prosecution, especially in light of the fact that contributors to political campaigns who are subsequently appointed to positions in government – especially contributors to issue-advocacy campaigns – have rarely, if ever, been prosecuted. *See Siegelman*, 561 F.3d at 1224 n. 13.

In 2002 Siegelman was narrowly defeated by Republican Bob Riley. The Republican Attorney General of Alabama, Bill Pryor, who was Karl Rove's client, initiated an investigation of Siegelman in response to a series of news articles alleging corruption in connection with ADECA's building of warehouses under state contract, which later became a joint investigation with the U.S. Attorney's office. However, as of mid-2004, Siegelman's lawyer was advised by the U.S. Attorney's office that the investigation was "coming to a close" and the charges under investigation had been "written off." Scrushy EXHIBIT I-A at 12-13. But in late 2004, when it became clear that Siegelman planned to challenge Governor Riley in the 2006 election, Siegelman's lawyer was advised that DOJ in Washington had ordered a "top to bottom" review of the case. *Id.* Other evidence indicates that Karl Rove and/or high-level officials in DOJ and/or the White House were involved in the decision to rekindle the investigation (*id*. at 9-10), and in the rejection of a plea agreement that had been reached (and approved by the U.S. Attorney's office in the Middle District) for Defendant Scrushy. Scrushy EXHIBIT I-G at ¶¶ 18-20; Scrushy EXHIBIT I-A at 9-10, 13. This case was initially indicted in June 2005 (Doc. 3), and trial did not conclude until just after the Democratic primary, in which Siegelman was declared the loser. *Berrios* recognized that "[s]elective prosecution then can become a weapon used to discipline political foe and the dissident." 501 F.2d at 1209 (citations omitted). Sadly, that is just what occurred in the Siegelman/Scrushy prosecution.

Second, in particular regard to Defendant Scrushy (who had supported the Republican candidate against Siegelman in the 1998 governor's race, *Siegelman* 561 F.3d at 1220), Scrushy was indicted for arranging a $500,000 contribution to the Alabama Lottery Education Fund, to support a referendum in which then-Governor Siegelman was attempting to gain approval for a state-wide lottery to support education. As the Eleventh Circuit recognized, the charges brought against Scrushy were based on the donation to the education-lottery campaign, and "[a]s such, they impact the First Amendment's core values – protection of free political speech and the right to support issues of great public importance." *Siegelman*, 561 F.3d at 1224. As the Supreme Court held in *Armstrong*:

> In particular, the decision to prosecute may not be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification," including the exercise of protected statutory and constitutional rights.

517 U.S. at 608. *See also Berrios*, 501 F.2d at 1211 (second element of prima facie case may be established by showing that prosecution was based on, *inter alia*, "the desire to prevent his exercise of constitutional rights").

Finally, the reach of the honest services fraud and federal bribery statutes to encompass the factual evidence here implicated has been a hotly contested issue, and one which will be raised by Defendant in his Petition for Writ of Certiorari to be filed in the Supreme Court. This case involves the conviction of a former public official and a contributor to an issue-advocacy campaign supported by that official under a statute that has been repeatedly described as "amorphous" and "open ended." *See, e.g.*, *United States v. Brumley*, 116 F.3d 728, 746 (5th Cir. 1977) (Jolly & DeMoss, JJ., dissenting). Indeed, as Judge Berzon of the Ninth Circuit Court of Appeals wrote in his concurring opinion in *United States v. Kincaid-Chauncey*, 556 F.3d 923 (9th Cir. 2009), an honest services fraud prosecution is fertile ground for selective prosecution:

> The stakes are considerably higher in the case of public officials. The lack of statutory specification can give rise to selective prosecution and political misuse.

Id. at 949 (citing Thomas M. DiBiagio, *Politics and the Criminal Process: Federal Public Corruption Prosecutions of Popular Public Officials Under the Honest Services Component of the Mail and Wire Fraud Statutes*, 105 Dick. L.Rev. 57, 57-58 (2000) ("With no established standards,

a federal public corruption prosecution, based on the intangible right to honest services, is particularly vulnerable to being snarled in politics.") and *United States v. Margiotta*, 688 F.2d 108, 143 (2d Cir. 1982) (Winter, J., dissenting)).

Defendant has demonstrated, with the evidence available to him at this time provided by co-defendant Scrushy and through Scrushy's investigation, a prima facie case of selective prosecution. This demonstration is clearly sufficient to entitle Defendant to discovery of evidence in the Government's possession under the standard set out by the Supreme Court in *Armstrong*, 517 U.S. 456.[9] The First Circuit effectively summarized the holding in *Armstrong* in the following discussion:

> The evidentiary threshold that a defendant must cross in order to obtain discovery in aid of a selective prosecution claim is somewhat below "clear evidence," but it is nonetheless fairly high. To cross this lower threshold, a defendant must present "some evidence" tending to show both discriminatory effect and discriminatory intent. It follows that discovery will not be allowed unless the defendant's evidence supports each of the two furcula of his selective prosecution theory: failure on one branch dooms the discovery motion as a whole.
>
> "Some evidence" is admittedly a protean standard. For this purpose, the evidence in support of the discriminatory effect must comprise a credible showing that similarly situated individuals who do not share the protected characteristic were not prosecuted. Similarly, the evidence in support of the asserted discriminatory intent must consist of a credible showing that the government chose to prosecute "at least in part because of, not merely in spite of," the defendant's protected characteristic.

United States v. Lewis, 517 F.3d 20, 25 (1st Cir. 2008) (citations omitted).

Here, Defendant has clearly met the "some evidence" threshold as to both prongs of a prima facie case of selective prosecution. As summarized above, based on sworn declarations, testimony under oath, campaign contribution records, and findings of the Judiciary Committee of the House of Representatives, there is far more than "some evidence" that at the time this case was brought, the Government was engaged in a concerted effort to prosecute Democratic candidates and their supporters or contributors, while similarly situated Republicans were neither investigated nor prosecuted. Similarly, Defendant has submitted more than "some evidence" that the purpose of this prosecution was to eliminate Defendant Siegelman as a viable Democratic candidate in the 2006

[9] Defendant has set out his specific discovery requests in a separate motion for discovery filed contemporaneously with this motion for new trial.

Alabama Governor's race, and that Defendant Scrushy was prosecuted "at least in part because of" his exercise of his First Amendment right to donate to an issue-advocacy campaign supported by Governor Siegelman. The threshold has been met, and Defendant is entitled to discovery of documents and testimony to prove his claim of selective prosecution. *See Smith*, 231 F.3d at 808 n.4 (noting that government did not appeal district court actions in requiring disclosure of investigative files to the defendants and conducting a four and a half day evidentiary hearing on the selective prosecution motion) and *United States v. Gordon*, 817 F.2d 1538, 1540-41 (11th Cir. 1987) *rev'd on other grounds*, 836 F.2d 1312 (11th Cir. 1988) (holding that evidence was sufficient to conclude that defendant was "entitled to an evidentiary hearing on the selective prosecution so the full facts may be known. [Defendant] is entitled to discovery of the relevant Government documents relating to the local voting fraud cases the Government has prosecuted and any voting fraud complaints which they have decided not to pursue."). *See also Armstrong*, 517 U.S. at 468: "If discovery is ordered, the Government must assemble from its own files documents which might corroborate or refute the defendant's claim."

Defendant submits that this Court should do just that: based upon Defendant's showing, the Court should allow discovery and grant the requests for information from the Government's files (as specified in Defendant's motion for discovery) which might corroborate or refute his claim of selective prosecution.

Discovery and Evidentiary Hearing Requested

Defendant Siegelman has filed a Motion for Discovery contemporaneously with this motion in which he sets out his specific requests for discovery which are necessary for him to have a fair opportunity to prove the claims set out in this motion for new trial, along with the legal authority supporting his right to access to this evidence.

Defendant Siegelman is also requesting, and should receive, an evidentiary hearing on this motion for new trial. This is so because he has raised sufficiently definite, specific, detailed, and nonconjectural facts, which, if proven, will entitle him to new trial relief. In *United States v. Poe*, 462

F.2d 195, 197 (5th Cir. 1972) the former Fifth Circuit discussed when an evidentiary hearing should be held in the analogous context of a motion to suppress:

> While we make no effort to enumerate all the factors which a district judge might consider in deciding whether a hearing is necessary, we approve the guidelines set forth by the Ninth Circuit in *Cohen v. United States*[, 378 F.2d 751 (9th Cir. 1967)]. In Cohen the court held that a hearing was not required on the defendant's motion to suppress and concluded: "The question is whether the allegations of the moving papers, including affidavits if any are filed, are sufficiently definite, specific, detailed, and nonconjectural, to enable the court to conclude that a substantial claim is presented. If the allegations are sufficient and factual issues are raised, a hearing is *required*. [378 F.2d at 761]"

462 F.2d at 197 (emphasis added). *See also United States v. Richardson*, 764 F.2d 1514, 1527 (11th Cir. 1985) (citing *Poe* and another former Fifth Circuit case: "A motion to suppress must in every critical respect be sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that a substantial claim is presented. In short, the motion must allege facts which, if proven, would provide a basis for relief."); *United States v. Schlei*, 122 F.3d 944, 994 (11th Cir. 1997) ("In determining whether a motion for a new trial based on newly discovered evidence was properly denied, we are persuaded that the acumen gained by a trial judge over the course of the proceedings makes her well qualified to rule on the basis of affidavits without a hearing. Where evidentiary hearings are ordered, it is because of certain unique situations typically involving allegations of jury tampering, prosecutorial misconduct, or third party confession.") (internal quotations, citations, and brackets omitted); and *United States v. Velvarde*, 485 F.3d 553, 560 (10th Cir. 2007) ("[T]he court is required to conduct the evidentiary hearing only if the admissible evidence presented by petitioner, if accepted as true, would warrant relief as a matter of law.").

Unless this Court decides to grant Defendant a new trial based on the declarations and evidence submitted with co-defendant Scrushy's motion, Defendant satisfies the above standard for obtaining an evidentiary hearing as to each of the five issues raised in his motion for new trial.

Issue I raises the question of *Brady/Giglio* violations by the Government, especially in regard to key Government witness Nick Bailey. Although Defendant has made a substantial, nonconjectural showing that such violations occurred, and that he is entitled to relief under the applicable legal

standards, much of the evidence to prove this claim is in the exclusive possession of the Government (notes of interviews by agents, prosecutors and paralegals) or in the hands of a third party who will not voluntarily turn over evidence (Nick Bailey's notebook) without compulsory process. This Court must grant an evidentiary hearing, in addition to discovery, in order for Defendant to have access to evidence which will conclusively prove his claim.

Issue II raises the issue of prosecutorial misconduct, including improper contact with the jurors in this case. Defendant has submitted substantial evidence of such conduct, including e-mails discussing such improper contacts, and the legal basis for relief upon proof of such improper contacts, particularly when they were not reported to the Court or the defense is clearly set out in this motion. The other grounds for relief based on prosecutorial misconduct (*ex parte* communication with the Court and misconduct in witness preparation) are likewise set out clearly, with substantial supporting evidence, and the law, as set out in this motion, would entitle Defendant to a new trial. *See Schlei*, 122 F.3d at 944 ("Where evidentiary hearings are ordered, it is because of certain unique situations typically involving allegations of jury tampering, prosecutorial misconduct,…").

In Issue III, Defendant has submitted substantial evidence, an admission from the Department of Justice that an *ex parte* meeting occurred between the Chief Judge and U.S. Marshals at which factual evidence was reported to the Court that was material to Defendant's then-pending motion on jury misconduct. The law is clear that such an *ex parte* meeting is a violation of Defendant's Fifth and Sixth Amendment rights. Defendant has not been advised of the specifics of the discussion, nor the names of the other parties in the meeting. An evidentiary hearing is necessary to determine what occurred at the meeting and for the Government to show, if it can, that Defendant was not prejudiced.

Issue IV raises the issue of U.S. Attorney Canary's failure to honor her recusal from the case in which her husband had a political and financial interest. There is substantial evidence submitted with this motion (including e-mails showing Canary's continued involvement after her purported recusal) that Canary continued to be involved with the case notwithstanding her publicly announced recusal. As set out above, Defendant was entitled to a "disinterested" prosecutor, and violation of this

entitlement is a structural error requiring a new trial without regard to prejudice. Unless this Court grants Defendant a new trial on this issue on the basis of the pleadings, this Court must order an evidentiary hearing.

In Issue V, Defendant has set out substantial evidence that improper political considerations were behind this investigation and prosecution. Evidence of selective prosecution normally is in the custody of the Government, so an evidentiary hearing is necessary to give Defendant access to compulsory process for both evidence and witnesses who are uncooperative. *See Armstrong*, 417 U.S. 456; *Lewis*, 517 F.3d at 25; *Smith*, 231 F.3d at 808 n. 4; and *Gordon*, 817 F.2d at 1540-41. *See also Wayte v. United States*, 470 U.S. 598, 623 (1985) (Marshall, J. dissenting) (recognizing that "most of the relevant proof in selective prosecution cases will normally be in the Government's hands").

WHEREFORE, Defendant Don Siegelman respectfully prays that this Court issue an Order granting him a new trial in the above styled matter or, in the alternative, granting his simultaneously filed discovery request and setting this motion for an evidentiary hearing, and for such other and further relief as this Court may deem just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2009 I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

Louis V. Franklin, AUSA
P. O. Box 197
Montgomery, AL 36101

Respectfully submitted,

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