Case No. 07-13163-B
District Court Case No. 2:05-CR-119-MEF

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee-Plaintiff,

v.

RICHARD M. SCRUSHY,

Appellant-Defendant.

On Appeal from the United States District Court
for the Middle District of Alabama

INITIAL BRIEF OF APPELLANT RICHARD M. SCRUSHY

JAMES K. JENKINS
MALOY JENKINS PARKER
75 Fourteenth Street, NW, 25th FL
Atlanta, GA 30309

BRUCE S. ROGOW
CYNTHIA E. GUNTHER
BRUCE S. ROGOW, P.A.
500 East Broward Blvd., Suite 1930
Fort Lauderdale, FL 33394

ARTHUR W. LEACH
75 Fourteenth Street, NW, 25th FL
Atlanta, GA 30309

LESLIE V. MOORE
MOORE & ASSOCIATES
3501 Lorna Road, Suite 3
Hoover, AL 35216

CASE NO. 07-13163-B

USA

vs.

SCRUSHY

_____/

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 27-1(a)(9), and Rule 26.1, Fed. R. App. P., Appellant Richard M. Scrushy certifies that the following persons and entities may have an interest in the outcome of this case:

R. Martin Adams, Attorney for Richard Scrushy

George Robert Blakey, Attorney for Governor Siegelman

Honorable Charles S. Coody, United States Magistrate Judge

Hiram Chester Eastland, Jr., Attorney for Governor Siegelman

Stephen P. Feaga, Assistant United States Attorney

Louis V. Franklin, Sr., Acting United States Attorney

Joseph L. Fitzpatrick, Jr., Special Assistant United States Attorney

Honorable Mark E. Fuller, United States District Judge

Jennifer Garrett, Special Assistant United States Attorney

Cynthia E. Gunther, Attorney for Richard Scrushy

W. Perry Hall, Attorney for Governor Siegelman

Frederick George Helmsing, Sr., Attorney for Richard Scrushy

Carmen D. Hernandez, Attorney for Richard Scrushy

Susan Graham James, Attorney for Governor Siegelman

James K. Jenkins, Attorney for Richard Scrushy

Vincent F. Kilborn III, Attorney for Governor Siegelman

Arthur W. Leach, Attorney for Richard Scrushy

Andrew C. Lourie, Acting Chief of the Public Integrity Section

W. Bruce Maloy, Attorney for Richard Scrushy

David A. McDonald, Attorney for Governor Siegelman

Leslie V. Moore, Attorney for Richard Scrushy

J.B. Perrine, Assistant United States Attorney

Richard C. Pilger, Trial Attorney, Public Integrity Section

Charles Redding Pitt, Attorney for Governor Siegelman

Bruce S. Rogow, Attorney for Richard Scrushy

Morgan Stanley (Symbol MS), awarded restitution at sentencing

William M. Welch II, Chief of Public Integrity Section

William C. White II, Attorney for Richard Scrushy

STATEMENT REGARDING ORAL ARGUMENT

On August 2, 2007, this Court entered an order which provided: "The Clerk is DIRECTED to schedule this appeal for oral argument once briefing has been completed."

Oral argument will assist the Court in this case. The conviction of Richard Scrushy and former Alabama Governor Don Siegelman presents important questions under *McCormick v. United States* regarding the proof necessary to prosecute, and convict, for a campaign contribution to a foundation created to support an Alabama education lottery.

This case also presents substantial issues regarding serious jury misconduct, substantial violations of the duty to insure that grand and petit juries are properly selected and do not discriminate against African-Americans, and the duty of a trial judge, who is the beneficiary of very large sums of money derived from government contracts with companies in which he has an interest, to disclose that renumeration and/or to recuse himself.

Oral argument will permit the Court to explore those issues with counsel.

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STATEMENT REGARDING ADOPTION OF PORTION OF BRIEF OF OTHER PARTY

Richard Scrushy adopts the portion of Governor Siegelman's Brief, pp. 27-56, addressing the *McCormick v. United States*, 500 U.S. 257, 111 S.Ct. 1807 (1991) issue. *See* p. 21, *infra*, n.1.

Richard Scrushy adopts the portion of Governor Siegelman's Brief, pp. 71-76, addressing the erroneous admission of hearsay testimony about statements by non-witness Eric Hanson, and the statute of limitations issue as to the bribery count, addressed in Governor Siegelman's brief, pp. 57-61.

STATEMENT OF JURISDICTION

This appeal is from the judgment of conviction and sentence of the United States District Court for the Middle District of Alabama, entered on July 3, 2007. R10-627. Defendant Scrushy timely filed his notice of appeal on July 11, 2007. R10-635. The Court of Appeals has jurisdiction pursuant to 28 U.S.C. § 1291, which gives the courts of appeals jurisdiction over all final decisions of the district courts of the United States.

STATEMENT OF THE ISSUES

I. Whether there was insufficient evidence of an explicit "*quid pro quo*," requiring acquittal, or whether the jury instructions failed to convey the requirement of an explicit "*quid pro quo*," requiring a new trial? (Adopting and supplementing Governor Siegelman's Brief, pp. 27-56).

II. Whether the district court abused its discretion by failing to grant Scrushy a full and fair evidentiary hearing, or a new trial, based on jury misconduct, which included exposure to prejudicial extrinsic evidence, premature deliberations, and deliberations by jurors outside the presence of all jurors?

III. Whether the district court judge, who had been an officer, director and shareholder in companies that derived substantial income from United States government agencies, and who derived substantial income from those companies, should have disclosed that extraordinary extra-judicial income

and/or recused himself from this case?

IV. Whether the jury selection procedures used by the Middle District of Alabama substantially violated the Jury Selection and Service Act and Scrushy's Sixth Amendment right to a grand jury and a petit jury selected from a fair cross-section of the community?

V. Whether the admission of hearsay testimony about statements attributed to non-witness Eric Hanson was erroneous and harmful, requiring a new trial. (Adopting Governor Siegelman's Brief, pp. 71-76).

VI. Whether the statute of limitations barred the prosecution of Counts Three and Four, the bribery counts. (Adopting Governor Siegelman's Brief, pp. 57-61).

STATEMENT OF THE CASE

i. Course of Proceedings in the District Court

On May 17, 2005, Defendant Richard Scrushy, Co-Defendants Don Siegelman, Paul Hamrick, and Mack Roberts were named in a multi-count sealed indictment. R1-3. A second superseding indictment was returned on December 12, 2005. Scrushy was named in Counts Three through Nine. Counts Three and Four charged Scrushy and Siegelman with federal funds bribery and aiding and abetting each other, in violation of 18 U.S.C. §§ 666(a)(1)(B) & 2. R1-61 at ¶¶ 52-66. Count Five charged Scrushy and Siegelman with conspiracy to commit honest services mail fraud, in violation of 18 U.S.C. § 371. R1-61 at ¶¶ 52-66. Counts Six through Nine charged Scrushy and Siegelman with honest services mail fraud and aiding and abetting each other, in violation of 18 U.S.C. §§ 1341, 1346 2. R1-61 at ¶¶ 57. Scrushy was not named in the remaining 27 counts of the indictment. R1-61.

Scrushy timely filed a jury composition challenge, alleging that the district's jury procedures underrepresented the African-American community. R1-104. While evidentiary hearings were held prior to trial, the trial proceeded over Scrushy's objection that the jury challenge had not been ruled on. R24-R27; R35-12-13. All four Defendants were tried before a jury from May 1, 2006 through June 29, 2006. R4-446. Prior to deliberations, the court ordered the Government to elect as to

multiplicitous Counts Three and Four, and dismissed Count Three as to Scrushy. R65-7246-47. After eleven days of deliberations, the jury convicted Scrushy of Counts Four through Nine. Siegelman was convicted of Counts Three, Five through Nine and Seventeen. Roberts and Hamrick were acquitted on all charged counts. R74-7861-86.

Scrushy filed a motion for new trial based on jury misconduct. R6-467. After two evidentiary hearings (R28; R29), the district court entered orders denying Scrushy's motion and supplemental motion. R7-518; R9-611. Just before sentencing, the district court adopted the magistrate's recommendation denying Scrushy's jury challenge. R8-576; R10-612.

The court sentenced Scrushy to 82 months imprisonment, three years supervised release, 500 hours community service, a $150,000 fine, $267,000 restitution, and $600 special assessment. R10-627.

The court immediately remanded Scrushy to custody, and he has been incarcerated since June 28, 2007. R10-627-2. The court held no hearing on Scrushy's written motion for bond pending appeal (R10-615; R34-305-06), and entered a written order denying bond without stating any reasons. R10-617.

Scrushy timely filed his notice of appeal on July 11, 2007. R10-635. On July 27, 2007, the Government filed its notice of cross-appeal. R10-640.

ii. Statement of Facts

The Government's case was comprised of three distinct parts, only one of which involved Scrushy. R35-47. That part was Scrushy's involvement with two $250,000 campaign donations to a foundation supporting a referendum for a lottery in Alabama to raise funds for public education. The Government's theory was that the campaign contributions were a bribe to Governor Siegelman to appoint Scrushy to Alabama's Certificate of Need Board ("CON Board"). The charges of federal funds bribery, aiding and abetting, conspiracy to commit honest services mail fraud, and substantive counts of honest services mail fraud, encompassed in Counts Three through Nine of the indictment, were all based on these allegations. R1-61 at ¶ 48-60.

Prior to trial, Scrushy filed a statutory and constitutional challenge to the district's jury system. R1-104. In 2001, the district court had found in *United States v. Clay*, 159 F.Supp.2d 1357 (M.D. Ala. 2001), that the procedures used to place previously deferred jurors on jury pools not only violated the Jury Selection and Service Act ("JSSA"), but tended to exclude African-Americans. *Id*. at 1367. Because of *Clay*, the Jury Plan was amended to limit the number and placement of previously deferred jurors, who were as a group nearly twice as likely to be white as African-American. R8-576-39. Four days of evidentiary hearings before the magistrate showed that the jury administrators repeatedly violated or ignored the Jury Plan and

the JSSA, with the result being that the jury pools selected from the 2001 wheel (from which Scrushy's grand jury pool was selected) and from the 2005 wheel (from which Scrushy's trial jury pool was selected), consistently underrepresented the African-American community by one-third. JCH Ex. 1 at 5-6, Ex.16 at Attachment X; R4-392, Ex. B. Over Scrushy's objection, the court proceeded with trial even though the jury challenge had not been decided. R35-12-13. Nearly a year after Scrushy's conviction, the magistrate filed a recommendation that the challenge be denied on both the JSSA and the Sixth Amendment grounds. R8-576. The district court entered an order adopting and supplementing the magistrate's recommendation. R10-612. The orders relied extensively on the recommendation and opinion entered in *United States v. Carmichael*, 467 F.Supp.2d 1282 (M.D. Ala. 2006), involving a contemporaneous challenge to the 2001 jury wheel. *Carmichael* is pending before this Court.

At trial the Government presented its case relating to the CON Board allegations against Scrushy and Siegelman as its first phase. The Government called 17 witnesses as to these charges. Much of the evidence was not in dispute; the interpretation and inferences to be drawn from the events, however, were hotly contested.

The Government's evidence showed that in 1998 then-Lieutenant Governor Siegelman, a Democrat, ran against the incumbent governor, Fob James, a Republican. R42-2000. Scrushy, CEO of HealthSouth, a medical service company based in Birmingham, supported Fob James, including holding a fundraiser for the James campaign which raised $325,000. R43-2051. When Siegelman won the election, Scrushy and HealthSouth were concerned that HealthSouth would not have a voice in the new administration. R42-2001-02. Eric Hanson, who was a personal friend of Siegelman and employed by HealthSouth as a lobbyist, spoke with Siegelman during the early months of his administration. R36-496, 499. According to the testimony of Nick Bailey, who was Siegelman's personal assistant and who testified as the Government's key witness pursuant to a plea agreement (R36-377-78), Siegelman told Hanson that since Scrushy had contributed $350,000 to the Fob James campaign, in order to "make it right" for the Siegelman campaign, Scrushy needed to contribute at least $500,000 to Siegelman's campaign initiative for the referendum to approve a state lottery to raise funds for public education. R36-500.

A meeting at the Governor's office between Siegelman and Scrushy was arranged. The evidence as to the date of that meeting was conflicting and contested. Bailey testified that sometime after the election, in June or July of 1999, Bailey saw Scrushy at the Governor's office. R36-504; R37-722. After a brief private meeting

between Siegelman and Scrushy, Bailey talked with Siegelman. According to Bailey, Siegelman showed Bailey a check for $250,000. R36-504. Bailey told investigators that he looked at the check and believed it was signed by Scrushy. R36-510. According to Bailey, Siegelman said, "[H]e's halfway there." R36-506-07. Bailey testified, "I responded by saying what in the world is he going to want for that? And [Siegelman's] response was, the CON Board…. I said, I wouldn't think that would be a problem would it? And he said, I wouldn't think so." R36-507.

Testimony of other Government witnesses conflicted with Bailey's version. Lorree Skelton, HealthSouth's legal counsel for CON Board matters, testified that she traveled to Montgomery in the HealthSouth helicopter with Scrushy and possibly State Senator Jabo Waggoner, to meet with Siegelman. Skelton described it as a "get-acquainted type meeting." R42-2006. She could not recall the date, but remembered being introduced to Bailey and Siegelman, and that she remained in the waiting room while Siegelman and Scrushy met in Siegelman's office for "maybe 30 minutes." R42-2002-05. Skelton testified that she only recalls one trip to see the Governor, and her memory as to the exact date was not refreshed by the flight log, which showed that Skelton, Scrushy and Waggoner flew from Birmingham to Montgomery on June 29, 1999. Scrushy Ex. 100; R43-2092-95. Senator Waggoner testified for the Government that he recalled a trip by helicopter with Scrushy and Skelton to meet

with the Governor. He was not told the purpose of the trip, but remembers meeting the Governor, and that he and Skelton stayed in the reception area while Siegelman and Scrushy met privately for 15-20 minutes, and then returned by helicopter to Birmingham. R42-1919-23. The Government introduced two pages from Waggoner's calendar, which Waggoner interpreted as setting the meeting date on July 14, 1999, although the entry mentioned only the helicopter. Gov't Ex. 50; R42-1918-19, 1939. On cross-examination, additional pages of Waggoner's calendar were admitted, which included an entry for June 29, 1999 stating: "RMS, Governor, 1:00 to 1:30." Scrushy Ex. 113; R42-1936-40.

The timing of the meeting was important because the Government's evidence showed that the $250,000 check in question was written by Integrated Health Services ("IHS") and dated July 19, 1999, and would have been mailed or sent overnight to Leif Murphy at HealthSouth, arriving no sooner than July 20, 1999 (Gov't Ex. 35; R42-1960-64, 1969), well after the meeting at the Governor's office where Bailey claimed to have seen Siegelman with the check.

Scrushy arranged the first contribution by directing HealthSouth CFO Mike Martin, another cooperating Government witness, to make arrangements with UBS investment banker Bill McGahan for UBS to make a $1 million contribution to the lottery campaign. At the time, UBS was hoping to become HealthSouth's primary

funding source based on McGahan's recent transfer from Citigroup. R41-1768-70. Martin had a number of conversations with McGahan, who tried to put Martin off, until Martin escalated the tone of his demands, finally telling McGahan that Scrushy was going to fire UBS if UBS did not make the contribution. R41-1772-74. Scrushy also had a conversation with McGahan, as did Hanson (who did not testify). R41-1624, 1629. McGahan eventually arranged for the contribution with Hanson's help through a mutual client, IHS. The CEO of IHS agreed to make the contribution if UBS would reduce the amount of an outstanding fee owed by IHS by $267,000. R41-1647-50. The check was written by IHS on July 19, 1999 and sent to HealthSouth. R42-1969.

Martin also testified that Scrushy told Martin in 1999 that it was important to be in the good graces of Siegelman or any other governor so that HealthSouth could have some influence or a spot on the CON Board, and that HealthSouth needed to assist Siegelman with raising money for the lottery campaign. According to Martin, "[W]e were making a contribution, … in exchange for a spot on the CON Board." R42-1800. In May of 2000, HealthSouth made a contribution of an additional $250,000 by a HealthSouth check payable to the Alabama Education Fund. R44-2378-80.

The Government contended that Scrushy bribed Siegelman to appoint Scrushy to the CON Board by arranging the contributions. R35-44-45. The CON Board is a state board comprised of nine members: three healthcare providers, three consumers, and three at-large members. A new governor has the prerogative to dismiss the existing board and appoint a new board. It is an unpaid, voluntary position. R35-205; R41-1580. The board acts on applications of healthcare providers to build or expand facilities or purchase medical equipment. Its purpose is to ensure orderly state planning and cost effectiveness for healthcare services. R42-2008. Most applications are uncontested and approved by consensus. R43-2111. When there was an objection to an application, there were extensive procedures which provide for a hearing before an ALJ and subsequent appeal to the circuit court. R36-293-95. If a board member had any financial interest in an application, either on its own behalf or one by a direct competitor, the board member was required to recuse himself or herself. R36-254.

As CEO of the largest healthcare provider in the state, Scrushy had been appointed to the CON Board by three previous governors. R43-2106. Scrushy's name was on a list of potential appointees prepared for Siegelman by Raymond Bell, Siegelman's appointments secretary. The list, with Siegelman's handwritten notes on it (including a circle around Scrushy's name and a handwritten star), was made during

the transition after his election, well before any discussions occurred about political contributions. R40-1453-56; Siegelman Ex. 220. Bell prepared another memo listing potential appointments dated June 25, 1999, reflecting 26 candidates, one of whom was Tom Carman, a HealthSouth employee who had served on the board before, and who was being recommended to Siegelman by HealthSouth CEO Scrushy. Gov't Ex. 30; R36-304; R40-1410-14, 1452, 1482-83. According to Bell, he would have met with Siegelman to finalize the Governor's choices within days of this memo. R40-1412. Scrushy and all but one other of the nine appointees were sent letters from the Governor dated July 26, 1999, informing them of their appointments. R40-1417-20. Scrushy served on the board until he resigned on January 17, 2001, because of other responsibilities which caused him to miss board meetings. R41-1543-44; R43-2175. Siegelman appointed Carman to replace Scrushy. R41-1574.

According to Margaret Sellers, who was the board's chair throughout the Siegelman administration, the board was a good and fair board; both Scrushy and Carman served as good members; and she never observed anything improper in their service. Scrushy never requested any special consideration from the CON Board for HealthSouth, and never received any. R41-1578. The Government contended that Scrushy had improperly sought to influence Sellers by calling her at home the night before a meeting to advise her of a discrepancy in the application of a HealthSouth

competitor for an MRI. Sellers did not think there was anything improper about the call, and Scrushy did not ask Sellers to vote against the application. R41-1543-45. Scrushy recused himself when the application was considered; the board found some discrepancies in the application, concluding the application was not proper, and denied it. R41-1562-63.

Government witness Alva Lambert, the Executive Director of the agency that set policy for the CON Board, and who coordinated the CON Board's activities (R35-201-05), testified that Scrushy was an innovator and pioneer in healthcare, and he never saw any impropriety in any of Scrushy's conduct on the board, and was not aware of any complaints against Scrushy relating to board activities. R36-300, 330.

With nine members on the board, HealthSouth never controlled the board, since it had only one vote. R43-2106; R41-1560. The Government contended that Scrushy sought to influence another board member, Tim Adams, by giving him rides to meetings on the HealthSouth helicopter, arranging a job interview for him, and hiring Adams as a consultant to draft a CON application for a PET scanner. R43-2076-83; 2227. Skelton testified that Adams was constantly asking for rides and a job at HealthSouth and that she arranged the drafting job to pacify him, because HealthSouth could not risk alienating him. R43-2148, 2151-59. Adams's work on

the application was substandard, and HealthSouth never hired him for any additional applications. Adams did not testify at trial. R43-2157-59.

During the time Scrushy was on the CON Board, from July 1999 until January 2001, HealthSouth did not file any applications, and Scrushy recused himself from any application by a company that was in direct competition with HealthSouth. R36-305-06. After Carman replaced Scrushy on the Board, he did the same. R36-306. The only two HealthSouth applications presented during the Siegelman administration were for a 38-bed rehabilitation hospital in Phoenix City, Alabama and a PET scanner. Both were considered after Scrushy left the Board; Carman recused himself from consideration of both; and both applications were unopposed and passed unanimously. R35-233; R36-305-308, 317-19.

The July 19, 1999 IHS check was held by the lottery committee and not deposited immediately. R40-1231-36. It was later deposited on November 5, 1999, along with other checks, in a lottery fund bank account at First Commercial Bank. R44-2332-36. That bank loaned the lottery committee $730,789.29, which was used to pay off a loan to the Alabama Democratic Party. The note from the committee was personally guaranteed by Mervyn Nabors, who had $29 million in stock pledged at the bank, and by Siegelman. R44-2357-85; 2408. That loan was paid off with the contributions of various corporations, including the $250,000 contribution that came

directly from HealthSouth. R44-2375-85. These checks were not reported under the Alabama Fair Campaign Practices Act when they were received as required by the statute, but they were reported in amended reports filed on July 26, 2002. R44-2488-2500; 2522-43. The Government did not contend that Scrushy had any knowledge of how the checks were handled once they were delivered.

After presenting its evidence relating to the political contributions and the CON Board during the first eleven days of trial, the Government presented evidence on the other two phases of its prosecution through 49 witnesses for the next 16 days. R45-R62. None of that evidence had anything to do with Scrushy or the charges against him.

Scrushy called five witnesses in his defense. Dr. Harold Philpot and Dr. Gilder Wideman served on the CON Board with Scrushy during the Fob James administration, from 1995 to early 1999. Both testified that Scrushy was an active member of the board and that his participation brought very useful business and healthcare expertise. Neither observed Scrushy do anything improper, illegal, or unethical. R64-6934-35, 6957-61. Both testified that Scrushy participated like all other board members, and recused himself on all matters relating to HealthSouth or its competitors. R64-6935-36, 6959, 6968. Both men testified that not only did Scrushy not try to control the board, but that it was impossible for one member on a

nine-member board to control the board. R64-6936, 6960. Dr. Wideman testified that Scrushy could not control the board:

> Because this board was made up of individuals who, in my opinion, had one objective in mind, and that was to do a good job. Nobody got a salary. Everybody was from different parts of the state of Alabama…. I don't think anybody could control that board, not one, two or three people.

R64-6960. Dr. Roosevelt McCorvey, who was appointed by Siegelman to serve on the CON Board at the same time as Scrushy, testified that Scrushy "was just another board member," and was an excellent member. R64-6976. He never saw Scrushy do anything improper, unethical or illegal. R64-6977. According to Dr. McCorvey, Scrushy always recused himself and left the room when a matter concerned HealthSouth. Scrushy did not control the CON Board, or make any attempt to do so. *Id*.

General Wyndall L. Clark, chief pilot and aviation manager for HealthSouth, identified flight records which showed that the HealthSouth helicopter flew on June 29, 1999 from HealthSouth headquarters to and from Montgomery, with Scrushy and two passengers on board. R64-6992-96; Scrushy Ex. 100. Flight records also showed that the helicopter flew from HealthSouth to and from Montgomery with Waggoner and Hanson on board on July 14, 1999. R64-6997-7002; Scrushy Ex. 101.

Elmer Harris, the CEO of Alabama Power from 1989 until his retirement in 2002 testified that Siegelman asked him to chair Siegelman's transition team in 1998. Harris, who had a long-standing relationship with Scrushy, knew that Scrushy had supported Fob James, and that Scrushy and Siegelman had some "major issues they needed to solve" as a result of the campaign. R64-7039-40, 7046, 7068. Harris told Siegelman that he was going to approach Scrushy for a contribution to the inaugural committee, and that "I believe that it is absolutely essential that you and Richard Scrushy get on the same wave length," because the Governor would need the support of the business community. Harris encouraged Siegelman to "talk to Richard Scrushy and see if y'all can't work out whatever differences you have." R64-7046-47. At the same time, Harris told Scrushy:

> [E]ssentially the same thing …. [Y]ou, Richard Scrushy, supported Fob James. Fob James lost. It's my assumption all the time that I'm going to support whoever is in office. Don Siegelman is in office. I don't care whether you like him or you don't like him; you need to sit down and talk about whatever differences y'all have and solve them, get them out of the way, so both of y'all can be helpful to each other.

R64-7047. At Harris's request, Scrushy donated $25,000 to the inaugural committee and let the committee use a HealthSouth jet to transport the band *Alabama* so they could play at the inauguration. R64-7041-42.

Part of Harris's role as head of the transition was to identify and recruit people to serve in the administration and on various boards. Harris met with Scrushy to recruit him for volunteer service on the CON Board. When Scrushy indicated he did not want to take on that job, Harris told Scrushy:

> [I]f you don't want to serve on the CON Board and you can find another person that can do a good, effective job on the CON Board, then you go down there and sit down in Governor Siegelman's office and tell him that. If you can't find somebody else … I think you ought to evaluate that and take the board position yourself. It's tough to get good people down there.

R64-7040, 7045.

Sometime later, Scrushy and Harris discussed the lottery referendum. Harris told Scrushy:

> [Y]our company is different from mine; and if you want to give to the lottery foundation, you have a perfect right to….There are no restrictions. You can give any amount of money you want to if you want to give it. Governor Siegelman would like for you to do that. I am not going to do that because of the customer base I have, but you don't have that problem. If you want to give a dollar, give a dollar. If you want to give a million dollars, give a million dollars.

R64-7070. Harris testified that he had no knowledge of Scrushy's ultimate contributions to the lottery fund. R64-7072-73.

After closing arguments (R66-7334-7546; R67-7566-7632), and final jury instructions (R67-7632-41), the jury began deliberations on June 15, 2006. R67-7646-47. On the second day of deliberations, the jury asked for clarification of "thing of value" as used in 18 U.S.C. § 666, to which the court responded with additional instructions. R68-7652-53, 7697-7700. On the fifth day of deliberations, the court, *sua sponte* and over Scrushy's objection, instructed the jury on their option to return a partial verdict at any time. R69-7703-13. The next day, the jury sent out a second note indicating they were unable to reach a verdict on any count. R70-7738-39. The court gave the jury an *Allen* charge, and deliberations resumed. R70-7750-53. On the ninth day of deliberations, the foreman sent out a note indicating problems deliberating. R11-866-7797; Court's Exhibit 3. The court heard arguments on additional instructions and excused the jury for the night. R11-866-7789-7828. The next day the court gave the jury a supplemental instruction and asked the jury to advise if they wished to continue deliberating. R73-7852-57. The jury sent a note indicating they wished to continue deliberating. R73-7858.

The following day, June 29, the jury returned a verdict. The jury found Scrushy guilty on Counts Four though Nine. Siegelman was found guilty on Counts Three, Six though Nine and Seventeen. Hamrick and Roberts were acquitted on all charged counts. R74-7864-76.

After the verdicts, a series of events occurred leading to the filing of a motion for new trial based on jury misconduct. Two jurors gave interviews to the news media which indicated possible exposure to extrinsic evidence on the Internet; another juror provided two affidavits describing extrinsic evidence in the jury room during deliberations; and counsel for Scrushy and Siegelman received two anonymous letters containing what appeared to be copies of e-mails between two jurors which indicated deliberative discussions while the Government was still putting on its case in chief. R6-467. More anonymous letters followed. The court held an evidentiary hearing on the possibility that defense counsel violated Local Rule 47.1, which forbids contact with jurors after the conclusion of a case (R28), and an evidentiary hearing at which the twelve deliberating jurors were questioned by the court. R29. The court entered a written order denying a new trial on December 13, 2006. R7-518. Shortly thereafter, two more deliveries of anonymous letters were received by counsel, containing copies of e-mails between four jurors discussing, on the Sunday before the verdict, the guilt of Scrushy and Siegelman. The e-mails specifically referenced articles found on the Internet. Scrushy filed another motion for new trial and then a supplemental motion (R7-519; R7-532), which were denied six months later, without any evidentiary hearing. R10-611.

Scrushy and Siegelman were sentenced on June 28, 2007. Scrushy's sentence included 82 months imprisonment. R10-627. Scrushy was immediately remanded to custody, without any hearing on his motion for bond pending appeal (R34-305-06), which the court denied in a written order the next day, with no findings or reasons for its denial. R10-615. Scrushy brings this appeal from the judgment of conviction and sentence.

iii. Statement of Standards of Review

I. The standard of review of the denial of a motion for judgment of acquittal is *de novo*. *United States v. Charles,* 313 F.3d 1278, 1284 (11th Cir. 2002). The standard of review of the denial of a requested jury instruction is *de novo* because the trial court decision regarding the requested instruction was based on a question of law – whether an essential element of the charges was proof of an "explicit *quid pro quo*." *United State v. Browne*, 505 F.3d 1229, 1267 (11th Cir. 2007).

II. This Court reviews the denial of a motion for new trial based on jury misconduct for abuse of discretion. *United States v. Martinez*, 14 F.3d 543, 547 (11th Cir. 1994). An abuse of discretion arises when the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact. *United States v. Baker*, 432 F.2d 1189, 1202 (11th Cir. 2005).

III. The "'standard of review for a § 455(a) motion [to recuse] is whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality."' *Brown v. United States Patent and Trademark Office*, 226 Fed. Appx. 866, 869 (11th Cir. 2007) (quoting *United States v. Patti*, 337 F.3d 1317, 1321 (11th Cir. 2003)). In this Court, the denial of a motion for recusal is reviewed "for abuse of discretion." *Brown*, at 867; *Draper v. Reynolds*, 369 F. 3d 1270, 1274 (11th Cir. 2004).

IV. A district court's decision based on the statutory language of the JSSA is reviewed *de novo*. *United States v. Olaniyi-Oki*, 199 F.3d 767, 772 (5th Cir. 1999). This Court reviews constitutional challenges to the jury selection system *de novo*. *United States v. Grisham*, 63 F.2d 1074, 1077 (11th Cir. 1995).

SUMMARY OF THE ARGUMENT

I. The convictions should be reversed and Scrushy discharged because the trial court should have granted a motion for judgment of acquittal. The evidence was insufficient to establish that Scrushy's political contribution to assist the campaign for an Alabama lottery supporting education was made in return for an explicit promise by Governor Siegelman that the "*quid pro quo*" for the contribution was an appointment to the Alabama Certificate of Need Board. *McCormick v. United States* and its progeny require proof of an explicit promise as the *sine qua non* for a conviction under the statutes at issue in this case, and the failure of proof was fatal to the Government's case.

In the alternative, a new trial is required because the trial court refused to give the *McCormick quid pro quo* instruction, an instruction that was essential to a fair trial on the charges.

II. There was extensive jury misconduct during trial and during deliberations – deliberations that went on for eleven days and led to an *Allen* charge because the jury had revealed its difficulty in deciding the case. In addition to the jurors accessing out of court information on the Internet, there were e-mails apparently sent between jurors that showed non-jury deliberations and discussions and decisions to convict made outside the jury room, including an e-mail that said,

inter alia, "Gov/Pastor GONE. . . ." And "gov & pastor up s—t creek. . . ." The undisputed evidence of jury misconduct and the trial court's failure to ferret it out requires a new trial, or at the least, a remand for a full and fair evidentiary hearing on the misconduct.

III. The trial judge's failure to disclose the enormous extra judicial income – apparently millions of dollars – derived from his intimate associations with companies that benefitted from huge government contracts, violated obligations under 28 U.S.C. § 455(a) and that information, had it been disclosed, would have led an objective, disinterested, lay observer to entertain a significant doubt about the judge's impartiality in this case. The failure to disclose, and the trial court's denial of the motion to recuse, was an abuse of discretion that requires a new trial.

IV. The trial court improperly denied Scrushy's jury composition challenge. The Alabama Middle District Jury Plan had been found to be in violation of the Jury Selection and Service Act of 1968 and was amended, but the violations persisted and resulted in a substantial underrepresentation of African-Americans on the grand and petit jury pools. A parallel challenge is presently before the Court in *United States v. Carmichael*, Case No. 07-11400-JJ, which was argued on April 16, 2008. A decision in *Carmichael* will be relevant to Scrushy's argument here – an argument that is based on the fact that the jury system at issue has consistently produced juries

that exclude one-third of the African-American community in the Middle District of Alabama.

V. The admission of hearsay testimony about statements attributed to a non-witness – statements that the Government seized upon to argue that Scrushy and Governor Siegelman should be convicted – was erroneous and highly prejudicial. Scrushy has adopted Governor Siegelman's argument on this point, and the point is well taken and applicable to both Scrushy and Governor Siegelman. *See* Governor Siegelman's Brief, pp. 71-76.

VI. Scrushy's conviction on Count 4 – the bribery count – must be reversed because it is barred by the statute of limitations. Scrushy adopts Governor Siegelman's Brief, pp. 57-61 on this point.

ARGUMENT AND CITATION OF AUTHORITIES

I

THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT SCRUSHY'S POLITICAL CONTRIBUTION WAS "MADE IN RETURN FOR AN EXPLICIT PROMISE OR UNDERTAKING BY" GOVERNOR SIEGELMAN TO PERFORM AN OFFICIAL ACT AND THE JURY INSTRUCTIONS FAILED TO CONVEY THE REQUIREMENT OF AN EXPLICIT *QUID PRO QUO* AS THE *SINE QUA NON* FOR CONVICTION[1]

McCormick v. United States, 500 U.S. 257, 111 S.Ct. 1807 (1991), states the law applicable to the Scrushy contributions to the Alabama Education Lottery Foundation and his later appointment to the Alabama Certificate of Need Review Board:

> The receipt of such contributions is also vulnerable under the Act as having been taken under color of official right, *but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act*.

---

[1] Pursuant to Rule 28(i), Federal Rules of Appellate Procedure, Scrushy adopts the argument of Governor Siegelman in his Initial Brief in Case No. 07-13163-B, pp. 27-56. "The prosecution was required to prove an 'explicit *quid pro quo*' agreement on the conspiracy, mail fraud and bribery charges. The District Court failed to instruct the jury on this point. Furthermore the evidence was insufficient on this point." *Id.* at 27. Scrushy's short argument here focuses on the lack of sufficient evidence of any explicit understanding or expectancy on Scrushy's side.

Id. at 273 (emphasis added). The evidence presented by the Government to meet that test was this:

> Q. [AUSA]: Okay. Now, when you saw the Governor, did he have this check in his hand? Did he have it?
>
> A. [Governor's Aide Nick Bailey]: Yes.
>
> Q. Okay. Now, when the Governor showed you the check, what if anything, did he say to you?
>
> A. He made the comment, referring to Mr. Scrushy's commitment to give $500,000, that he's halfway there.
>
> Q. Okay. And what, if anything, did you say to him?
>
> A. I said – I responded by saying, what in the world is he going to want for that? And his response was the CON Board, the C-O-N Board.
>
> Q. Okay. And what did you say?
>
> A. I said, I wouldn't think there would be a problem, would it? And he said, I wouldn't think so.

R36-506-07.

Added to that was the testimony of former Healthsouth CFO Michael Martin. He said that Scrushy told him "in order to get into the good graces of Governor Siegelman that we needed to assist him with raising money for the lottery campaign" (R41-1766-67), and that Scrushy thought "if we raised that money, then we would

have a spot on the CON Board." R42-1865. That testimony added nothing to the "explicit" equation, because Scrushy's thoughts cannot substitute for the "made in return for an explicit promise" *sine qua non* for conviction. Thus, as a matter of law, the evidence was insufficient.

Bailey neither witnessed, nor testified about, anything that he had heard directly from Scrushy, and his testimony did not state any source for the Governor's belief. Moreover, nothing in Bailey's testimony established, by any measure of evidence, that there was any *explicit* promise or undertaking to appoint Scrushy to the CON Board; that Scrushy's contribution was a "payoff" for the appointment or that the appointment was the explicit *quid pro quo* for the contribution. *That* is the *McCormick* standard:

> "Whether described familiarly as a payoff or with the Latinate precision of *quid pro quo*, the prohibited exchange is the same: a public official may not demand payment as an inducement for the promise to perform (or not to perform) an official act."

McCormick, 500 U.S. at 273, quoting *United States v. Dozier*, 672 F.2d 531, 537 (5th Cir. 1982).[2] The absence of any explicit promise evidence means that a judgment of

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[2] Each of Scrushy's counts of conviction is directly implicated by the *McCormick quid pro quo* sufficiency issue. The Supreme Court has expressly ruled that the *quid pro quo* requirement is an element of a 18 U.S.C. § 666 violation (federal funds bribery), which was charged in Count Four. *United States v. Sun*

acquittal should have been granted and that this Court should order that Scrushy be discharged.

In the alternative, Scrushy is entitled to a new trial because of the failure to properly instruct the jury. Scrushy objected to the failure of the jury instructions to have told the jury that an explicit *quid pro quo* was the standard for judging whether the lottery referendum contributions and the CON appointment was a criminal violation. *See* R66-7328-29 (Scrushy's objections to failure to require proof beyond a reasonable doubt of an express *quid pro quo* as to the charges against him).

The Supreme Court's explanation for why explicit *quid pro quo* is the exacting standard in political extortion (and other political bribery-like cases) fits the Scrushy/Siegelman case like a glove and compels the conclusion that Scrushy (and Siegelman) committed no crime:

Diamond Growers, 526 U.S. 398, 404-05 (1997). Similarly, Counts Six through Nine alleging honest services mail fraud in violation of 18 U.S.C. §§ 1341 and 1346, both require proof of an express *quid pro quo*. *See*, *e.g., United States v. Sawyer,* 85 F.3d 713, 741 (1st Cir. 1996); *United States v. Martin,* 195 F.3d 961, 966 (7th Cir. 1999). Finally, the remaining count of conviction, Count Five, which charged a conspiracy to engage in honest services mail fraud, also required proof of an express *quid pro quo* because without such an agreement, there was a total absence of evidence of any other conspiratorial agreement under 18 U.S.C. § 371.

> Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done. Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, "under color of official right." To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation.

McCormick, 500 U.S. at 272. *See also United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 405, 119 S.Ct. 1402 (1999) ("a bribe requires proof of a *quid pro quo*").

This case is, in many ways, simple. Five hundred thousand dollars was contributed to the Alabama Education Lottery Fund ("AELF") and its successor, the Alabama Education Fund ("AEF"). The AELF was created to lobby for a lottery amendment to the Alabama Constitution in order to raise funds for education.

Governor Siegelman had appointed Scrushy to a term on the Alabama CON Board. Earlier, Siegelman showed a $250,000 check from Integrated Health Services ("IHS") to Nick Bailey, an aide. Bailey asked Siegelman "what in the world is he going to want for that" and Bailey said the Governor's "response was the CON Board, ..." R36-506-07. That colloquy did not establish or even reasonably infer that Scrushy and Siegelman had an *explicit* agreement that the AELF contribution would beget the CON Board appointment. Without such evidence, and without a jury instruction that made clear the explicit *quid pro quo* requirement, Scrushy's conviction cannot stand. He is entitled to a judgement of acquittal, or at the least, a new trial.

II.

JURY MISCONDUCT REQUIRES A NEW TRIAL OR A REMAND FOR A PROPER INQUIRY INTO THE MISCONDUCT

The verdict in this case was tainted by the jury's exposure to prejudicial extrinsic evidence, premature jury deliberations, and deliberations of jurors outside the presence of the entire jury. The district court's ruling denying a new trial was erroneous as a matter of law and based on factual findings that were clearly erroneous. The Government did not meet its burden of proof to rebut Scrushy's showing of exposure to extrinsic evidence. The district court's inquiry into the allegations of misconduct was insufficient and the failure to obtain and preserve

critical documentary evidence relating to e-mails exchanged by the jurors was fundamentally unfair and an abuse of discretion. At a minimum, there remain significant unanswered questions as to the nature and extent of the misconduct, and this Court should remand this case for a thorough inquiry into the evidence of misconduct.

A. SCRUSHY MADE MORE THAN A "COLORABLE SHOWING" THAT THE JURY WAS EXPOSED TO EXTRINSIC EVIDENCE WHICH POSED A REASONABLE POSSIBILITY OF PREJUDICE

1. The Sixth Amendment Guarantee to a Fair and Impartial Jury Requires All Juries to be Insulated from Extrinsic Influences

The Sixth Amendment guarantees every defendant the right to a fair trial before an impartial jury. Implicit in this concept is that the jury's verdict be based solely on the evidence, argument and law adduced in the courtroom, free from extrinsic influences, duress, or juror misconduct. "The requirement that a jury's verdict 'must be based upon the evidence developed at trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." *Turner v. Louisiana*, 379 U.S. 466, 472, 85 S.Ct. 546 (1965) (quoting *Sinclair v. United States*, 279 U.S. 749, 49 S.Ct. 471 (1929)). Justice Holmes wrote:

> The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and

> argument in open court, and not by any outside influence, whether of private talk or public print.

Patterson v. Colorado, 205 U.S. 454, 462, 27 S.Ct. 556 (1907).

United States v. Martinez, 14 F.3d 543 (11th Cir. 1994), reversed a defendant's conviction for racketeering and extortion "because extrinsic influences entered the jury's deliberations, infecting the process and causing him prejudice." *Id.* at 546 (citations omitted). The Court held:

> As a matter of established law, the burden of proving prejudice does not lie with the defendant because prejudice is presumed the moment the defendant establishes that extrinsic contact with the jury in fact occurred.
>
> * * *
>
> Once the defendant proves extrinsic contact, the burden shifts to the government to demonstrate that the consideration of the evidence was harmless. Again as the Court unambiguously held: "the presumption [of prejudice] is not conclusive, but the burden rests heavily upon the government to establish, after notice to the defendant, that such contact with the juror was harmless to the defendant." *Remmer*, 347 U.S. at 229, 74 S.Ct. at 451.

Id. at 550 (citations omitted). A trial court's duty is "to ensure that the jury verdict is in no way tainted by improper outside influences." *United States v. Rowe*, 906 F.2d 654, 656 (11th Cir. 1990).

When a party makes a "colorable showing" of jury exposure to extrinsic influence, a district court has an unequivocal obligation to make sufficient inquiry into the nature and extent of that influence. *United States v. Barshov*, 733 F.2d 842, 851 (11th Cir. 1984) ("Where a colorable showing of extrinsic influence is made, a trial court, in the exercise of its discretion, must make sufficient inquiries or conduct a hearing to determine whether the influence was prejudicial."); *United States v. Sedigh*, 658 F.2d 1010, 1014 (11th Cir. 1981) ("Upon receiving a colorable claim of extrinsic influence on . . . [a jury's] impartiality, the trial court should investigate the asserted impropriety to determine initially if and what extrinsic factual matter was disclosed to the jury.") (citation omitted); *United States v. Caldwell*, 776 F.2d 989, 998 (11th Cir. 1985) ("The more serious the potential jury contamination, especially where alleged extrinsic influence is involved, the heavier the burden is to investigate."); *Remmer v. United States*, 350 U.S. 377, 379, 76 S.Ct. 425 (1956) ("the entire picture should be explored."). *See also United States v. Moten*, 582 F.2d 654, 660 (2d Cir. 1978) ("Whenever something occurs at a trial that may tend to affect the impartiality of one or more members of the jury, both sides have a vital interest in learning everything there is to know about the matter."); *Dunn v. United States*, 307 F.2d 883, 885 (5th Cir. 1962) (reversing a conviction and emphasizing that United States Attorney "owes a heavy obligation [of fairness] to the accused.").

In determining whether the Government has rebutted the *Remmer* presumption of prejudice, a district court must "consider many factors including the heavy burden on the government, the nature of the extrinsic information, the manner in which the information reached the jury, and the strength of the government's case." *Martinez*, 14 F.3d at 550. This Court, when reviewing a district court's *Remmer* decision, will also consider "the factual findings in the district court and the manner of the court's inquiry into the juror issues." *United States v. Ronda*, 455 F.3d 1273, 1300 (11th Cir. 2006).

A jury's consideration of extrinsic evidence "requires a new trial if the evidence poses a reasonable possibility of prejudice to the defendant." *United States v. Awan*, 966 F.2d 1415, 1432 (11th Cir. 1992) (quoting *Rowe*, 906 F.2d at 656)). *Accord United States v. Pessefall*, 27 F.3d 511, 516 (11th Cir. 1994).

2. Scrushy's "Colorable Showing" of Jury Exposure to Extrinsic Influences

Although the district court ultimately entered two orders denying a new trial (R7-518 and R10-611), a review of the record reveals substantial intrusion of evidence from the Internet and news media into the jury room, and a startling failure of the court to determine and consider the nature and extent of that evidence. Indeed, to the extent that the court inquired into Scrushy's showing of jury exposure to

extrinsic influences (and, at least as to three significant e-mails between jurors, it engaged in *no inquiry at all*) it did so in a crabbed and perfunctory manner that left critical factual questions unanswered.

The evidence of extrinsic influence included: the testimony of the twelve deliberating jurors at an evidentiary hearing on November 17, 2006 (R29); affidavits of one juror and two witnesses (R6-467, Ex. 6-9); copies of press interviews by two jurors after the verdict (R6-467, Ex. 1-5); copies of news articles that jurors may have accessed on the Internet (R7-509, Ex. 21); a copy of WSFA's "Courthouse Chronicles," an Internet blog that jurors may have accessed (R7-510, Ex. 22); and copies of what appear to be eight e-mails exchanged between four of the deliberating jurors both during and prior to official jury deliberations. R6-467, Ex. 10-15; R7-519, Ex. 23-24; R7-532, Ex. 26. This evidence shows:

1. At the November 17, 2006 evidentiary hearing, two jurors admitted that they used the Internet to obtain and download information which they used during jury deliberations. The foreperson of the jury, Juror 7,[3] testified he researched the role of a foreperson on the district court's website shortly after deliberations began. R29-119-21. Juror 7 also testified that he used the same website to print a copy of the

[3] The district court ordered that all jurors be referred to by juror number to protect their identities. R2-255-3.

unredacted indictment, which he studied at home and on which he made notes, and that he took the indictment copy and his notes into the jury room to help him lead discussions. R29-119-22. Juror 40 testified that she used the Internet to download a copy of the unredacted indictment on the first weekend of jury deliberations. She read the indictment at home, but denied having brought it into the jury room. R29-81-83.

2. Juror 40 testified that "I saw a headline on an Internet site and I did not read the article but I did see the headline." R29-77. She testified she believed it was in the Montgomery Advertiser, and that it occurred at around the time that Faulkner, an Alabama law school, received its accreditation "because that's what I was looking at." Scrushy supplemented the record with copies of articles printed off the Internet site Juror 40 described. R7-509, Ex. 21. The only news story on Faulkner's accreditation was on June 13, 2006. Ex. 21B. That same day the website ran an article headlined, "Defense Abruptly rests case." Ex. 21C. That article contained comments by the Acting U.S. Attorney on Siegelman's failure to present a defense. Juror 66 testified that Juror 40 said that she saw *and read* an article on the Internet about the trial and "she just made a comment about the writer and the Defendants or whatever." R29-59. In a *videotaped* interview of Juror 40 by television station WSFA, Juror 40 told the reporter: "I saw one Internet article. So I'll confess…. It was – it was – yes, it was

almost by accident. It was – after I saw the headline, I was, oh, I wonder what that says. But I really did try very hard." R6-467, Ex. 5-B at 24.

3. Juror 40 denied bringing her downloaded copy of the indictment into the jury room. R29-82. Juror 63 insisted that Juror 40 brought a document into the jury room which Juror 63 saw Juror 40 take out of her coat and hold in her hand. R29-92-95. Juror 66 testified that Juror 40 told the jury that she went to the court's website, downloaded a copy of the indictment and "highlighted some points on it and I guess like took her notes on it, put her evidence, plugged her evidence into the different charges and different indictments." R29-59. Juror 5 testified that in the jury room Juror 40 was questioned by jurors "about the knowledge she had of the trial, she must have been on the Internet or something. And she said she went on the Internet to look at the book." R29-135. In response to the district court's questioning, Juror 5 testified that Juror 40 did *not* say anything about looking up the indictment on the Internet. *Id.* In his first affidavit, Juror 5 stated, "I don't know who brought [the Internet] information in for sure. They were pulling stuff out of files and some were talking about having Internet information and talking about that too. So we

considered everything that everybody brought and pulled out of the file." R6-467, Ex. 8 at 2.[4] In his second affidavit, Juror 5 stated:

> After [Juror 40] told us so much law and legal procedures during our deliberations, all the jurors got on her and questioned her knowledge of knowing too much. At this time, [Juror 40] admitted that she had searched the internet.

R6-467, Ex. 9 at 1.

4. Other jurors had a different take on Juror 7's activities and his ambiguous claim at the evidentiary hearing that he did not access any other information. R29-123: "As far as I can recall today." Juror 66 testified that Juror 7 downloaded a copy of the indictment and "looked at….each one of the charges while he was at home and when he came back he brought just detailed information about how we should consider each one of the charges and what they were saying." R29-51-52. Juror 66 insisted that Juror 7 had done his own "research" at home and "he brought it back." *Id*. at 53. Juror 66 testified that there was other information from the Internet about the indictment which Juror 7 had in his hand or in his jacket and:

[4] At the October 31, 2006 evidentiary hearing held by the district court, Juror 5 testified that this first affidavit did not reflect his exact words, but that "was kind of in sinc [sic] with what was going on." R28-253.

> It was always okay, well, but when you look here this says this and it's not in the book you gave us, its not in the indictment – and he had his paperwork there, so each one of the charges was information about it.

R29-57. Juror 30 testified to a similar belief that Juror 7 had conducted research on the Internet based on the way "he was detailing the briefing and everything, and just the way he was handling things, it was kind of done like as the Court's back [sic] style,…," (R29-74).

5. Juror 66 specifically recalled that Juror 7 told the jury about information he had found on the Internet about the other Defendants: "He looked up information on another one of the Defendants…on another Defendant, on one that's not here today. He looked up to see what – how long he had been with his employer and what he had to –" (R29-52). Juror 66 testified that Juror 7 spent ten or fifteen minutes discussing the information on *each* of the two Defendants who was acquitted. *Id.* at 58.

6. Two jurors testified that Juror 7 and/or Juror 40 appeared to have read the daily blog that television station WSFA was running on the trial proceedings. Juror 38 testified:

> There was one of the jurors [Juror 7] said they had been on the Internet – well it was like one of the TV stations had all the proceedings was on the Internet, you could read it and that was mentioned. And that's the only thing that I know of that they [sic] had read what was going on in

> court. I mean it wasn't anything else besides what had happened here.

R29-38. Juror 38 also testified that when the jurors questioned Juror 7 about their desire to have a "foreman's book," Juror 38 testified that Juror 7 replied:

> [W]ell, you can go on the internet and get it. Said all this stuff was on the Internet and get it. And it was brought up to him well, why are you looking on the Internet. He said well, there's nothing on there that you are not hearing right here anyway.

R29-39. Juror 30 testified: " [Juror 40] said the trial – the whole trial was on the Internet daily, you know, so that's why I assumed she had probably read through it on the Internet." Juror 30 testified that "[t]his was during the whole trial…. [b]efore deliberations began." R29-72. Juror 30 testified that Juror 7: "Just to my knowledge it was – looked like he probably read it on the Internet too or saw it on the Internet" based on the way Juror 7 handled the deliberations. *Id.* at 73-74. The content of that blog was admitted as an exhibit below. R7-510, Ex. 22. In addition to a detailed summary of the daily testimony, the blog contained evidence and argument that the jury did not hear, including, for instance, discussion of Scrushy's prior prosecution. Ex. 22A at 218.

7. The most startling evidence of the jury's exposure to prejudicial extrinsic evidence were in the eight e-mails that appear to have been sent between jurors both

before and during deliberations.[5] After the verdict, counsel for both Defendants received a series of envelopes by U.S. Mail from an anonymous source or sources. The first envelopes were postmarked September 5, 2006, and last were postmarked February 20, 2007. If authentic, these e-mails are conclusive evidence of grave jury misconduct. They show that Jurors 7 and 40 were engaged in deliberations as early as May 29, 2006, prior to the time that the Government completed its case in chief (R62-6475), including discussion of two other jurors who were "off trac." R6-467, Exhibit 11. Six of the e-mails were exchanged between Jurors 7 and 40 and at least two other jurors in the evening hours during the eleven-day jury deliberations. The e-mails, in chronological order, are:

a. Monday, May 29, 2006 10:41 PM

from: [e-mail address containing name of Juror 40]
to: [e-mail address containing name of Juror 7]

…need to talkl…..!?
[first name of Juror 40]

R6-467, Ex. 10.

b. Monday, May 29, 2006 11:38 PM

from: [e-mail address containing name of Juror 40]

[5] As discussed below, the authenticity of these e-mails has yet to be confirmed, despite Scrushy's repeated requests for the court's intervention necessary to authenticate the e-mails.

to: [e-mail address containing name of Juror 7]

I agree some of the kounts r confusing 2 our friends.
Chek txt 30/38 still off trak.
[first name of Juror 40]

R6-467, Ex. 11.[6]

c. Sunday, June 25, 2006 10:09 PM[7]

from: [e-mail address containing name of Juror 40]
to: [e-mail address containing name of Juror 7]

…judge really helping w/jurors
still having difficulties with #30
…any ideas???
keep pushing on ur side.
did not understand ur thoughts on statute
but received links
[first name of Juror 40]

R7-519, Ex. 23.

d. Sunday, June 25, 2006 10:41 PM

from: [e-mail address containing name of Juror 40]
to: [e-mail address containing name of Juror 7]

I can't see anything we miss'd. u?
articles usent outstanding! gov & pastor up s—t creek.
good thing no one likes them anyway. all public officials

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[6] Juror 30 and Juror 38 participated in the jury deliberations in this case. R29-34, 66.

[7] The jury began deliberations on June 15, 2006 and returned a verdict on June 29, 2006. R7-518-14.

r scum; especially this 1. pastor
is reall a piece of work
…they missed before, but we won't
…also, keepworking on 30…
will update u on other meeting.
[first name of Juror 40]

R7-519, Ex. 24.

e. Sunday, June 25, 2006 10:47 PM

from: [e-mail address containing first name of Juror 7]
to: [e-mail address containing name of Juror 40]

great info for our friends
% of prosecution increases dramatically.
Could not find that when I surfed it.
Gov/Pastor GONE….

R7-532, Ex. 26.

f. Sunday, June 25, 2006 11:28 PM

from: [unidentfiable e-mail address]
to: [e-mail address containing name of Juror 40]

penalty 2
severe….still
unclear on
couple of counts
against pastor &
gov.

R6-467, Ex. 12.

g. Sunday, June 25, 2006 11:31 PM

from: [e-mail address containing name of Juror 40]
to: [unidentifiable e-mail address]

proud of u…
other 6 kounts
most important
c.u.n..am
[first name of Juror 40]

R6-472, Ex. 15.

h. Sunday, June 25, 2006 11:48 PM

from: [e-mail address containing name of Juror 40]
to: [same e-mail address as e-mail set out in ¶ (f))

...stay focused….remember
what judge
said….have plans
for 4th….right?
[first name of Juror 40]

R6-467, Ex. 13.

If these e-mails are authentic (and Scrushy has been denied the opportunity to authenticate them) they prove: (1) that this jury was riven with misconduct; (2) that multiple jurors violated the explicit instructions of the court; (3) that two or more jurors were untruthful in their testimony on November 17, 2006; and (4) that this jury was exposed to highly prejudicial extrinsic evidence obtained from the Internet.

Furthermore, the e-mails corroborate the testimony of Jurors 5, 30, 38, 63 and 66 and the affidavits of Juror 5, and show that Juror 7 and Juror 40 used the Internet

to access far more extrinsic evidence than what they admitted under oath. The references by both Jurors 7 and 40 to what could only be research on the Internet are explicit: **"received links"** (R7-519, Ex. 23); **"articles usent outstanding!"** (R7-519, Ex. 24); **"Could not find that when I surfed it."** R7-532, Ex. 26. Another e-mail, sent to the e-mail address of Juror 40 specifically refers to the possible sentence in the case: **"penalty 2 severe…."** (R6-467, Ex. 12).[8] This e-mail is supported by the affidavit of Juror 5, which stated that several jurors were discussing possible jail sentences. R6-467, Ex. 9 at 2. Additionally, as set out in Juror 5's first affidavit, Juror 5 "thought that the governor had put the money from HealthSouth in his personal account. But I now know that ain't true." R6-467, Ex. 8 at 2.[9]

The content of the e-mails supports a strong inference that the extrinsic materials related to one or both of the prior high-profile trials of the Defendants in the Northern District of Alabama in which both Defendants were acquitted:[10] One of the

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[8] There was no evidence admitted at trial concerning potential sentences in this case (R7-518-53 n.35), and the jury was instructed not to consider sentencing. R4-450-50.

[9] The evidence as to the two $250,000 contributions in question showed that both were deposited to the account of the Alabama Education Fund (AEF), not to any personal account of Siegelman's. R36-522-23.

[10] On June 28, 2005 Scrushy was acquitted of all charges relating to a $2.7 billion fraud at HealthSouth in a jury trial in the Northern District of Alabama. CR-03-BE-

e-mails from Juror 7 to Juror 40, after stating **"articles u sent were outstanding!"** makes the frightening assertion: **"….they missed before, but we won't"**,[11] (R7-519, Ex. 24), showing that these jurors had read articles about the previous trials. Moreover, in that same e-mail from Juror 40 to Jury 7, Juror 40 wrote: **"gov & pastor up s—t creek. good thing no one likes them anyway. all public officials r scum; especially this 1. pastor is real a piece of work"**. R7-519, Ex. 24.[12] Similarly, according to the e-mail copies, Juror 7 wrote to Juror 40 just six minutes later: **"Great info 4 r friends. % of prosecution increases dramatically. Could not find that when I surfed it. Gov/Pastor GONE…."** R7-532, Ex. 26.

Finally, from the text and timing of the e-mails during deliberations, it is apparent that Jurors 7 and 40 were having discussions, including by e-mail, with at least two other jurors, as to their votes on certain counts, and that the extrinsic

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530-5. On October 15, 2004, all charges against Defendant Siegelman were dismissed with prejudice on the Government's motion after the jury was sworn in a Medicare fraud prosecution in the Northern District of Alabama. (04-CR-00200-SLB-RRA-2).

[11] The court and counsel went to great pains to shield the jury from any testimony concerning Scrushy's trial for the HealthSouth fraud. *See, e.g.,* R52-1813-16.

[12] Siegelman was the Governor of Alabama from January 1999 through January 2003. R1-9 at 1-2, ¶ 1-c. Scrushy is the Pastor of Grace and Purpose Church in Birmingham, Alabama and active in a multi-denominational group called Kingdom Builders. *See* R34-197; R28-190-91.

information was being used in those discussions. At 10:09 PM on June 25, 2006, Juror 40 e-mailed Juror 7: **"still having difficulties with #30 ... any ideas? keep pushing on ur side."** R7-519, Ex. 23. At 10:41 PM, Juror 40 e-mailed Juror 7: **"…also, keepworking on 30…will update u on other meeting."** R7-519, Ex. 24. The next e-mail, from Juror 7 to Juror 40 at 10:47 PM supports an inference that the extrinsic information was being used in these contacts with other jurors to solicit guilty votes: **"Great info 4 r friends. % of prosecution increases dramatically ….."** R7-532, Ex. 26. Shortly thereafter e-mails between Juror 40 and two other apparent jurors discuss **"counts against pastor and gov."** (R6-467, Exhibit 12), and **"other 6 counts"**. R6-472, Ex. 15.

Scrushy clearly has made much more than a "colorable showing" of jury exposure to extrinsic evidence, and a thorough inquiry was required.

B. THE DISTRICT COURT'S INQUIRY WAS INSUFFICIENT

The district court's inquiry into the jury's exposure to extrinsic evidence failed to fulfill its duty to ensure that the verdict was not tainted by outside influences, failed to explore "the entire picture," *Remmer*, 350 U.S. at 379, and failed to provide a complete record of precisely what extrinsic evidence entered the jury room, and how many jurors were exposed to it. Without a complete inquiry, it is impossible to

determine whether or not the Government has met its heavy burden of rebutting the presumption of prejudice, *Remmer*, 347 U.S. at 229 and *Martinez*, 14 F.3d at 550, and whether there was "a reasonable possibility of prejudice to the defendant." *Awan*, 966 F.2d at 1432. Only a limited remand for a full and fair inquiry can lead to these answers.

The inquiry here was insufficient in three areas: the court's failure to authorize access to documentary evidence to authenticate the e-mails; the court's inadequate inquiries at the November 17, 2006 evidentiary hearing; and the court's failure to make any inquiry after three additional, and far more explicit, e-mails appeared.

1. Investigation of the Authenticity of the E-Mails

This is a case where documentary evidence could conclusively resolve an important legal issue. If the copies of the e-mails are authentic, they are incontrovertible evidence of jury misconduct and Scrushy deserves a new trial. Scrushy made every conceivable effort to determine the authenticity of, and to obtain a court order to preserve them before they were discarded or destroyed. Each request was denied.

Counsel was powerless to investigate these e-mails because Local Rule 47.1 precludes counsel from having any contact with jurors after a verdict without permission of the court. The court had also entered an order forbidding counsel to

reveal the identities of any jurors. R2-255-3. In their first filing, Defendants sought an order: (1) permitting counsel to interview the jurors pursuant to Local Rule 47.1; (2) holding that the court would question the jurors pursuant to Local Rule 47.1; (3) requiring Jurors 7 and 40 to preserve any computers used during jury service and forbidding any deletions of information relating to this case; (4) ordering all jurors to provide *in camera* a list of all e-mail and text-messaging accounts, all Internet Service Providers ("ISPs"), and companies providing text-messaging services; and (5) authorizing issuance of Rule 17(c) subpoenas to ISPs and telephone companies. R6-467-13-15. Both Defendants sought expedited relief in procuring and/or preserving these records. R6-469; R6-472; R6-474. Scrushy's motion emphasized: "Defendant is not seeking *access* to such evidence on an expedited basis. Defendant is seeking only that this Court take limited action to preserve evidence that may be critical to the determination of Defendants' new trial motion." R6-472-5. The Government opposed all relief based on its contention that "Defendants' allegations of juror misconduct rely on exhibits that are entirely speculative and unauthenticated." R6-476-2. In fact, there is nothing speculative about this evidence – it is specific and probative – and the only reason why the authenticity question remains open is the Government's objections and the court's rulings which stymied Scrushy's efforts to authenticate it.

A week later, the district court set an evidentiary hearing to investigate possible post-trial contact with Juror 5, the juror whose affidavits were included as exhibits to Defendants' initial pleading. The court did not address any of the requests for preservation of the records. R6-477. At that hearing on October 31, 2006, the district court used documentary evidence which the court had subpoenaed to examine the witnesses (Juror 5, Juror 5's wife, a lawyer representing Juror 5, and two notaries) to determine if any attorney had violated Local Rule 47.1. R28-36-39, 49-60, 73-74, 92-96, 140-41, 163-64, 195, 209-10, 235-39. The court found there was insufficient evidence to find any violation of Local Rule 47.1. R7-492-7-8. In the same order, the court denied all of Defendants' requests for access to or preservation of records relating to the jurors' e-mails. *Id*. at 2 n.4. The court set an evidentiary hearing on November 17, 2006 to inquire into whether the jury was exposed to extraneous information or outside influence. *Id.* at 9.

On November 9, Scrushy filed a "Motion for Issuance of Subpoenas for November 17, 2006 Evidentiary Hearing." R7-496. In this motion, Scrushy requested issuance of subpoenas *duces tecum* to: (1) Jurors 7 and 40 and the juror whose e-mail address used a nickname; (2) all remaining jurors and alternate jurors; (3) reporters who published interviews quoting Jurors 7 and 40; (4) the record custodians for records reflecting Internet searches by Jurors 7 and 40; and (5) the record custodians

for e-mail accounts for Jurors 7 and 40 and the juror whose e-mail address used a nickname. Attached to the motion were exhibits containing proposed language for the subpoenas. *Id.* at 4-16 and Ex. 18-20. In support of these requests, Scrushy provided an affidavit of a qualified computer forensics specialist, describing in detail all of the access points for recovery of records which would reveal Internet searches and e-mail messages between known individuals. R7-496, Ex. 16 at ¶¶ 3-16. The affidavit addressed the need to act quickly:

> As with all computer-based investigation, time is of the essence because of the volatility of electronic data. Over time, the more a computer is used the greater the likelihood that electronic evidence on the computer hard drive, including records of deleted files, may be irretrievably lost.

Id. at ¶ 18. On November 13, 2006, the court denied Scrushy's motion, giving no reasons for the denial. R7-499.

That was an abuse of discretion; procurement and preservation was essential to a fair determination of jury misconduct:

> However, since it is the court's duty to ensure that the jury verdict is in no way tainted by improper outside influences, the court must investigate the asserted impropriety upon a merely colorable showing of extrinsic influence. Subject only to Federal Rules of Evidence 606(b), *the court may use whatever inquisitorial tools are necessary and appropriate to determine prejudice.*

United States v. DeLaVega, 913 F.2d 861, 870 (11th Cir. 1990) (emphasis added). Moreover, Fed. R. Crim. P. 17(c) provides ample authority for the court to have issued subpoenas. A Rule 17(c) subpoena should issue if: the requested documents are evidentiary and relevant; if they are not otherwise procurable by exercise of due diligence; if a defendant cannot properly prepare for a hearing without the documents; and if the motion "is made in good faith and not intended as a general 'fishing expedition.'" *United States v. Nixon*, 418 U.S. 683, 699-700, 94 S.Ct. 3090 (1974); *accord United States v. Silverman*, 745 F.2d 1386, 1397 (11th Cir. 1984). Courts, including the former Fifth Circuit, have concluded that Rule 17 authorizes the issuance of subpoenas in all phases of a criminal case, including issues raised and decided after trial. *Welsh v. United States*, 404 F.2d 414, 417 (5th Cir. 1968) (Rule 17 requires issuance of subpoena when the facts alleged, if true, would be relevant to any issue in the case); *United States v. Winner*, 641 F.2d 825, 833 (10th Cir. 1981) (use of Rule 17(c) subpoenas to prepare for post-trial hearings).

At the November 17, 2006 hearing, the only witnesses were the twelve deliberating jurors to whom court subpoenas had been issued requiring jurors to bring any documents they may have obtained during deliberations. R29-5, 28, Court's Ex. 1-12. At the hearing, despite requests from both Defendants *and* the (Government R29-12, 16, 20), the court did not ask any juror if he or she had sent or received any

e-mails to or from other jurors, nor did it inquire in any manner into the copies of the e-mails which Scrushy had submitted as exhibits in the motions. R29-27-143.

The district court's refusal: (1) to assist Scrushy in obtaining the documentary evidence that could have authenticated the e-mails; (2) to at least obtain and preserve the evidence; or even (3) to order that it be preserved by the individuals and entities that possessed it, was a disturbing abuse of discretion. And, because that evidence may have been lost or destroyed during the intervening period, the court may have deprived Scrushy of evidence that would require a new trial.

The right way is exemplified by *Commonwealth v. Guisti*, 434 Mass. 245, 747 N.E. 2d 673 (2001) ("*Guisti I* "). There, a juror posted an electronic message "stating that she was 'stuck in a 7 day-long Jury Duty rape/assault case ... missing important time in the gym, working more hours and getting less pay because of it! Just say he's guilty and lets [*sic*] get on with our lives!'" *Id.* at 249-50. At least two e-mails responded to the posting. The trial court refused defendant's request to conduct a post trial voir dire of the juror, but the appellate court reversed, analyzing the situation as one potentially involving exposure to extrinsic influence, depending on the nature and extent of the responses to the juror's posting. *Id.* at 252-53:

> "Where a case is close, as here, a judge should exercise discretion in favor of conducting a judicial inquiry." *Commonwealth v. Dixon, supra* at 153, 479 N.E.2d 159.

> Accordingly, the judge should have allowed the defendant's motion. We remand the case for the judge to conduct a voir dire limited to determining the following: whether the juror was in fact the woman who posted the two e-mail messages; if so, whether she received any responses; the contents of any such responses; and whether the juror communicated the substance of any such responses to other jury members prior to or during deliberations.

Id. at 253. The trial court needed to determine the *authenticity* ("whether the juror was in fact the woman who posted the two e-mail messages") and the *nature of contents* ("the contents of any such responses") of the e-mails that could have tainted the jury's deliberations.[13]

After the *Guisti I* remand, the trial court determined that there was no problem, but the defendant appealed again, "alleging, among other things, that the trial judge had unduly restricted the scope of the hearing." *Commonwealth v. Guisti*, 449 Mass. 1018, 1018, 867 N.E. 2d 740 (2007) ("*Guisti II* ") (referring to prior unpublished opinion). A second remand, while retaining jurisdiction, stated: "The judge shall determine the appropriateness of appointing an expert to examine the juror's

[13] In Massachusetts, counsel are prohibited from making post-verdict contact with jurors, a point *Guisti* recognized as important to a trial court's duties: "We recognize, however, that defense counsel is in a sensitive position, as counsel is barred from independently contacting jurors or conducting unsupervised interviews with jurors after the verdicts are rendered." *Id.* at 252 n.10 (citation omitted).

computer, to determine whether any e-mails the juror may have received in response to those she sent can be located and retrieved, even if the juror believed that she had 'deleted' them. The judge shall also consider, for example, whether the contents of any responsive e-mails can be determined through the records of the [I]nternet mail service provider or administrator of the so-called 'listserv.'"*Id.* at 1018-19 (internal quotation marks omitted). *Guisti II ordered* the trial court to take the actions Scrushy sought in order to obtain information regarding e-mails from third parties, including Internet Service Providers.

Guisti I and *II* provide the proper response to the *Remmer v. United States* duty to explore "the entire picture." 350 U.S. at 379. The trial court here failed that duty.

2. The November 17, 2006 Evidentiary Hearing

The manner in which the court conducted the inquiry into extrinsic evidence failed "to determine if and what extrinsic factual matter was disclosed to the jury." *Sedigh*, 658 F.2d at 1014.

First, the court foreclosed any meaningful input from the parties, making it plain that it was not interested in anything the parties felt necessary to complete the record. R29-5. After the court read the twelve questions it intended to ask of the jurors (R29-10-12), all parties objected or suggested additional inquiries. The Government objected that the inquiry was too broad, but then also requested that the

court ask Jurors 7 and 40, whose e-mails are at the center of this issue, whether they generated those e-mails. R29-12-14. The Government complained that the twelve questions were too complicated for the jurors:

> [W]e think frankly some of those questions are going to be the types of questions where a juror may be confused or may be concerned about whether to say yes or no because they are not really going to know what the answer is.

Id. at 14. The defense also suggested additional areas of inquiry, including that the jurors be asked about the e-mails. *Id*. at 16, 20. During the hearing, counsel for Scrushy objected to the court's leading questioning of a juror who was beginning to describe the jury's exposure to extrinsic evidence because the court suggested what the evidence was. Counsel requested the court to ask open-ended questions when having the jurors describe extrinsic evidence brought into the jury room. The court's only reply was, "Thank you for your request. Juror 29 will be next." R29-98. The court did not alter the pattern of its questioning. R29-101-106. At the end of the hearing, the court gave the parties an opportunity to make objections to how the court conducted the hearing. Counsel for Defendants stated extensive objections. *Id.* at 144-66. The court noted the objections, but clearly intended to take no action, as all the jurors had been excused and were no longer available. *See*, *e.g*., R29-143.

Second, the twelve questions were so confusing, as the Government pointed out, that the jurors "are not really going to know what the answer is." R29-14. Particularly problematic was the issue of extrinsic evidence. Question 10, asked of each juror:

> During the time that you were serving as a juror, did any juror say or do anything that caused you to believe that he or she had been exposed to extraneous information about this case from any source?

R29-11. The court defined "extraneous information" along with other preliminaries prior to asking the first question, burying the definition in three-plus pages of transcript. R29-24-27. The court compounded the definitional differences by talking to the jurors in two separate panels. It read its prefatory remarks, including the definition of "extraneous information," to a group of five jurors,[14] then called each of them separately to the witness stand. Each juror would thus have to independently remember the definitions while awaiting his or her turn to be questioned. R29-27, 84. After a lunch recess, the same process was repeated with the remaining six jurors. R29-84-88.

At least one juror was clearly confounded. Juror 5, who was called next to last, had previously signed two affidavits that described extrinsic evidence. R6-467, Ex.

[14] One juror was apparently late for court, so the court repeated the instructions when that juror was called. R29-42-44.

8 and 9. However, when the court asked him whether any juror did or said anything that caused him to believe he had been exposed to "extraneous information," Juror 5 answered, "No." After the court said, "Let me make sure I understand your response" and then asked the same question again and substituted "from documents or research or exhibits outside of what the Court provided to the jury to look at," for the term "extraneous information" (R29-134), Juror 5 changed his answer to "Yes." *Id.* One of the unsuccessful requests made by Scrushy's counsel was that Juror 5 be brought back, specifically to walk him through his affidavit, "because I think he was struggling to understand the Court's questions." R29-154.

Third, the court did not attempt to resolve factual disputes. The record is replete with contradictions between jurors' testimony and their own prior statements, and with contradictions within the jurors' testimony, contradictions between the testimony of one juror and that of other jurors.

For instance, Juror 40 testified that she had seen a headline of a news article on the Internet, but denied reading the article. R29-77. Yet Juror 66 testified that Juror 40 had said she had "read" "an Internet article about the trial," and "made a comment about the writer and the Defendants or whatever." R29-59-60. The testimony of Juror 66 was corroborated by Juror 40's admission, in a videotaped interview with WSFA just after the verdict, that she did read the article on the

Internet. R6-467, Ex. 5B at 24. Despite the contradictions, the court did nothing to resolve them and simply accepted, without any further inquiry, Juror 40's naked denial at the evidentiary hearing that she had read anything but the headline.

Juror 40 testified that she was unaware of any extrinsic information on the possible sentences in the case (R29-79), but her testimony was contradicted by the exchange of e-mails between her and another juror expressing concerns about "**penalty 2 severe."** R6-467, Ex. 12. Yet the court did not ask Juror 40, nor any other juror, a single question about any of the e-mails, nor try to resolve this conflict in the evidence.

Juror 5 signed an affidavit (R6-467, Ex. 8), upon which the district court relied in setting the evidentiary hearing (R7-492-8), which indicated the jury had talked about the fact that Siegelman had put the HealthSouth money in his personal account (a fact contradicted by the record) and that the jury had talked about the fact that the Defendants would not go to jail, yet the court failed to ask a single question about these attestations.

The court completely failed to explore, or try to obtain the documentary evidence that could have provided resolution of the fact that five jurors testified that the Internet research was either broader in scope than Jurors 7 and 40 admitted, or that it occurred differently than Jurors 7 and 40 claimed. *See* testimony of Juror 38

(R29-39-39); Juror 66 (R29-52, 54-55, 57-58); Juror 30 (R29-71-72, 73); Juror 63 (R29-92-95); and Juror 5 (R29-134-36).

Finally, the district court made no inquiry to determine if any of the jurors conducted premature deliberations, notwithstanding the two e-mails that reflected exchanges between Jurors 7 and 40 on May 29, 2006. R6-467, Ex. 10 and 11. Nor did the court ask any questions to determine in the presence of all the jurors, if any jurors had conducted deliberations by e-mail or otherwise, despite the flurry of e-mails exchanged between four jurors on June 25, 2006. R6-467, Ex. 12, 13 and 15. The district court simply chose not to develop any factual record as to this alleged misconduct.

Because of the manner in which the district court structured and conducted the hearing, it failed to explore "the entire picture" and it failed to determine the contents and extent of the extrinsic evidence the jury was exposed to. Without further inquiry – one which is both thorough and even-handed, with the documentary evidence to ensure the telling of the full story – there can be no confidence in the verdict.

3. The District Court's Final Order Without Any Inquiry

After the November 17, 2006 hearing, the district court denied relief on December 13, 2006. R7-518. Shortly after, copies of two more e-mails were delivered to counsel, postmarked December 20, 2006. The first appeared to be from Juror 40 to Juror 7 on Sunday, June 25, 2006 at 10:09 pm, and stated, among other things: **"still having difficulties with #30 … any ideas? … did not understand ur thoughts on statute but received links."** R7-519, Ex. 23. The second e-mail, also from Juror 40 to Juror 7, a little over half an hour later, included statements such as: **"articles u sent were outstanding! gov & pastor up s—t creek …they missed before but we won't also keepworking on 30…."** R7-519, Ex. 24. Scrushy filed these with the court as attachments to a renewed motion. R7-519.

Scrushy argued that the two e-mails constituted significant new evidence relating to the jury's exposure to extrinsic evidence from the Internet and deliberations by jurors outside the presence of the entire jury. Scrushy again asked the court to obtain or preserve the documentary evidence and to conduct a further evidentiary hearing. R7-519-8-20. But, before the district court acted, additional copies of an e-mail arrived, postmarked February 20, 2007. An e-mail apparently from Juror 7 to Juror 40, sent just six minutes after the previous e-mail:

Great info 4 r friends.

% of prosecution increases dramatically.
Could not find that when I surfed it.
Gov/Pastor GONE….

R7-532, Ex. 26. Scrushy submitted this exhibit as a supplement to his then still-pending motion and reiterated his requests for relief. R7-532-8-13.

The district court *took no action* for nearly six months, finally entering an order denying all relief without conducting any further inquiry of any kind on June 22, 2007, four days before sentencing began. R10-611. The order criticized Defendants' efforts to obtain a full investigation of the jury's actions, noting: "[T]he central inquiry in this, and every other criminal case, ought to be whether the defendant committed the crime charged," and it added that the costs associated with "searching for defects in the criminal justice system" included "the corrosion of public respect for a judicial system that loses its focus on the ultimate question of guilt or innocence." R10-611-2 at n.5.

This order "assume[d] *arguendo* that the e-mails are authentic," (R10-611-4 at n.9), but speculated on the authenticity of the e-mail copies, and cited the Government's suspicions concerning "the timing of the appearance of the e-mails." *Id.* The court chose not to take any steps to determine authenticity because, "[e]ven if the computer records showed that e-mail messages were exchanged between

computers owned or used on occasion by jurors, that would not prove who actually authored the messages using these machines." R10-611-6.

That hypothesis is devoid of merit. It is illogical to surmise that e-mail exchanges between two users with e-mail addresses containing the names of Jurors 7 and 40 were not exchanges between those two jurors, especially given the subject matter in the e-mails. More importantly, by proffering the e-mails in question, Scrushy surely made the "colorable showing" sufficient to trigger the district court's duty to investigate.

The court viewed its questions on November 17, 2006 to have assured that the jurors would have fully testified about any Internet searches or other possible exposure to extraneous information, and that "the only reason for further inquiry would be to attempt to impeach the jurors' prior testimony." R10-611-7. The court rejected the content of the last three e-mails as "merely cumulative" of the previous exhibits, and concluded that its broadly worded questions were sufficient to overcome concerns about the most recent e-mails' references to "links," "articles," and "surfing." R10-611-10. The three e-mail copies received after the evidentiary hearing and initial order denying relief constituted new and significant evidence of the exposure to extrinsic evidence. They contained the most explicit references to research on the Internet, and clearly indicated that this information was being used

to individually lobby other jurors. They were not cumulative evidence; they were specific, explicit, and if the prior e-mails were insufficient to require the court to make a direct inquiry of all the jurors, and obtain all available documentary evidence to make that inquiry effective, then the three new e-mails should have triggered such an inquiry. The court's original order relied on its conclusion that "the documents purporting to be juror e-mails on which Defendants rely are wholly unrelated to any evidence of jury exposure to extraneous information or outside influence." R7-518-53 (footnote omitted). The three additional e-mails undermine that conclusion, and mandated a new, and complete, investigation.

While a court has wide discretion in *how* it investigates a jury's exposure to extrinsic evidence, based on the "colorable showing of extrinsic influence" here, *whether* to investigate was an obligation: "[T]he court *must* investigate the asserted impropriety." *United States v. Ayarza-Garcia*, 819 F.2d 1043, 1051 (11th Cir. 1987) (emphasis added). *Accord Barshov*, 733 F.2d at 851. Once the three additional e-mails with their deeply troubling content were made available to the district court, it had a duty to investigate them fully. The nature and extent of the jury's resort to extrinsic information must be fully explored in an evidentiary hearing on limited remand.

C. ANY REMAND SHOULD BE TO A DIFFERENT JUDGE

The seminal case on this issue is *United States v. Torkington*, 874 F.2d 1441 (11th Cir. 1989):

> We consider at least three elements in determining whether to reassign a case to a different judge based on the original judge's actions at trial where there is no indication of actual bias: (1) whether the original judge would have difficulty putting his previous views and findings aside; (2) whether reassignment is appropriate to preserve the appearance of justice; (3) whether reassignment would entail waste and duplication out of proportion to gains realized from reassignment.

Id. at 1447. These *Torkington* factors have been applied repeatedly by this Court. *See, e.g., CSX Transp., Inc. v. State Bd. of Equalization*, 521 F.3d 1300, 1301 (11th Cir. 2008); *United States v. Gupta*, 363 F.3d 1169, 1177 (11th Cir. 2004). Here, as in *Torkington*, and in *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1373 (11th Cir. 1997), it is "the second factor [of *Torkington* which is] the most telling[,]" and which dictates reassignment on remand.[15]

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[15] The other two *Torkington* factors also favor reassignment. The same factors that indicate that this case should be reassigned "to preserve the appearance of justice" also suggest that the district court "would have difficulty putting his previous views and findings aside[;]" and the issue of juror misconduct is discrete and has never been thoroughly vetted, reassignment on remand would not "entail waste and duplication out of proportion to gains realized from reassignment."

The court's handling of Scrushy's post-trial claims of juror misconduct leave no doubt that there would be difficulty in putting aside the court's previous views and findings.

Second, at a previous hearing on October 31, 2006, the court's aggressive inquiry into whether any defense attorney had violated Local Rule 47.1 showed it was more interested in pursuing defense counsel than in ferreting out juror misconduct.[16]

In addition, the court scoffed at Scrushy's efforts to press it to fulfill its obligation to explore "the entire picture," disdaining that by saying: "[T]he central inquiry in this, and every other criminal case, *ought* to be whether the defendant committed the crime charged" (R10-611-2 at n.5) (emphasis added), adding that outcome trumps process because the latter prompted "the corrosion of public respect for a judicial system that loses its focus on the ultimate question of guilt or innocence." *Id.*

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[16] Even in finding no Rule 47.1 violation, the court's order insinuated that Scrushy might somehow have been involved in contacting Juror 5 via his pastor, Charles Winston: *"It is clear that both Charles Winston and Debra Bennett Winston had connections to Richard M. Scrushy prior to August of 2006."* R7-518-21-22. However, Pastor Winston testified that he had "been in [Scrushy's] company, but he wouldn't have known me," having attended two large meetings where Scrushy spoke. R28-151. Debra Bennett Winston's last contact with Scrushy was over 25 years ago, when she was secretary to a department head at University of Alabama, where Scrushy taught and reported to that department head. R28-214.

That thought is contrary to the entitlement of a fair trial, including the right to an impartial jury unencumbered by extrinsic influences. *See Kimmelman v. Morrison*, 477 U.S. 365, 379, 106 S.Ct. 2574 (1986) ("The constitutional rights of criminal defendants are granted to the innocent and the guilty alike."); *Colorado v. Connelly*, 474 U.S. 1050, 1053, 106 S.Ct. 785 (1986) (Mem.) ("[A] truly free society is one in which every citizen – guilty or innocent – is treated fairly and accorded dignity and respect by the State.").

Reassignment of this case to a different district judge is required on this record.

D. THIS COURT SHOULD GRANT A NEW TRIAL BASED ON THE EXISTING EVIDENCE OF JURY EXPOSURE TO EXTRINSIC EVIDENCE

Apart from the sufficiency of the inquiry into the jury's exposure to extrinsic evidence, there is sufficient evidence in the record to mandate a new trial. The summary of evidence set out in Section II-A, *supra*, demonstrates that considerable extrinsic information was brought into the jury room, and that much of it was highly prejudicial to Defendants. Therefore, there was substantial evidence of the jury's exposure to extrinsic evidence which posed a reasonable possibility of prejudice, and the *Remmer* presumption of prejudice applied.

While this presumption is "not conclusive" the "burden rests heavily upon the government" to show that the extrinsic influence was harmless. *Martinez*, 14 F.3d at

550 (quoting *Remmer*, 347 U.S. at 229). In this Circuit, this analysis is subject to the four factors set out in *Martinez*, 14 F.3d at 550, and the additional factor relating to appellate review in *Ronda*, 455 F.3d at 1300. The Government did not rebut the presumption of prejudice.

The first factor, the manner in which the information reached the jury, weighs against a finding of harmlessness. Unlike cases where the exposure occurred due to an inadvertent event, *see*, *e.g.*, *Pessefall*, 27 F.3d at 516 (exhibit which had not been admitted was "inadvertently delivered … to the jury room" by the marshal), the exposure was a direct result of deliberate violations of the court's instructions by Jurors 7 and 40 when they accessed the Internet to obtain and use information about this case. By their own admission, both Jurors 7 and 40 used the downloaded indictment to study at home in order to present the evidence in the jury room, something the other jurors, who did not violate the court's orders, could not do. The evidence from the other jurors demonstrates the egregiousness of how the information came into the jury room, and weighs heavily against a finding of harmlessness. Various jurors testified that Juror 7 and/or Juror 40 brought in information they had obtained by research on the Internet that dealt with the two acquitted Defendants, or that appeared in newspaper reports, or on the WSFA blog. That was in direct violation of the repeated admonishments of the district court and, if the e-mails are

correct, the information was used in extra-judicial deliberations by e-mail outside the presence of other jurors.

The timing of when the extrinsic information reached the jury is the second factor. *Martinez*, 14 F.3d at 550; *United States v. Perkins*, 748 F.2d 1519, 1534 (11th Cir. 1984) (holding that where extraneous information injected before a jury that for many hours had remained hopelessly deadlocked, "[t]he likelihood of prejudice on a jury is obvious."). Jury deliberations in this case began on Thursday, June 15, 2006. R68-7641. On the sixth day of deliberations, the jury sent a note indicating it was unable to reach a unanimous verdict on any count, and the Court gave an *Allen* charge. R70-7739, 7750-53. On the ninth day of deliberations, the foreman sent out a note indicating difficulty deliberating (R11-866-7799-7829), and on the following day the court gave a supplemental jury instruction. R73-7852. The jury returned its verdict on June 29, 2006. R74-7864-76. Juror 40 testified that she downloaded a copy of the indictment the weekend after deliberations began and used it for two weekends. R29-81. Although Juror 7 was not forthcoming about the precise timing of his use of the downloaded indictment (R29-119, 122), Juror 66 testified that she believes that this "may have been after the first time we said it was a hung jury and then he, I guess maybe the night came back and said, this is what I have done,…" R29-55. The content of the six e-mails on Sunday evening, June 25, 2006, indicated

that the extrinsic evidence was being accessed and shared shortly after the jury sent their note that they were deadlocked on June 22. The likelihood of prejudice from this extraneous information at such a critical time is "obvious." *Perkins*, 748 F.2d at 1534.

The nature of the extrinsic information also demonstrates that the Government cannot prove its harmlessness. The admitted use of the unredacted superseding indictment downloaded by Jurors 7 and 40, shows prejudice. While the differences between the redacted and unredacted indictments were small (R7-518-13), during the deliberations, Jurors 7 and 40 had access to and use of their own copies of the indictment to study and make notes on at home, something that would give them an advantage over the ten other jurors who had followed the court's instructions. As a result, Jurors 7 and 40 became "superjurors." While the jurors' impressions of how this affected their deliberations would be precluded by Rule 606(b), it is clear that under the requisite objective standard, *United States v. Howard*, 506 F.2d 865, 869 (5th Cir. 1975), Jurors 7 and 40 would have an unfair advantage in the deliberations. The prejudice is illustrated by the fact that if a juror requested permission to take home a copy of the indictment to "research" it outside the presence of the other jurors and outside court-supervised deliberations, any court would refuse it.[17]

[17] This begs the question of what, if anything, Jurors 7 and 40 used as reference materials in studying their downloaded copies of the indictment at home. Juror 7 testified he made notes on his copy of the indictment, which he brought into the jury

In light of the other extrinsic evidence testified to, the possibility of prejudice is overwhelming: the information in the newspaper article that Juror 40 most probably accessed was highly prejudicial (R7-509, Ex. 21C); the materials contained in the WSFA blog were highly prejudicial, including discussion of Scrushy's fraud trial in Birmingham. R7-510, Ex. 22A at 218. Even the extrinsic evidence that Juror 7 brought into the jury room concerning the acquitted Defendants carried the substantial possibility of prejudice. The district court utterly failed to determine the precise nature of this information and the extent to which it was disseminated (other than the testimony of Juror 66 that there was a 10-15 minute discussion of the information as to each acquitted Defendant (R29-52, 57)), but the fact that these two Defendants were acquitted and Scrushy and Siegelman were convicted compels the conclusion that the material was either unfavorable to the convicted Defendants, or that they appeared to be more guilty in comparison to the acquitted Defendants, in light of the extrinsic material.

In regard to the *Ronda* factor – the manner of the district court's inquiry into the juror misconduct issues and the findings of the district court – the court's

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room. R29-120, 122. Juror 66 testified that Juror 7 did research on the indictment at home and brought it back to the jury room, and told jurors about information that was not in the indictment ("he had his paperwork there, so each one of the charges was information about it" (R29-55-57)). The jurors were directed to leave their notes at the courthouse each day. R35-30; R67-7646.

investigation into evidence of misconduct was insufficient, as discussed in Section II-B, *supra.* Moreover, the district court's findings of fact (R7-518), were deeply flawed because the court illogically limited its finding of extrinsic evidence to the three items that Jurors 7 and 40 admitted obtaining from the Internet and bringing into the jury room. The Court ignored the contradictory testimony and evidence from Jurors 5, 30, 38, 63 and 66, while crediting the testimony of the two jurors who violated the court's instructions, notwithstanding the fact that these two jurors had the most to lose if the other jurors' testimony was believed. "Binding precedent in this circuit holds that a juror's denials of misconduct are an insufficient basis upon which to reject a claim of misconduct,…" *United States v. Brantley*, 733 F.2d 1429, 1440 (11th Cir. 1984) (citing *United States v. Forrest*, 620 F.2d 446 (5th Cir. 1980)). In *Forrest*, the former Fifth Circuit found the trial court's investigation into extrinsic contact insufficient and cautioned:

> We must be mindful of the fact that at the outset of the trial the judge told the jurors to avoid contacts with anyone involved in the case and not to discuss the case among themselves until they retired. Watson's natural disposition would be to claim she had complied with those instructions. Only the other jurors can enlighten us properly on this subject.

620 F.2d at 457.

Finally, the Government cannot show that its case against Scrushy was so strong that the jury's exposure was harmless. This jury had great difficulty, as demonstrated by the length of deliberations (eleven days) and the two announcements that they were deadlocked. R70-7739; R11-886-7797-7829. *Bulger v. McClay*, 575 F.2d 407, 411 (2d Cir. 1978) (holding that jury's difficulty in reaching a verdict supported a finding of prejudice from jury's discussion of extraneous evidence).

Simply put, extensive evidence that the jury was exposed to extrinsic information from multiple sources and the Government's failure to carry its burden of proof to demonstrate the lack of prejudice, require a new trial. The extrinsic evidence here is far in excess of that relied on by this Court to order a new trial in *Martinez*, 14 F.3d at 550. The trial court has a "duty to ensure that the jury verdict was in no way tainted by improper outside influences," *Rowe*, 906 F.2d at 656, yet the district court did not fulfill this duty here, thus a new trial should be granted.

E. PREMATURE DELIBERATIONS AND DELIBERATIONS OUTSIDE THE PRESENCE OF ALL JURORS ALSO REQUIRE A NEW TRIAL

1. Premature Jury Deliberations

In *United States v. Dominguez*, 226 F.3d 1235 (11th Cir. 2000), this Court addressed a claim that a defendant was denied a fair trial because the jury began deliberations before the government finished presenting its case. Before finally concluding that the district court acted decisively to avoid prejudice, *id*. at 1247-48, this Court summarized the applicable legal principles:

> A jury's impartiality is endangered by colloquy among jurors about the case prior to the beginning of formal deliberations. *See United States v. Yonn*, 702 F.2d 1341, 1345 n.1 (11th Cir. 1983). The danger is that "such conversations may lead jurors to form an opinion as to the defendant's guilt or innocence before they have heard all of the evidence, the arguments of counsel, and the court's instructions." *Id.* That is why juries are typically instructed at the beginning of the trial and periodically throughout it not to discuss the case among themselves until permitted to so at the completion of the evidence and closing instructions.

Dominguez, 226 F.3d at 1243. *See also United States v. Resko*, 3 F.3d 684, 689-90 (3d Cir. 1993) (discussing six reasons for the prohibition on premature deliberations in a criminal case).

The court instructed the jury not to discuss the facts of the case among themselves at *every* break throughout the trial, and at the end of every day of proceedings. *See, e.g.,* R37-586; 645; 704; 805. But if the e-mails between Jurors 7 and 40 are true, at least two of the jurors deliberately violated those instructions, and began discussing the facts of the case and deliberating before the Government rested its case.

The Government was still putting on its case in chief when Juror 40 apparently e-mailed Juror 7 on May 29, 2006. R6-467, Ex. 10. Juror 40 writes to Juror 7: **"…need to talkl….!?"** *Id.* Less than an hour later, Juror 40 e-mailed Juror 7: **"I agree some of the kounts r confusing to our friends. Chek text.30/38 still off trac."** R6-467, Ex. 11. Jurors 30 and 38 were part of the convicting jury. R29-34, 66. If authentic, these e-mails show the two jurors were not only discussing the case, but were discussing the case with Jurors 30 and 38.

In ruling on the issue of premature deliberations, the district court made three findings. First, it concluded that because neither this Court nor the Supreme Court have actually granted a new trial based on premature deliberations, no relief was necessary. R7-518-50-51. Second, it found that the evidence of the e-mails "are photocopies of documents which were sent anonymously to counsel for Defendants after trial." *Id*. at 51. Third, it was barred by Rule 606(b) from asking the jurors about

the e-mails, and there was no legal precedent for obtaining documentary evidence from third parties to authenticate the e-mails. *Id.* at 51-52. In other words, unless another juror reports premature deliberations, such as in *Dominguez*, there is no way to prove or remedy premature deliberations.

This cannot be the law of this Circuit. The danger to impartiality posed by premature deliberations was expressly recognized in *Dominguez*, 226 F.3d at 1243. Here, there was no midtrial correction to protect Defendants' rights, as in *Dominquez*. Moreover, if such premature deliberations did occur, it is nonsensical to cloak them in any 606(b) privilege. Rule 606(b) precludes only testimony "as to any matter or statement occurring during the course of the jury's deliberations…." It does not forbid inquiry into jury misconduct that occurred weeks before jury deliberations began. Discussing the facts and assessing evidence and apparently taking stock of other jurors' positions weeks before the defense presented its case is not conduct which should be ignored. The district court should have inquired and should have obtained the documentary evidence to authenticate the e-mails. While a district judge's discretion is at its broadest when it involves investigating allegations of internal misconduct such as premature deliberations, *Dominguez*, 226 F.3d at 1246, that discretion does not extend to an outright refusal to investigate, and blocking access to a procedure or documentary evidence to establish what the evidence

colorably demonstrates occurred in this trial. The failure to have done that timely requires a new trial.

2. Deliberations by Jurors Apart from All Twelve Jurors

The district court here properly instructed the jurors that they were not to deliberate unless all twelve jurors were present. R67-7641. This instruction is in keeping with Fed. R. Crim. P. 23(b)(1) that "[a]jury consists of 12 persons unless this rule provides otherwise[,]" and case law recognizes that deliberation by less than the entire jury is improper. *United States v. Gaskin*, 364 F.3d 438, 463-64 (2d Cir. 2004); *United States v. Mackey*, 114 F.3d 470, 474 (4th Cir. 1997) (finding that district court's decision to permit two jurors to remain after deliberations to research and summarize evidence was error, but harmless based on finding that there was no evidence that jurors failed to comply with instructions not to deliberate); *United States v. Spurrier*, 930 F.2d 30, 1991 WL 43282 at *4 (9th Cir. 1991) (unpublished); and *United States v. Devery*, 935 F.Supp. 393, 409-11 (S.D.N.Y. 1996).

The e-mails between four jurors here, if authenticated, demonstrate beyond cavil that at least four jurors engaged in deliberations via e-mail outside the presence of the other jurors. A series of e-mails on Sunday night just before the jury entered what would be its final four days of deliberations included: **"…judge really helping w/jurors still having difficulties with #30….any ideas??? keep pushing on ur**

side." (R7-519, Ex. 23); **"….also, keepworking on 30…will update u on other meeting."** (R7-519, Ex. 24); **"% of prosecution increases dramatically….. Gov/Pastor GONE…."** (R7-532, Ex. 26); **"still unclear on couple of counts against pastor & gov."** (R6-467, Ex. 12); **"…stay focused….remember what judge said…."** (R6-467, Ex. 13); **"proud of u…other 6 kounts most important….c.u.n..am"** (R6-472, Ex. 15).

These e-mails, if authentic, show that jurors were discussing *and deciding* the guilt or innocence of Defendants *by e-mail* on a weekend during deliberations. The district court concluded that deliberations by fewer than all the members of the jury was misconduct, but not misconduct that it could investigate (R7-518-53), especially based on the evidence contained in e-mails that Defendants were precluded from authenticating by the district court's rulings. But the events demanded further investigation, and the failure to do so requires a new trial.

III.

THE TRIAL COURT HAD A DUTY TO DISCLOSE HIS EXTRAORDINARY EXTRA JUDICIAL INCOME FROM BUSINESSES WITH CONTRACTS WITH THE UNITED STATES GOVERNMENT PURSUANT TO 28 U.S.C. § 455(a), BECAUSE THAT INCOME WAS RELEVANT TO RECUSAL ON THE GROUND THAT HIS IMPARTIALITY MIGHT REASONABLY BE QUESTIONED

The trial court's April 26, 2007 Memorandum Opinion and Order relating to recusal correctly sets forth the § 455(a) standard:

> "whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality," *Parker v. Connors Steel Co.,* 885 F.2d 1510, 1524 (11th Cir. 1988), and doubts must be resolved in favor of recusal, *United States v. Kelly*, 888 F.2d 732, 744 (11th Cir. 1989).

R8-567-7. The Order is also candid in admitting that:

> Scrushy is correct in his contention that the undersigned is currently, and has been for several years, a shareholder in several privately held companies which derive income from customers which include but are not limited to, various agencies of the United States Government. Scrushy is incorrect in his assertion that the undersigned is currently an officer, director, or fiduciary to such companies. In fact since taking the federal bench in 2002, the undersigned has only been a shareholder in the companies. These investments have resulted in income to the undersigned. Both the income and the investments are reported each year in Financial Disclosure Reports as required by the Ethics in Government Act of 1978, 5

U.S.C. §§ 101-111.

R8-567-5 n.8.

Not said in the Order, but disclosed in the Financial Disclosure forms, is that in 2003, 2004 and 2005 the trial court judge reported receipt of income of between $100,001 and $1,000,000 for each of those years from Doss Aviation, Inc. And an *additional* $100,001 to $1,000,000 from Doss of Alabama, Inc. in each of those years. R8-551, Ex. 8, 9, 10. The website of Doss Aviation, Inc. describes the company this way:

> Doss Aviation, Inc. is a privately owned company with over 29 years experience in flight training, aircraft maintenance and modification, air traffic control, maintenance training, fuels and supply management, transient aircraft support services, airfield management and defense fuel support operations. Since our inception, we have performed a variety of services for the U.S. Army, U.S. Navy, U.S. Air Force, Defense Logistics Agency, the States Department and the Federal Aviation Agency (FAA).

R8-551, Ex. 11. The 2004, 2005 and 2006 Maine Secretary of State records reflect Judge Fuller's status as a shareholder/director for Doss Aviation, Inc., listing his address for each of those years as "1 Church St., A300, Montgomery, AL 36104." *See* R8-551, Ex. 4, 5, 6. That address is the address of the United States Federal Courthouse in Montgomery.

In February 2006, the Air Force announced that Doss Aviation, Inc. had won a $178,000,000 contract to train pilots and navigators for the Air Force, and in March 2006 a nearly $5,000,000 contract for maintenance of aircraft at the Air Force Academy. R8-551, Ex. 17, 19. Other Doss government contracts since 2000 have generated more than $50,000,000 for the company. R8-551-8 n.4.

The question is whether the trial judge should have disclosed the significant income he was receiving from the Doss companies' contracts with the United States, while he was the trial judge in a case brought by the United States.

The trial court rejected Scrushy's recusal motion: "The mere indirect receipt of financial benefit from ownership interest in the shares of private companies which have obtained competitively bid contracts with the United States government should not disqualify the undersigned from presiding over federal criminal prosecutions brought by the United States government." R8-567-10-11. In two closing footnotes the court added: "Additionally, the Court has no doubts concerning its impartiality" and "were this Court to hold otherwise, it would require undersigned to recuse himself in all criminal cases and in any civil cases in which the United States was a party." R8-567-11 n.15 & 16.

Those comments are revealing. Under 28 U.S.C. § 455(a), the threshold issue is not recusal, but whether the judge should have disclosed his (apparently) multi-

million dollar income from a company whose income is tied to government contracts. The question is whether an objective lay observer would entertain a significant doubt about impartiality; not whether the judge thinks he or she is impartial, but whether an observer could reasonably be dubious where a judge receives millions of dollars beyond this judicial income from government contracts favoring a company he partially owns.

Nor would it mean that the judge would be "require[d] . . . to recuse himself" in all cases in which the government was a party. R8-567-11 n.16. Disclosure does not necessarily lead to disqualification, but it would be preferable for litigants to know the extraordinary financial relationship between a judge and a company in which he has an interest, and the Government. We acknowledge that this is not a case in which Judge Fuller has a financial interest in a company that is a litigant, the paradigm for triggering a § 455(d) issue ("financial interest" means ownership of a legal . . . interest, however small . . . ."). But the fact that such *de minimus* holdings require disclosure and are potentially disqualifying, only underscores why the unique situation here – millions in income derived from the party seeking to imprison the Defendant – should have required disclosure. Indeed, the safety valve in § 455(f), which allows a judge to finesse disqualification by an after the disclosure divestment of a *de minimus* financial interest, buttresses the argument that the instant large

indirect financial interest with the United States raised the specter of an appearance of impropriety.

Judge Fay's sensitive opinion in *R.B. Potashnick v. Port City Construction Co*., 609 F.2d 1101 (5th Cir. 1980) is instructive. Judge Fay addressed Judge Hand's connections to various participants in a case, and, reversing Judge Stafford's decision that there was "no reasonable basis for disqualification of Judge Hand" (*id.* at 1107), Judge Fay emphasized that it is the *appearance* of impartiality that motivates § 455(a):

> This overriding concern with appearances, which also pervades the Code of Judicial Conduct and the ABA Code of Professional Responsibility, stems from the recognized need for an unimpeachable judicial system in which the public has unwavering confidence. As this court has noted, "the protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the palladium of our judicial system." *United States v. Columbia Broadcasting System, Inc.*, 497 F.2d 107, 109 (5th Cir. 1974). Any question of a judge's impartiality threatens the purity of the judicial process and its institutions.
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> * * *
>
> Because 28 U.S.C. § 445(a) focuses on the appearance of impartiality, as opposed to the existence in fact of any bias or prejudice, a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street. Use of the word "might" in the statute was

> intended to indicate that disqualification should follow if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality.

Id. at 1111 (footnote omitted).

Potashnick confirms our point that disclosure does not necessarily mean disqualification: "section 455(e) permits waiver after a full disclosure. . . ." *Id.* at 1114. And it confirms our point that if *de minimus* financial interests are *per se* disqualifying ("[A] small financial interest [under § 455(b)] . . .cannot be waived under the statute" (*id.*)), then prodigious financial interests must be disclosed.

The Government will argue that Scrushy's recusal motion (R8-550), was untimely, but that would place on every litigant the duty to search high and low for any possible relevant financial interests of a judge. Even the Financial Disclosure Reports filed by Judge Fuller did not reveal the relationship between his sources of income and the United States, so looking there would not have revealed the fact that he derived between $200,000 and $2,000,000 a year from his companies' businesses with the United States. And while the Government will portray Judge Fuller as a mere "shareholder," his filings reveal him to have been on the Board of Directors and a registered agent of the companies. The duty to disclose is the judge's. Title 28 U.S.C. § 455(a). The defendant has no duty to discover that which the judge has withheld, at the pain of being found "untimely."

This is not a case where a judge's son was an associate in a law firm representing a party, but the son had no involvement in the case. *United States ex rel Weinberger v. Equifax, Inc.*, 557 F.2d 456, 463-64 (5th Cir. 1977). It is not a case where the judge had a passive investment in a office building with lawyers involved in a case. *In re Beard*, 811 F.2d 818, 830-31 (4th Cir. 1987). This case is far different from any case in which family or business relationships have been viewed as benign because of the extraordinary income and its unique source.

The Government will argue that it would be an "injustice" to vacate the conviction because of the failure to disclose, but that comes down on the wrong side of justice. Nothing is more important than an impartial judge preserving the purity of the judicial process and its institutions. *R.B. Potashnick,* 609 F.2d at 1111. A new trial is required.

IV.

THE COURT IMPROPERLY DENIED SCRUSHY'S JURY COMPOSITION CHALLENGE

In 2001, the district court found that the procedures used to place previously deferred jurors on jury pools, which tended to exclude African-Americans, was a substantial violation of the Jury Selection and Service Act of 1968 ("JSSA"), 28 U.S.C. § 1861 *et seq.*, *United States v. Clay*, 159 F.Supp.2d 1357 (M.D. Ala. 2001),

and the Jury Plan was amended. Scrushy timely filed a constitutional and statutory challenge to the jury selection system. R1-104; R8-576-1. Scrushy's grand jury was drawn from the 2001 jury wheel; the trial jury was drawn from the 2005 jury wheel. R8-576-2. The magistrate held four days of evidentiary hearings prior to trial. R24; R25; R26; R27. Over Scrushy's objection that the magistrate had not yet ruled, the district court ordered that his trial proceed. R35-12-13. The magistrate filed his recommendation denying the jury challenge nearly a year after Defendants Scrushy and Siegelman had been convicted. R8-576. Scrushy timely filed his objections. R8-580. Four days before sentencing hearings began, the district court adopted and supplemented the magistrate's recommendation and denied Scrushy's challenge on all grounds. R10-612-9-10.

This appeal of the jury challenge issue is in an unusual procedural posture, as a parallel challenge was litigated in the district court at the same time. The other challenge, in *United States v. Leon Carmichael, Sr.,* No. 2:03cr259-MHT, was heard by a different magistrate and judge. But for the fact that only the petit jury which was drawn from the 2001 jury wheel was challenged there, the issues presented overlap. Both orders in this case relied extensively on the findings and reasoning of the magistrate and the district court in *Carmichael*, and the Government adopted its filings in *Carmichael* when ordered to respond to Scrushy's objections. R8-576-12;

R10-612-2; R8-586. The *Carmichael* jury challenge was ultimately denied in an extensive published opinion in *United States v. Carmichael*, 467 F.Supp.2d 1282 (M.D. Ala. 2006). That order has been appealed to this Court in Case No. 07-11400-JJ, with oral argument on April 16, 2008. Since the briefing schedule in the instant case will not be completed until early October 2008, a decision in *Carmichael* may occur prior to Scrushy's oral argument.

At the heart of both jury challenges is the fact that the jury selection system employed by the district failed to fairly represent African-American citizens. This jury system has consistently produced juries that exclude one-third of the African-American community in the middle district. Scrushy's evidence demonstrated both a substantial violation of the JSSA, the Jury Plan for the Middle District of Alabama ("Jury Plan"), and the Sixth Amendment's fair cross-section requirement.

A. THE JURY SELECTION PROCEDURES SUBSTANTIALLY VIOLATED THE JSSA

In *United States v. Clay*, the court found that a combination of three procedures relating to previously deferred jurors, which were as a group twice as likely to be white as African-American, was a substantial violation of the JSSA. 159 F.Supp.2d at 1368. The Jury Plan was amended to place a 15% cap on deferred jurors in any pool and to require those jurors be given no preference within the pools. JCH Exhibit

65, ¶ 14(d)(ii)-(iii). Despite that, because of violations of these and other provisions, a majority of the last 44 jury pools drawn from the 2001 jury wheel, including the pool from which Scrushy's grand jury was selected, contained over 15% deferred jurors and gave them preference. Combined with other violations, the result was a legally significant exclusion of African-Americans from jury pools. Evidence as to the early juries drawn from the 2005 wheel shows that the pattern of underrepresentation is continuing, with Scrushy's jury pool containing only 19% African-Americans in a community of 30.466% African-Americans.

1. The Violations

The evidence here tracked the evidence in *Carmichael*, and demonstrated numerous violations of the JSSA or Jury Plan:

a. The Clerk continued to grant virtually 100% of all the predominantly white deferral requests, *Carmichael* at 1292, granting serial deferrals and "deferrals simply because the juror prefers to be elsewhere." *Id.* at 1295. R8-576-39.

b. The jury administrators violated the 15% cap on deferred jurors in 27 of the last 44 jury pools of the 2001 jury wheel,[18] and there was "a direct link between the inclusion of too many deferred jurors and the underrepresentation of African-

[18] Since there was a dispute as to the definition of previously deferred jurors, Scrushy's computations here rely on the more conservative definition of the Government's expert. R27-788.

Americans in the pools." *Carmichael* at 1304. R24-112-24; JCH Exhibit 17; R25-273-82. The pool from which Scrushy's grand jury was selected, pool number 201040604 (R26-644), contained 17% previously deferred jurors, and only 24% African-Americans. JCH Exhibit 37; R8-576-52.

c. In *Carmichael*, the deferred jurors were not being dispersed in a "statistically random way." *Id.* at 1302. In the jury pool from which Scrushy's grand jury was selected, seven out of the first ten jurors were previously deferred, even accepting the Government's more conservative definition of previously deferred jurors. R26-658; JCH Exhibit 37B.

d. There was a deliberate violation of ¶ 16(e) of the Jury Plan, where administrators gave two-year excusals instead of one. *Carmichael* at 1300. R24-65-67. This caused deferred jurors to be resummoned in a much shorter period than other jurors, resulting in further dilution of African-American representation. *Carmichael* at 1300. R26-588-90.

e. While 28 U.S.C. § 1863(b)(2) requires districts to supplement the voter list when it fails to produce a fair cross-section, here the Jury Plan affirmatively provided that this statute did not apply in the district. JCH Exhibit 65 at ¶ 5. The Clerk found in completing the JS-12 for the 2001 jury wheel (JCH Exhibit 122), that the jury

wheel had only 20.74% African-Americans, but took no action, because "it's just another form you have to fill out and send in." R25-408-12.

f. Out of the first 25,000 jury questionnaires for the 2001 jury wheel, nearly 43% were not returned, largely due to out-of-date mailing addresses, which could be remedied for $350, and which would substantially reduce the under-representation of African-Americans. R24-35-39; R26-621-29. Ignoring the record in the case (*id.*), the district court found that "Defendants presented no evidence from which the court could conclude that persons who did not respond were predominantly African-American." R10-612-3. This pattern has continued in the creation of the 2005 jury wheel, as the magistrate found, 34% of 40,000 questionnaires were either undelivered or not returned. R8-576-44-45.

g. As the district court found in *Carmichael*, there were "serious deficiencies in the training and supervision of the jury administrators, including failure to instruct them about the requirements of *Clay*," as well as problems with the standardized software provided by a company *in Canada* and used by 88 districts. *Carmichael* at 1296-97. As the magistrate in the instant case stated: "It is abundantly clear that one, the Court staff don't fully understand either the plan or the operation of the computer program." R25-369. Additionally, the evidence showed that the administrators never

checked the results in the jury pools, because they "trusted the computer." R24-195; R25-258, 407.

h. The evidence showed that once the 2001 jury wheel was retired, the Clerk failed to completely empty the jury wheel before creating the 2005 jury wheel, as required by § 1863(b)(4) of the JSSA. As a result, at least ten jurors from the 2001 wheel were illegally carried over to the 2005, and one of these jurors was on the jury pool from which Scrushy's grand jury was selected. R8-576-53-54.

2. The Violations Were "Substantial Violations"

Only "substantial violations" of the JSSA require relief. 28 U.S.C. § 1867(d). A violation, or combination of violations, is substantial if it: (1) compromises the use of objective criteria to determine disqualifications, excuses, exemptions, and exclusions; (2) impacts randomness; or (3) affects the fair cross-section. *United States v. Gregory*, 730 F.2d 692, 699 (11th Cir. 1984), overruled on other grounds by *United States v. Singleterry*, 605 F.2d 122, 123 n.1 (5th Cir. 1982); *United States v. Kennedy*, 548 F.2d 608, 612 (5th Cir. 1977); *United States v. Davis*, 546 F.2d 583 (5th Cir. 1977).

a. Violation of the Objectivity Policy

The magistrate adopted the reasoning of the judges in *Carmichael* (R8-576-39-42), who concluded the Clerk's practice did not compromise the JSSA's objectivity

policy because: "[T]he Clerk's policy of granting all deferrals is almost definitionally objective in that it does not favor one applicant over another." *Id.* at 1294. The court excused the Clerk's failure to comply with the statute, saying that using *no* criteria at all is the same as using the *objective* criteria required by the statute. This renders § 1866(c)(1) meaningless. The court also failed to recognize that there *is* a subjective criteria within this process, as *Kennedy* held:

> Surely a district would be in substantial violation … if it selected all its jurors by randomly drawing names from the qualified wheel and allowing those selected to opt in or opt out at will.

548 F.2d at 612. *See also United States v. Branscome*, 682 F.2d 484, 484 (4th Cir. 1982) (holding "selection of volunteers introduces a subjective criterion for grand jury service not authorized by the act.") The result of the Clerk's free-deferral policy was that thousands of improper deferrals were given to jurors, on the flimsiest of reasons, often on multiple occasions. JCH Exhibits 17, 68-100, 114-121. And, as the *Carmichael* court found, and Scrushy proved here, if the rate of granting deferrals was reduced by half, the representation of African-Americans in the jury pools would increase by between 0.6% and 0.7%. *Id.* at 1292. R26-619-20. Since the Clerk's practice "intentionally or not, result[ed]…in discrimination," it violated the JSSA. *United States v. Bearden*, 659 F.2d 590, 608 (5th Cir. 1981).

b. Violation of the Randomness Policy

After concluding the Jury Plan's 15% limit on previously deferred jurors does not apply to grand juries, the magistrate again adopted the findings in *Carmichael* (R8-576-34), concluding that the repeated violations of the 15% cap was "less egregious" than *Clay*. *Carmichael* at 1304. That these violations occurred at all is "substantial" under *Kennedy*, where the Court found that *any* departure that affects randomness is a substantial violation regardless of its consequences in a particular case because "a litigant need not show prejudice." 548 F.2d at 612. The unrebutted evidence showed that the violations placed more deferred jurors on the pools than the Plan allowed, causing a preference for the disproportionately white previously deferred jurors to appear on the pools. JCH Exhibit 1 at 7-8; JCH Exhibits 18, 125; R26-573-92. This result destroyed randomness. *See Clay* at 1367.

Each of the additional violations worked together to compromise randomness. In regard to the failure of the computer to randomly distribute the previously deferred jurors, a violation of ¶ 14(d)(iii) of the Jury Plan, the magistrate here departed from the findings in *Carmichael*. R8-576-34-38. First, the magistrate concluded that this provision of the Jury Plan does not apply to grand juries (*id.* at 36), which will be addressed *infra.* Next the magistrate rejected Scrushy's expert's generally accepted statistical test (which both the magistrate and district judge accepted in *Carmichael*

at 1302) by concluding (without any expert testimony to support the conclusion or the analysis) that the test did not prove a failure to randomize because it depended on observing the placement of previously-deferred jurors vis-à-vis non-deferred jurors, and "that separation and differential treatment is precisely what *Clay* decried and what the Court's Plan seeks to prohibit." R8-576-38.

That analysis was wrong. By design, the Jury Plan creates two groups of jurors: previously deferred (which the computer segregates in the Deferral Maintenance Pool) and jurors who have not been deferred (maintained in the Qualified Jury Wheel). The Plan requires that the previously deferred jurors be randomly dispersed, not clustered, in order to avoid giving these disproportionately white jurors a preference, and thereby skewing the juries to underrepresent African-Americans. The only way to determine if this is occurring is by a statistical test that shows where the deferreds are being placed in the pools. That is just what Scrushy's expert did. He concluded that the dispersal was not random, just as the magistrate and court did in *Carmichael.* R26-593-604; JCH Exhibit 1 at 12-14. The *Carmichael* court, while finding "[t]hat such preferential grouping of a racially distinct subgroup of jurors violates the random selection provision is plain," *Carmichael* at 1301, nevertheless found it to be an insubstantial violation because part of the problem was a "software glitch" that was *being* corrected, and by ignoring the evidence as to

clustering. *Id.* at 1302. This finding is erroneous as a matter of law, *Kennedy* at 612, and factually erroneous since this non-random placement shows up in Scrushy's grand jury pool, where seven of the first ten jurors were previously deferred, again using the Government's more conservative figures. JCH Exhibit 37B; R26-658.

The *Carmichael* court found that the admitted, deliberate violation of ¶ 16(e) of the Jury Plan throughout the 2001 jury wheel contributed to the previously deferred jurors being recalled for jury pools at a faster rate than the non-deferreds. Putting one group of jurors back on jury pools faster (seven months) than another group (thirty-one months) is not a random process. As with the 15% violations, it gave these jurors "more chances at bat." *See Carmichael* at 1300. R26-564-67. The magistrate in the instant case did not rule on these violations, as Scrushy pointed out in his objections. R8-580-24-25. The district court, *sua sponte*,[19] held that Scrushy waived the issue because "Defendants failed to argue this issue." R10-612-9. That was wrong. Defendant put on evidence of this violation (R26-564-67), *and* argued it to the magistrate. R27-865. The court also incorrectly concluded that "a violation of the Middle District of Alabama's Jury Plan is not necessarily a substantive violation

[19] The Government filed no objections to the magistrate's recommendation, and did not raise any waiver in the reply it filed to Scrushy's objections when the court ordered it to. R8-586; R8-581. *See Taubert v. Barnhart*, 438 F.Supp.2d 1366, (N.D. Ga. 2006) (if no objection to specific recommendation, court's review of factual findings limited to clearly erroneous standard).

of the JSSA." R10-612-9. However, "[t]he same analysis is applied for claims alleging a failure to comply with the Local Plan." *Bearden*, 659 F.2d at 601.

In regard to the failure to empty the 2001 jury wheel before the 2005 jury wheel was created, the magistrate first relied on the analysis of the magistrate in *Carmichael* that, in regard to the similar failure to empty the 1996 wheel, this was only a technical violation because the evidence showed that there was no effect on randomness since none of those jurors was ever selected for a jury pool (R8-576-53-54), quoting *Carmichael* recomendation at 33-34. However, in Scrushy's case, one of the 2001 jurors who was improperly carried over to the 2005 wheel was not only summoned for a jury pool, it was for the jury pool in Scrushy's case. The magistrate, however, relying on the fact that this juror was 267 on a list of 300, concluded that the juror "had no influence on the petit jury selection process at all," and the error was harmless. R8-576-54. However, this juror was not randomly or legally selected for the 2005 master jury wheel and did not go through the same process as every other juror in the jury pool in this case. That is a substantial violation under *Kennedy's* ruling that *any* departure that affects randomness is a substantial violation because "a litigant need not show prejudice." 548 F.2d at 612. The magistrate confused "substantial violation" with a need to show prejudice, which is not a requirement for demonstrating a substantial violation of the JSSA.

Finally, the Clerk's continued practice of granting almost all deferral requests violated the randomness policy. As the court held in *Clay*, that deferral practice "introduced a non-random element into the jury selection process." 159 F.Supp.2d at 1367. That court's decision to excuse this continued conduct in *Carmichael* cannot be squared with either *Clay* or *Kennedy*, where the Court ruled that a "substantial" violation "[s]urely" will occur if a court's practices allowed jurors who were originally selected randomly "to opt in or opt out at will." *Kennedy*, 548 F.2d at 612. That is what occurred here, and why this, too, is a substantial violation of the JSSA.

c. Violation of Fair Cross-Section Policy

Neither the magistrate nor the district court addressed the violations in the context of their effect on the fair cross-section policy of the JSSA. R8-576; R10-612. The *Carmichael* court determined that a litigant needed to prove an absolute disparity of greater than 10% under a Sixth Amendment analysis as a prerequisite for a statutory violation – a "substantial violation" of this JSSA policy. *Carmichael* at 1307. The precedents relied on by the *Carmichael* court do not expressly hold that, and are at most non-binding *dicta*. *See United States v. Santa*, 236 F.3d 662, 672 n.14 (11th Cir. 2000) (recognizing no opinion can be considered as binding authority unless the case calls for its expression). Further, the legislative history of the JSSA and the earlier decisions construing it demonstrate that Congress intended the JSSA

to provide fair cross-section protection *beyond* that found in the Constitution. *See United States v. Fernandez*, 480 F.2d 726, 733 (2d Cir. 1973); *Anderson v. Casscles*, 531 F.2d 682, 685 n.1 (2d Cir. 1976). This Court should so hold here, especially since six of the admitted or proved violations herein had a direct, and harmful, effect on the level of representation of African-Americans on jury pools.

First, the Jury Plan's provision in ¶ 5 that the statutory duty to supplement found in § 1863(b) is not applicable in the district constitutes a substantial violation because it means that *no* supplementation would occur to ensure fair representation of any minority. The testimony shows that both the Clerk and the jury administrator had actual notice that African-Americans were not being represented in numbers near their presence in the community (R24-32; R26-408-12; JCH Exhibit 122), yet no supplementation occurred. The district court improperly concluded that this issue was waived because it was not specifically argued in the oral argument at the end of the evidentiary hearing. Due to the impending trial date, the magistrate could not await briefing, opting instead for oral argument. A review of the transcript shows that the agenda for that argument was directed by the magistrate's questions (R27-837-919), and the magistrate was certainly aware this issue was raised by the evidence and the statute, because the magistrate questioned the prosecutor on the duty to supplement. R27-900. The district court compounded its error by confounding the issue of the use

of voter registration lists as a starting point, with the issue of whether there is a duty to supplement when those lists do not produce a fair cross-section of the community. R10-612-6. Section 1863(b)(2) contains unambiguous language requiring supplementation when necessary. A substantial violation occurred because even though the Clerk and jury administrator knew the system was not representing African-Americans in proportion to their representation in the community, they did nothing to comply with the statute.

Second, the 15% violations were substantial because, as the *Carmichael* court recognized, the evidence "demonstrate[d] a direct link between the inclusion of too many deferred jurors and the underrepresentation of African-Americans in the pools." *Id.* at 1304.

Third, the failure of the computer to distribute the deferred jurors in the pools placed these jurors in a preferred position for selection, in violation of ¶ 14(d)(iii) of the Jury Plan. R26-593-604. Since these jurors were disproportionately white, this contributed to the further dilution of African-American jurors in the pools, which were already "whitened" by the over-inclusion of previously deferred jurors in violation of the 15% limit in ¶ 14(d)(ii).

Fourth, the deliberate violation of ¶ 16(e) of the Jury Plan had the same effect in a different way. It caused the previously deferred jurors to be resummoned for jury

pools at a faster rate than other jurors. R26-564-67. Since these jurors were disproportionately white, this violation contributed to the further dilution of African-Americans. *See Carmichael* at 1292, 1300.

Fifth, the Clerk's deferral violations were "substantial" because they too compromised the fair cross-section policy. As was proved here (R26-605-14), and the court found in *Carmichael*, if deferrals were simply cut in half, "the representation of African-Americans in the jury pools would increase by between 0.6% and 0.7%. *Id.* at 1292 (footnote omitted).

Sixth, the Clerk's use of outdated mailing addresses substantially reduced the representation of African-Americans, as the unrebutted testimony established. R26-620-29. That this problem could have been remedied for no more than $350 (R26-625), bespeaks an intentional disregard of fair representation requirements.

d. Combined Effect of the Violations

Scrushy also argued that the combined effect of these violations, coupled with the flawed software, the deficiencies in training jury administrators, the absence of any effort to verify that the computer was selecting jury pools in compliance with the JSSA and the Jury Plan, and particularly the over-inclusion of previously deferred jurors, all had the effect of decreasing the representation of African-Americans on the jury pools. The magistrate adopted wholesale the findings of the *Carmichael* court

in denying this basis for relief. R10-576-53-56. The magistrate, however, failed to note the *Carmichael* court's final conclusion: that there was a "*compelling* need for the Middle District of Alabama to examine, and undertake to remedy, administrative inaction and operational deficiencies…." *Carmichael* at 1315 (emphasis added).

If a "remedy" is "compelling[ly]" needed because the violations were systematically depressing the representation of African-Americans in the district's jury system, then they must be considered "substantial." That the violations occurred even *after* the *Clay* court required them to be corrected exposes a jury system that gives little more than lip service to the JSSA and its own Jury Plan. Absent action from this Court, one-third of the African-American community will continue to be deprived of the right to serve on juries, and defendants deprived of their statutory right to a jury selected at random from a fair cross-section of the community. Surely such a "flagrant" violation of the JSSA "is a proper subject of judicial sanctions." Gewin, J., Report to Committee on the Operation of the Jury System, Appendix to *Foster v. Sparks*, 506 F.2d 805, 828 (5th Cir. 1975).

e. The Jury Plan Applies to Grand Juries

The magistrate found that the reforms added to the Jury Plan as a result of *Clay* do not even apply to grand juries. Quoting language in ¶ 14(d)(ii) and (iii), which refers only to "civil or criminal petit jury," the magistrate concluded that the 15%

limit in ¶ 14(d)(ii) "contained in this court's plan by its clear and definite terms applies only to the creation of jury pools for selection of petit juries, not grand juries." R8-576-31. The same conclusion was applied to the Plan's requirement in ¶ 14(d)(iii) that previously deferred jurors not be given any preference over others in jury pools. R8-576-36. The magistrate concluded that, based on his statutory interpretation, there was no intention to extend protections to ensure fair representation of African-Americans to grand juries selected in the district, finding that the additions to the Jury Plan were "a remedial measure which arose in the context of problems relating to jury pools from which criminal petit juries were drawn, not grand juries." *Id*. at 12.

First, the "Declaration of Policy" found in ¶ 2 of the Jury Plan, along with the language in ¶ 14(d)(ii) relied upon by the magistrate demonstrates that the drafting of the Plan was less than precise when it used the term "jury" and that the absence or presence of the modifier "petit" or "grand" does not evidence an unambiguous intention to exclude grand juries from those provisions. In ¶ 2 of the Jury Plan, ¶ 2(a) speaks to the "right to petit juries" selected at random from a fair cross section of the community" and then goes on to state that "[p]etit juries for criminal matters and grand juries shall be selected proportionately by Division for the District at large." *Id*. The immediately succeeding subsections, ¶¶ 2(b) and 2(c), which address the Plan's policy relating to citizens' opportunity and obligation to serve and prohibition

against discrimination in selection for service, specifically reference both grand and petit jurors or juries. If the parallel language in the JSSA, 28 U.S.C. § 1861 is compared, it is apparent that the omission of a specific reference to grand juries from the first section of ¶ 2(a) was a mere oversight, as the Jury Plan's language (with the exception of the additional provision for district wide criminal petit juries and grand juries) in ¶¶ 2(a), (b) and (c) tracks the language in the JSSA, which *includes* grand juries in the policy relating to random selection from a fair cross-section. 28 U.S.C. §§ 1861-1862.

Surely the drafters of the Jury Plan did not, by this language, evidence an intention to omit the randomness and fair cross-section policies of the JSSA from the Jury Plan. Nor does the omission of grand juries from ¶ 14(d)(ii) evidence an intent to exclude grand juries from the protections of the 15% limitation, which limitation was a product of *Clay*'s finding that the inclusion of a discretionary number of preciously deferred jurors contributed to a "non-random selection" process that substantially violated the JSSA. *Clay*, at 1367, 1370.

Second, the Jury Plan clearly intends that grand juries be selected subject to the same limitations and procedures as district-wide petit juries because the Plan's provision relating to the selection of grand jurors, ¶ 17, does not specify any process for the selection of grand jurors that is different or apart from the selection of petit

jurors. Grand jurors are selected from the same jury wheel as petit jurors; that selection process is carried out by the same computer program; and there is a complete integration of both selection processes. Jury Administrator Myers confirmed this when asked if she did anything different when she created a pool for a grand jury as opposed to a pool that was going to be used to select a petit jury: "No, sir, not that I can recall. They are pulled District-wide just as the criminal juries." R25-386.

Additionally, under the magistrate's reasoning, the other sections of the Jury Plan would not apply to grand juries or persons selected for a grand jury pool, most notably the remaining provisions of ¶ 14(d), which address service by persons excused or deferred. While ¶ 14(c) clearly authorizes the Clerk to "excuse or defer any person summoned for grand or petit jury service when it is determined that service by the person would entail undue hardship or extreme inconvenience," the language of ¶ 14(d) speaks first in terms of "person summoned for jury service" and thereafter prescribes the process for the selection of persons who have been deferred only in terms of selection on "a civil or petit jury." Consistent with the magistrate's interpretation under ¶ 14(d)(i), there would be *no* provision that authorized the selection of *any* previously deferred jurors for any grand jury pool. This is in direct conflict with the magistrate's finding that the court could "use any number of deferred or excused jurors" on a grand jury "at the conclusion of a deferment so long as they

are selected on a pure random basis." R8-576-33. Moreover, under the magistrate's reasoning, the "plain language" of ¶ 14(d)(i) would mean that the inclusion of *any* previously deferred jurors in a grand jury pool would not be authorized by the Jury Plan. Since Scrushy's grand jury was selected from a jury pool which contained 17% previously deferred jurors (JCH Exhibit 37B), then an application of the magistrate's statutory interpretation would prove another substantial violation of the Jury Plan by the inclusion of *any* previously deferred jurors, let alone the number actually in the grand jury pool.

Third, absurd results would follow from implementing the magistrate's interpretation. *Dewsnup v. Timm*, 502 U.S. 410, 427, 112 S.Ct. 773 (1992) (if possible court should avoid construing statute in a way that produces absurd results). If, as the magistrate concluded, the Jury Plan does not put any limit on the number of previously deferred jurors on a grand jury (R8-576-33), then the jury administrator could use the computer function to include anywhere from 0% previously deferred jurors up to 100% previously deferred jurors, completely at her discretion. R25-265-66. After *Clay*, it was common knowledge that the deferral maintenance pool contains a significantly lower percentage of African-American jurors than does the jury wheel (JCH Exhibit 1 at 24; *Carmichael* at 1304), so the higher the percentage of jurors that are selected from the deferral maintenance pool, the lower the percentage of African-

Americans on the jury pool. Therefore, if the jury administrator wanted to discriminate against African-Americans in the selection of a grand jury pool, all she would need to do would be to choose 100% from the deferral maintenance pool. By doing this, which the magistrate believed could be authorized by the Jury Plan and consistent with the JSSA, the jury administrator could take the district back to a process that replicated the key procedure condemned in *Clay*. That would be a substantial violation of the JSSA in two ways: it would vitiate the fair cross-section policy, 28 U.S.C. § 1862 (which by its plain language applies to a citizen's "service as a grand or petit juror"), and would be contrary to the anti-discrimination provision in § 1863. *Clay*, and the provisions found in ¶ 14(d) of the Jury Plan were plainly intended to address the processes that resulted in the creation of jury pools that did not result in a random selection from a fair cross-section of the community. To the extent that the magistrate's parsing of the language of ¶ 14(d)(ii) excluded grand juries from the limitation adopted in the wake of *Clay*, the result would be both absurd and contrary to the JSSA and the Jury Plan.

For all these reasons, Scrushy submits that the court below erred in denying his statutory challenge, and this Court should grant Scrushy a new trial because his indictment was not returned by a grand jury which was selected in compliance with the JSSA and the Jury Plan.

B. THE SIXTH AMENDMENT VIOLATION

To establish a prima facie violation of the fair cross-section requirement of the Sixth Amendment, a defendant must show that: (1) the excluded group is "distinctive;" (2) the representation of that group in venires is not "fair and reasonable in relation to the numbers of such persons in the community;" and (3) the underrepresentation is the result of a "systematic" jury selection process. *United States v. Duren*, 439 U.S. 357, 364, 99 S.Ct. 664 (1979). The burden then shifts to the government to justify the infringement "by showing attainment of a fair cross-section to be incompatible with a significant state interest." *Id*. at 368. While agreeing that African-Americans were a "distinctive" group, the court erred in its analysis of the two remaining factors and finding that Scrushy did not establish a prima facie case. R8-576-56-73; R10-612-7-8.

1. Fair and Reasonable Representation

The Supreme Court has never decided how this element is measured. This Court uses the difference between the percentage of the distinctive group among the population eligible for jury service and the wheel or pools that are selected from it, *United States v. Pepe*, 747 F.2d 632, 649 (11th Cir. 1984), and has consistently

applied the "absolute disparity" test, requiring a showing of more that 10%. *United States v. Tuttle*, 729 F.2d 1325, 1327 (11th Cir. 1984)[20]

In regard to the 2001 jury wheel from which Scrushy's grand jury was drawn, the evidence from both the Government's expert and Scrushy's expert showed an absolute disparity of 10.478% as to African-Americans in all 92 pools from the 2001 jury wheel, as summarized in *Carmichael* at 1308-09 and quoted by the magistrate. R8-576-61-62. Fifty-three of 91[21] district-wide pools underrepresented African-Americans by an absolute disparity of greater than 10%. Twenty-seven of the last 44 jury pools (when the violations of the Jury Plan were taking place) had an absolute disparity of over 10%. (JCH Exhibit 14; JCH Exhibit 66 at Attachment X (Report of Government expert)). Only one jury pool out of 91 drawn from the 2001 wheel had more than 30% African-Americans in a community that is comprised of 30.466% African-Americans. *Id*. The Government's expert's computations, which were nearly identical to Scrushy's, showed that out of all 92 pools from the 2001 jury wheel, the

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[20] Scrushy disagrees with the singular reliance on the absolute disparity test, and submitted evidence in support of relative disparity as a more appropriate measure. R26-550-54. The Government's expert agreed. R27-807. Scrushy recognizes that a panel deciding this case is bound by this precedent. This issue is ripe for *en banc* review.

[21] Because the Clerk furnished different data sets to Scrushy's expert and the Government's expert, Scrushy's analysis did not include the first of the 92 district-wide juries. R26-536-47.

percentage of African-Americans was 19.988%, an absolute disparity of 10.478%. JCH Exhibit 66 at Attachment X; R27-821; JCH Exhibit 130.

In regard to the 2005 jury wheel, from which Scrushy's petit jury was drawn, Scrushy's expert's analysis, because of the problems associated with the procedures used in managing the jury wheel, expected the underrepresentation of African-Americans to increase as that jury wheel was used to select more pools. R26-549-50; JCH Exhibit 1 at 10. Scrushy's evidence, as supplemented, showed that, on the record on which the magistrate decided this matter, four of the last five district-wide jury pools contained less than 20% African-Americans, an absolute disparity in excess of 10%. This included the jury pool from which Scrushy's jury was selected, which contained only 19% African-Americans, an absolute disparity of 11.466%. R4-392, Exhibit B at ¶¶ 3-6; JCH Exhibit 15; JCH Exhibit 1 at Appendix D. The magistrate incorrectly looked at only one number, which showed that on February 15, 2005, the qualified jury wheel was comprised of 21.84% African-Americans, to wrongly conclude that Scrushy did not demonstrate an absolute disparity greater than 10%. R8-576-60-61. The magistrate ignored the fact that Scrushy's challenge was not limited to the composition of the jury wheel, but primarily as to the pools that the jury system selected, because those procedures significantly contributed to the underrepresentation of African-Americans in the jury pools selected, including

Scrushy's. *United States v. Holstick*, 875 F.Supp.795, 798 (M.D. Ala. 1994) (holding that where challenge is as to alleged systematic exclusion after the creation of the qualified wheel, the composition of the wheel is not necessarily informative and the focus should be on whether the jury venires reflect the overall percentage of the community).

The magistrate also relied on *Carmichael*'s analysis in which the court concluded that Carmichael failed to meet his burden of proof as to absolute disparity of greater than 10% because the expert witness failed to identify the race of 546 jurors (out of 13,097) from the 2001 jury wheel who failed to self-identify race on their jury questionnaires. R8-576-61-63. There are a number of flaws to this finding. First, unlike *Carmichael*, where the district court raised the issue at a hearing and allowed testimony and argument before entering its order, this issue was *never* raised in this jury challenge, by either the Government or the court. The first time this issue was raised was when the magistrate denied Scrushy's challenge. R8-576-61-63. Scrushy was denied any opportunity to litigate this issue and could only include it in his objections to the magistrate's recommendation (R8-580-30-32), which the district court ignored. R10-612. Before this, the issue had never been raised, argued or briefed, and the parties and their respective experts had consistently relied on data

sets provided by the Clerk, who maintained all jury records. No one, including the court, ever suggested a need to go outside these records.

Second, prior to the magistrate's wholesale adoption of the finding in *Carmichael* on this point, the parties and their experts all treated consistently the small number of jurors whose race was not known, by having a separate category of "missing" and including that category in all calculations. JCH Exhibit 1 at 6; JCH Exhibit 66 at Attachment X. This methodology is consistent with the methodology adopted by the A.O.C. for the JS-12 form which measures representativeness of jury wheels. JCH Exhibit 122.

Third, by placing the burden on a defendant challenging a jury system to identify the race of 546 jurors, the court was placing – without notice or any request by the opposing party to do so – an unprecedented burden on Scrushy to obtain *external* data, in addition to the data maintained by the Clerk. Neither the *Carmichael* court, nor the magistrate or district court in the instant case, cited a single case where such a burden has been put on a defendant in making what is only a prima facie showing of a Sixth Amendment violation.

Fourth, the *Carmichael* court suggested that this burden could be met by interviewing the missing jurors to determine their race. *Carmichael* at 1310. This procedure would require representatives of a criminal defendant to make intrusive

inquiries as to race of potential jurors *before* a case goes to trial, a procedure fraught with potential problems.

Fifth, by changing the rules as to how representation of African-Americans would be calculated after the evidentiary hearing and then only in the decision of the case on the merits – thereby depriving Scrushy of any opportunity to present evidence or argue the issue – the court here has denied Scrushy minimal due process.

Finally, what the court does here, by adopting the *Carmichael* holding, the concept of a prima facie showing is stood on its ear. A prima facie showing is just that: a preliminary showing that a party must make in order to continue to the next stage of the litigation of that issue. It should not be employed to determine the ultimate issue. *See Batson v. Kentucky*, 476 U.S. 79, 93-96, 106 S.Ct. 1712 (1986).

For all these reasons, this Court should find that the court below improperly, and unfairly, concluded that Scrushy failed to prove underrepresentation of African-Americans by more than 10% as to both the 2001 and 2005 jury wheels for the purposes of his prima facie showing under *Duren*'s second prong.

2. Systematic Exclusion

The magistrate also concluded that Scrushy did not meet the third *Duren* prong, that the underrepresentation was the result of a "systematic" jury selection process.

R8-576-71-73. Again, the magistrate adopted the analysis in *Carmichael*. *Id.* at 1314. R8-576-72.

The few cases that examine the "systematic" requirement do not support the *Carmichael* analysis. While that court correctly began with *Duren*, it pointed only to one part of the holding, ignoring the Supreme Court's reliance on *three* stages where systematic exclusion took place, including *the implementation of a procedure by the jury commissioners* where they presumed that women who failed to respond to the summons were claiming the statutory exemption. *Duren*, 439 U.S. at 366-67.

Duren defines systematic as "inherent in the particular jury selection process utilized." *Id*. at 366. *Accord Gibson v. Zant*, 705 F.2d 1543, 1549 (11th Cir. 1983); *United States v. Pion*, 25 F.3d 18, 23 (1st Cir. 1994); *United States v. Rioux*, 97 F.3d 648, 658 (2d Cir. 1996). Two cases out of the Second Circuit found systematic exclusion analogous to the violations in the instant case. In *United States v. Osorio*, 801 F.Supp. 966 (D.Conn 1992), the court found a violation of the fair cross-section requirement based on an *inadvertent* exclusion of residents of two cities due to a computer programming error. Since the exclusion was not "due to random chance," and was "the effect of implementing [the] jury plan," the exclusion was "systematic." *Id*. at 980. In *United States v. Jackman*, 46 F.3d 1240 (2d Cir. 1995), the court found a Sixth Amendment violation based on the clerk's failure correctly to implement the

changes required by *Osorio*, concluding that the clerk's mistakes caused the underrepresentation and therefore were "systematic" within the meaning of *Duren.* 46 F.3d at 1245, 1248. In the instant case, the underrepresentation flowed from the jury administrators' failure to correctly implement the changes in the Jury Plan mandated by *Clay*.

The violations that occurred here were plainly the product of a broken "system," not a random event. They were not a result of any external force. They were all accomplished by actions within the court, and within the control of the court. None were isolated or infrequent events. The use of outdated mailing addresses and the failure to supplement were unilateral decisions by the Clerk. The multiple violations of the Jury Plan as to deferred jurors were repeated acts by the jury administrators. All had a measurable impact on last 44 jury pools drawn from the 2001 jury wheel. Although there were no 15% violations in the pools drawn from the 2005 jury wheel as of the time the record in this case was completed, many of these problems carried over to the 2005 wheel, especially the continued use of outdated mailing addresses, failure to supplement, and the processing of the disproportionately white deferred jurors, which continued to cause the African-American community to be grossly underrepresented.

CONCLUSION

Richard Scrushy's convictions should be reversed. The Court should order him discharged on all counts because his motion for judgment of acquittal should have been granted since there was no evidence of an explicit *quid pro quo* as required by *McCormick v. United States*. Moreover, Count 4, the bribery count against Scrushy, was barred by the statute of limitations.

In the alternative, the convictions should be reversed and a new trial ordered for any or all of the following reasons: (1) the failure to give an explicit *quid pro quo* instruction as required by *McCormick*; (2) the extensive jury misconduct before and during deliberations; (3) the failure of the trial court to have disclosed its financial interests or recused itself; (4) the improper admission of prejudicial hearsay testimony; (5) the violations of the JSSA and/or the Sixth Amendment arising from the improperly constituted grand and petit juries.

Finally, if neither discharge or a new trial is ordered, a remand would be required to provide a full and fair hearing regarding the jury misconduct that occurred during the trial and the deliberations.

Respectfully submitted,

BRUCE S. ROGOW
Florida Bar No. 067999
CYNTHIA E. GUNTHER
Florida Bar No. 0554812
BRUCE S. ROGOW, P.A.
500 East Broward Blvd., Suite 1930
Fort Lauderdale, FL 33394
Ph: (954) 767-8909
and
JAMES K. JENKINS
Georgia Bar No. 390650
MALOY JENKINS PARKER
75 Fourteenth Street, NW, 25th FL
Atlanta, GA 30309
Ph: (404) 875-2700
and
ARTHUR W. LEACH
Georgia Bar No. 442025
75 Fourteenth Street, NW, 25th FL
Atlanta, GA 30309
Ph: (404) 786-6443
and
LESLIE V. MOORE
Alabama Bar No. 7306L74M
MOORE & ASSOCIATES
3501 Lorna Road, Suite 3
Hoover, AL 35216
Ph: (205) 403-9116

By: _____
BRUCE S. ROGOW

Counsel for Appellant - Defendant

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume and limitations and typeface requirements of Fed.R.App.P. 32(a)(7)(B) because this brief is typed in Times New Roman 14-pont proportionally spaced typeface and contains 26,422 words, as determined by Word Perfect 12. The Court has approved 30,000 words for this Brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to counsel listed below, by Federal Express this 2nd day of June, 2008:

LOUIS V. FRANKLIN, SR.
Acting United States Attorney
One Court Square
Montgomery, Alabama 36101-0197

VINCENT F. KILBORN, III
1810 Old Government Street
Mobile, Alabama 36606

JOHN-ALEX ROMANO
Appellate Section, Criminal Division
Department of Justice
950 Pennsylvania Ave., NW
Room 1264
Washington, DC 20530

_____
BRUCE ROGOW