No. 07-13163-B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

DON EUGENE SIEGELMAN & RICHARD M. SCRUSHY,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

CORRECTED BRIEF FOR THE UNITED STATES

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United States v. Don E. Siegelman & Richard M. Scrushy
Case No. 07-13163-B

CERTIFICATE OF INTERESTED PERSONS

In compliance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1 and 26.1-3, the undersigned hereby certifies that, in addition to those individuals and entities listed in the briefs of appellants and amicus curiae, the following persons and/or entities have an interest in the outcome of this case:

1. Stemler, Patty Merkamp
2. UBS AG (UBS)

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STATEMENT REGARDING ORAL ARGUMENT

By order dated August 2, 2007, the Court directed the Clerk to schedule this case for oral argument once briefing has been completed.

JURISDICTION

This case involves appeals from final judgments of conviction in a criminal case. The district court (Fuller, C.J.) had jurisdiction under 18 U.S.C. § 3231, and entered an amended judgment against defendant Don Siegelman (R10-634) on July 10, 2007, and entered judgment against defendant Richard Scrushy (R10-627) on July 3, 2007. Both defendants timely appealed those judgments. R10-637 (Siegelman notice filed July 23, 2007); R10-635 (Scrushy notice filed July 11, 2007); *see* Fed. R. App. P. 4(b)(1)(A)(i). This Court has jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

STATEMENT OF THE ISSUES

I. Whether the jury was required to find an explicit *quid pro quo* to convict defendants of bribery, conspiracy, and honest services fraud, and, if so, whether the court's instructions were reversible error.

II. Whether the evidence was sufficient to satisfy any *quid pro quo* requirement, and whether it was sufficient to support Siegelman's fraud convictions on Counts 8 and 9.

III. Whether defendants waived their claim that the statute of limitations bars their bribery convictions, and, if not, whether their claim satisfies the plain-error test.

IV. Whether the evidence was sufficient to prove that Siegelman obstructed justice.

V. Whether the admission of a coconspirator statement under Fed. R. Evid. 801(d)(2)(E) was reversible plain error.

VI. Whether the district court abused its discretion in denying defendants' joint motion for a new trial and motions for reconsideration based on alleged juror misconduct.

VII. Whether the denial of Scrushy's post-trial recusal motion was an abuse of discretion.

VIII. Whether the Middle District of Alabama's jury selection system substantially violated the Jury Selection and Service Act, 28 U.S.C. §§ 1861-71, or violated the Sixth Amendment.

IX. Whether the district court abused its discretion in granting an upward departure for Siegelman on the ground that his criminal conduct was part of a pervasive and systematic corruption of government; if so, whether that error was harmless.

STATEMENT OF THE CASE

I. Course of the Proceedings and Disposition Below

A Second Superseding Indictment returned on December 12, 2005, charged

Siegelman with racketeering conspiracy, in violation of 18 U.S.C. § 1962(d) (Count 1); racketeering, in violation of 18 U.S.C. § 1962(c) (Count 2); federal funds bribery, in violation of 18 U.S.C. § 666(a)(1)(B) (Count 3); conspiracy to commit honest services mail fraud, in violation of 18 U.S.C. § 371 (Count 5); honest services mail fraud, in violation of 18 U.S.C. § 1341, 1346 (Counts 6-12, 18-33); honest services wire fraud, in violation of 18 U.S.C. § 1343, 1346 (Counts 13-14); obstructing justice, in violation of 18 U.S.C. § 1512(b)(3) (Counts 16-17); and extortion, in violation of 18 U.S.C. § 1951 (Count 34). R1-61. The indictment charged Scrushy with federal funds bribery, in violation of 18 U.S.C. § 666(a)(2) (Count 4); conspiracy to commit honest services mail fraud, in violation of 18 U.S.C. § 371 (Count 5); and honest services mail fraud, in violation of 18 U.S.C. § 1341, 1346 (Counts 6-9). *Id.* at 30-36.[1] The indictment also charged two co-defendants, Paul Hamrick and Gary "Mack" Roberts, with various offenses. *Id.* at 1-29, 36-39, 41-43.

Trial on the Second Superseding Indictment commenced on May 1, 2006. R35-670. On June 29, 2006, the jury convicted Scrushy on all six counts against him, and convicted Siegelman on seven counts: bribery (Count 3), conspiring to

[1] The Second Superseding Indictment originally charged Siegelman and Scrushy in both bribery counts (Counts 3 and 4), but, prior to verdict, the district court ruled that the counts were multiplicitous and ordered the government to elect to proceed on only one bribery count as to each defendant. R2-254; R60-6416-17.

commit honest services fraud (Count 5), honest services mail fraud (Count 6-9), and obstructing justice (Count 17). R4-437, 438. The jury acquitted Siegelman on the remaining counts, and acquitted Hamrick and Roberts on all counts against them. R4-437; R7-7869-70.

On June 28, 2007, at the conclusion of a three-day sentencing hearing, the district court sentenced Siegelman to 88 months of imprisonment, to be followed by three years of supervised release, and ordered him to pay a $50,000 fine. R10-634. The court sentenced Scrushy to 82 months of imprisonment, to be followed by three years of supervised release, and ordered him to pay a $150,000 fine and $267,000 in restitution. R10-627.

Siegelman is released on bond. Scrushy is incarcerated.

II. Statement of Facts

Siegelman is the former Governor and Lieutenant Governor of Alabama. R36-389, 412. Scrushy is the founder and former CEO of HealthSouth Corporation, a major hospital corporation with operations throughout Alabama. R37-715; R41-1767. The defendants' bribery, conspiracy, and fraud convictions are based on their making, executing, and concealing a corrupt agreement, reached after Siegelman was elected Governor in November 1998, whereby Siegelman gave Scrushy membership on, representation at, and influence over the Certificate

of Need Review Board ("CON" Board) in return for a $500,000 bribe, which Siegelman used to pay down a state lottery campaign debt for which he was personally liable as a guarantor. Siegelman's obstruction of justice conviction is based on his efforts to thwart the federal investigation into his corrupt activities as Governor and Lieutenant Governor.

A. The CON Board Scheme

1. Siegelman Is Elected On A Platform That Advocates A State Lottery; Scrushy and HealthSouth Back The Losing Candidate.

Siegelman was elected Governor in 1998 on a campaign platform that advocated the establishment of a state lottery to help fund education. R38-907. Siegelman's top priority upon becoming Governor was getting the lottery initiative passed. R39-1067. In that vein, the Alabama Education Lottery Foundation (AELF) was created in early 1999 to raise money for the lottery campaign. R39-1067-68; R40-1225-27. The AELF's fundraising director, Darrin Cline, testified that Siegelman "called the shots" on the lottery campaign. R36-513; R40-1225-30, 1388-89. The lottery initiative was eventually defeated in a statewide referendum election on October 12, 1999. R40-1237; R44-2554.

Scrushy and HealthSouth supported Siegelman's opponent in the 1998 gubernatorial election, incumbent Governor Fob James. R42-1860. HealthSouth even held a fundraiser for James's re-election campaign in 1998, raising

approximately $325,000. R43-2051.

2. Governor Siegelman Has Sole Authority To Appoint Members To The CON Board, A Position Of Importance To Scrushy And HealthSouth.

One of Siegelman's responsibilities upon becoming Governor was to make appointments to the CON Board – an arm of the State Health Planning and Development Agency (SHPDA). R35-202, 206-12; R40-1404, 1408-09. SHPDA worked to prevent the unnecessary duplication of healthcare services in Alabama through a process that required healthcare providers to apply for and obtain a certificate of a healthcare need before opening a new facility or offering a special healthcare service. R35-202. The CON Board, a quasi-adjudicatory body, decided which certificate applications would be approved for an announced healthcare need, sometimes choosing between competing applications or ruling on objections filed by an applicant's competitor. *Id.* at 202-04, 231. The Board consisted of nine members who were appointed by, and served at the complete discretion of, the Governor. *Id.* at 205.

Scrushy had served on the CON Board under previous governors, including Governor James. R36-298. Mike Martin, former CFO of HealthSouth, testified that having influence over the CON Board was important to Scrushy and HealthSouth because it determined the number of healthcare facilities in the state and affected HealthSouth's competitors. R41-1760, 1767. Likewise, the

HealthSouth lawyer responsible for CON Board matters, Loree Skelton, testified that the CON Board was important to HealthSouth because it could affect the company's business and its ability to develop and grow. R42-1993-94; *see also* R64-7055, 7066-67 (former CEO of Alabama Power Company testifying on behalf of Scrushy that CON Board was very important to healthcare companies). After the 1998 election, Skelton expressed concern to HealthSouth's outside lobbyist, Eric Hanson, that HealthSouth would not have a voice in the new administration because HealthSouth had openly supported Siegelman's opponent. R42-2001-02. Hanson, who had worked as a lobbyist for HealthSouth for over ten years, R41-1778-79, and had been friends with Siegelman "for some 20-odd years," allayed Skelton's concerns. R42-2002.

3. Siegelman Appoints Scrushy To The CON Board In Exchange For A $500,000 Bribe.

a. Siegelman Solicits The $500,000 Bribe Via Hanson. From the time Siegelman was campaigning for Lieutenant Governor through his term as Governor, Nick Bailey was Siegelman's constant traveling companion and closest confidential assistant. R36-383-84, 390, 420; R40-1230-31. Siegelman even trusted Bailey with his personal financial matters. R37-768-69. Cline, Siegelman's top fundraiser, testified that he "always knew that whatever Nick told me that the Governor wanted was what the Governor said," and that "if the

Governor wanted to get something done, then Nick . . . blindly went ahead and did it." R40-1249-51.

Bailey testified that he was present at a meeting between Hanson and Governor Siegelman in 1999, sometime before Siegelman made appointments to the CON Board on July 26, 1999. R36-496-97; R37-546. Siegelman told Hanson that, because Scrushy had contributed at least $350,000 to the James campaign, Scrushy needed to do at least $500,000 in order to make it right for the Siegelman campaign. R36-500-02. Siegelman was referring to the lottery campaign, and Hanson was to relay their conversation to Scrushy. *Id.* In another conversation, Hanson told Bailey that Scrushy wanted control of the CON Board from the Governor. R37-545-47. Bailey testified that "[Hanson] made it clear that if Mr. Scrushy gave the $500,000 to the lottery campaign that we could not let him down" with respect to the CON Board seat. R39-1152. Bailey "reminded the Governor periodically of the conversations that [Bailey] had with Eric Hanson and the conversations that the Governor had with Eric Hanson about what Mr. Scrushy wanted for his contributions, and that was the CON Board." R36-519-20.

b. Scrushy Extorts The First Bribe Installment From HealthSouth's Investment Banker. After Siegelman was elected Governor, Scrushy told HealthSouth CFO Martin that, to "have some influence or a spot on the CON Board," they had to help Siegelman raise money for the lottery campaign. R41-

1766-67. Scrushy said that, if they did so, "[they] would be assured a seat on the CON Board." R42-1802. Martin testified: "we were making a contribution . . . in exchange for a spot on the CON Board." *Id.* at 1800. Scrushy, however, wanted to conceal the fact that HealthSouth, which had not supported the lottery, was the source of the contribution. R41-1768, 1775-76. Accordingly, he told Martin to ask HealthSouth's investment banker, William McGahan of UBS, to make the contribution. *Id.* at 1619-20, 1768-69.

Martin was uncomfortable asking UBS to support something that HealthSouth did not want to do publicly and was concerned about the legality of the transaction, but he followed Scrushy's directive. R41-1775-76; *see also* R42-1872 (Martin: "I . . . thought the thing stunk, it reeked, it was unethical and immoral; and I thought it could be illegal.").[2] Martin called McGahan in late June or early July of 1999 and asked UBS to make a large contribution, in excess of $250,000, to the Alabama state lottery campaign. R41-1622-23, 1771. As an investment banker, McGahan had previously been asked to donate to causes, but "[t]ypically the amounts were in the ranges of five to ten or even 20 to 25,000 on the highest end." *Id.* at 1623. Martin told McGahan that the request was coming

[2] The Alabama Fair Campaign Practices Act prohibits an individual from concealing the source of a campaign contribution by having an entity or person make the contribution in its or his own name. R45-2664-65; *see also* Ala. Code § 17-5-15.

from Scrushy himself and that McGahan would be receiving a call from Scrushy. *Id.* at 1623, 1771. In a later call, Scrushy told McGahan that he wanted UBS to "step up and support" the lottery cause in Alabama. *Id.* at 1624. According to Martin, Scrushy "basically told [McGahan] that . . . his team and his boss[] owed it to us [HealthSouth]. We'd given them all of our business." *Id.* at 1772.

McGahan did not want to make the donation and hoped that the matter would "go away." R41-1625. It didn't. Over the next week to two weeks, Martin called McGahan at least once a day to ask him about the status of UBS's donation, and about "when [McGahan] was going to get the donation done." *Id.* at 1626. In escalating tone and rhetoric, Martin said that Scrushy was going to fire UBS if it did not make the contribution. *Id.* at 1773. Martin yelled and used profanity, even telling McGahan that he "would be fucked if he didn't make this contribution." *Id.* at 1773-74; *accord id.* at 1626. The pressure was coming from Scrushy. *Id.* at 1773 (Martin: "I wanted Mr. McGahan to understand the severity of this and the seriousness of it, because Mr. Scrushy was definitely going to fire them . . . if they did not make the contribution.").

During the same period, Hanson, acting on HealthSouth's behalf, called McGahan several times about UBS making the payment to the lottery campaign. R41-1627-30. McGahan told Hanson that it would be difficult for UBS to pay the requested amount because its size was "out of the norm." *Id.* at 1647. Fear of

losing HealthSouth's business, however, spurred McGahan to work with Hanson to meet Scrushy's demand. *Id.* at 1659-61. Hanson's lobbying firm, U.S. Strategies, specialized in healthcare issues. *Id.* at 1627. Hanson and McGahan decided that Hanson would approach a mutual client of U.S. Strategies and UBS – Integrated Health Services (IHS) of Maryland – and ask IHS to make the donation to the lottery campaign in exchange for UBS reducing an outstanding fee that IHS owed it. *Id.* at 1647-48, 1774-75. IHS agreed to the arrangement, and subsequently donated $250,000 in exchange for a reduction of $267,000 in the fee it owed UBS. *Id.* at 1647-49, 1668, 1673; R42-1978-79.

IHS's purported donation was in the form of a $250,000 check dated July 19, 1999, made payable from itself to the AELF (the "IHS check"). R36-509-11; R37-737; Gov't Trial Ex. ("GX") 21. Scrushy told Martin that it was important that he, Scrushy, hand deliver the IHS check to Siegelman, reminding Martin "on a number of occasions that he personally had to have the check and he personally had to give it to Governor Siegelman." R41-1776. Martin instructed HealthSouth Vice-President Leif Murphy to coordinate with Taylor Pickett, CFO of IHS, regarding the delivery of the IHS check. *Id.* at 1736-39. Pickett had IHS issue the IHS check via a "hot check," indicating the speed with which it was produced, R42-1962-63, and then had it sent to HealthSouth via overnight courier, where it arrived on or about July 19th. R41-1738-43. Murphy personally gave the check

to Martin who, in turn, personally gave it to Scrushy. *Id.* at 1778. Martin testified that the arrival of the check was time-sensitive because Scrushy was to hand deliver it to Siegelman at a meeting already scheduled on Scrushy's calender. *Id.* at 1777-78.

c. Scrushy Gives Siegelman The IHS Check. Scrushy met with Siegelman on one or more occasions before July 26, 1999 – the date Siegelman appointed Scrushy to the CON Board. *See* R36-504; R37-720-21. Scrushy, Skelton, and Jabo Waggoner, a state senator and HealthSouth consultant in 1999, flew to Montgomery aboard a HealthSouth helicopter from Birmingham on July 14, 1999, for a meeting with Siegelman in the Governor's Office. R41-1916, 1919. After the group made small talk in the outer area of the Governor's office, Scrushy and Siegelman met privately for 15-20 minutes. *Id.* at 1920-21; *see also id.* at 1936-39 (Scrushy cross-examination of Waggoner suggesting defendants also met on June 29, 1999); *id.* at 2002-04 (Skelton testifying about trip to Montgomery in summer 1999 for meeting between defendants).

In or around July 1999, Bailey also saw Scrushy meeting with Siegelman alone in Siegelman's office. R37-732-36; R39-1112. At some point after that meeting (but perhaps not the same day), in the area of the Governor's office, Siegelman showed Bailey the IHS check, and said that the check was from Scrushy and that Scrushy was "halfway there." R36-504-12. Bailey asked "what

in the world is he [Scrushy] going to want for that?" R36-507. Siegelman replied, "the CON Board." *Id.* Bailey then asked, "I wouldn't think that would be a problem, would it?"; Siegelman responded, "I wouldn't think so." *Id.*; *see also* p. 70 n.18, *infra* (discussing date of Siegelman-Bailey conversation).

d. Siegelman Appoints Scrushy To The CON Board. Siegelman appointed Scrushy to the CON Board on July 26, 1999 – one week after the date on the IHS check. R36-517-18; GX 6B. Seven other Board members were appointed the same day. R35-213. The night before the new CON Board's orientation meeting, Bailey, at Siegelman's direction, contacted Margie Sellers, the chair-designee of the CON Board, and told her that Siegelman wanted Scrushy to be vice-chair of the Board. R36-518-20; R41-1538-39. The vice-chair acted as chair in the chairperson's absence. R41-1569. Sellers had another person in mind for vice-chair, but informed the CON Board of the Governor's wishes. *Id.* at 1558-59. The Board elected Scrushy vice-chair. *Id.* at 1540-41. Bailey testified that Siegelman made Scrushy vice-chair "[b]ecause [Scrushy] asked for it." R36-519.

Before the IHS check was delivered to Scrushy, Martin had a conversation with Hanson in which Hanson said that it was "absurd" that IHS was going to make a $250,000 contribution to the lottery campaign because it had only one facility in Alabama; Hanson found it humorous. R41-1780; *see also* R40-1374 (lottery fundraising director testifying that IHS did not have a $250,000 interest in

helping Alabama). At an annual HealthSouth retreat in the fall of 1999, Hanson bragged about the fact that he was able to get HealthSouth a seat on the CON Board with the help of the IHS check. R41-1781-82.

e. Scrushy Pays the Second $250,000 Bribe Installment. On or around May 18, 2000, Siegelman and Bailey traveled to HealthSouth's headquarters in Birmingham, where Siegelman met privately with Scrushy in Scrushy's office. R37-537-38, 552; R39-1117-19. At that meeting, Scrushy gave Siegelman a check issued by HealthSouth for $250,000; the check was payable to the Alabama Education Foundation (AEF) – the successor to the AELF – from HealthSouth, bore Scrushy's signature, and was dated May 18, 2000 (the "HealthSouth check"). R37-538, 549-53, 742; GX 27B.

f. The Bribes Were Not Disclosed To HealthSouth Lawyer Skelton. In addition to her CON Board responsibilities, Skelton was the primary coordinator of political contributions within HealthSouth. R43-2223. Skelton testified that, in her 13 years of employment with HealthSouth, she had never participated in a $250,000 contribution. *Id.* at 2221-22. Even though she regularly traveled to CON Board meetings with Scrushy, R42-2010, and regularly worked with Hanson to coordinate political contributions for HealthSouth, *id.* at 1994-95, she only learned about the IHS and HealthSouth checks from reading a newspaper article well after the fact. R43-2089-90.

4. Siegelman Conceals Deposit Of The IHS Check From His Own Fundraising Director.

The AELF was subject to reporting requirements under the Alabama Fair Campaign Practices Act because it advocated a position (*i.e.*, establishment of a lottery) in a referendum. R40-1229, 1281. Accordingly, the AELF kept records of contributions it received. *Id.* at 1228.

Cline directed the AELF's fundraising efforts in 1999, having previously overseen the fundraising operation for Siegelman's 1998 gubernatorial campaign. R40-1222-27. As he did with each of his clients, Cline had instructed Siegelman about the laws governing political contributions, including those prohibiting the exchange of contributions for official action. *Id.* at 1269-70, 1306, 1386-88. Much of the AELF's fundraising was done by telephone. *Id.* at 1268. Cline regularly sat with Siegelman when Siegelman called prospective contributors to the campaign, *id.* at 1223, 1230, and got to know Siegelman well, *id.* at 1250. Cline was not present when Scrushy gave Siegelman the IHS or HealthSouth checks. *Id.* at 1231-32, 1253.

In July 1999, Siegelman and Bailey gave Cline the IHS check, and told him that it was from Richard Scrushy and that Scrushy had raised that money for the lottery. R40-1232, 1235. Cline called the IHS check a "colossal" amount, *id.* at 1368 – it was the largest check ever received by the AELF, which raised a total of

$5-$6 million, *id.* at 1234, 1237. Cline told Siegelman that he should be concerned about accepting that amount of money from one person. *Id.* at 1368, 1376. Siegelman's instructions were to hold the check until they determined what to do with it. R36-512; R40-1233, 1290, 1368.

Cline held the IHS check for six to eight weeks without logging it in AELF records; he kept the check in a lock box in his apartment. R40-1235-36. Siegelman and Bailey told Cline that they were going to send the check back to IHS, and Bailey retrieved it from Cline. *Id.* at 1235-37, 1385. Unbeknownst to Cline, Siegelman used the check. At Siegelman's direction, on November 5, 1999 (about three weeks after the defeat of the lottery referendum), Bailey opened a new checking account in the AEF's name at First Commercial Bank in Birmingham. R36-522; R44-2331. Bailey made an initial deposit of $275,000: the $250,000 IHS check and a $25,000 check payable to the AEF from another company. R44-2333-38. Cline had "no clue" that the IHS check was ever deposited. R40-1380.

Meanwhile, sometime between September and the middle of November 1999, HealthSouth investment banker McGahan had a conversation with Scrushy about the still-uncashed IHS check. R41-1669-70. At that time, IHS was facing possible bankruptcy due, in part, to problems in the nursing home industry. *Id.* at 1669-70. McGahan told Scrushy that he had been smart in previously selling HealthSouth's nursing homes to IHS because it looked like IHS might go under.

Id. at 1670. In a reference to the $250,000 payment to the AELF, Scrushy said "can you believe that they haven't cashed that check yet?" *Id.* at 1670. McGahan and Scrushy talked about when IHS would declare bankruptcy – possibly the end of the year – and, at the end of the call, Scrushy said, "well, I've got to go get on that" (*i.e.*, the IHS check). *Id.* at 1670-71.

5. The $500,000 Bribe Is Used To Pay Down A Campaign Loan For Which Siegelman Is Personally Liable As A Guarantor.

On March 9, 2000 – after the lottery initiative had been defeated but before Siegelman received the second $250,000 payment from Scrushy – the AEF took out a promissory note for $730,789.29 from the First Commercial Bank. R44-2357-59. Nick Bailey signed the note as the AEF's executive director. *Id.* at 2359. Repayment of the note was guaranteed by two individuals: Siegelman and one Mervyn Nabors. *Id.* at 2361. Siegelman signed an unconditional guarantee of repayment, which stated that if the AEF did not repay the note, Siegelman would repay it. *Id.* at 2361-62. An unconditional guarantee makes a person personally liable for the debt, and the bank would have looked to Siegelman and Nabors for repayment if the AEF could not satisfy the note. *Id.* at 2362.

The proceeds of the AEF's loan went directly to pay off an existing debt of the Alabama Democratic Party ("ADP") at Colonial Bank, R44-2363-67, 2402-03,

which the ADP had incurred for get-out-the-vote expenses during the lottery campaign, *id.* at 2534-37.

Both $250,000 checks given by Scrushy to Siegelman were used to pay down the AEF loan for which Siegelman was unconditionally liable as a guarantor. R44-2383. At the time of the March 9, 2000 loan, the AEF had over $447,000 in its checking account at First Commercial Bank, $250,000 of which came from the IHS check deposited on November 5, 1999. *Id.* at 2333-53, 2363-64, 2374. On March 13, 2000, $440,000 was debited from the AEF's checking account and used to pay down AEF's loan at First Commercial Bank, leaving a loan balance of about $290,000. *Id.* at 2374-77. On May 23, 2000, the $250,000 HealthSouth check was applied directly against the AEF's loan balance. *Id.* at 2379-83. The approximate $40,000 balance was paid off on January 31, 2001. *Id.* at 2382-85.

6. Siegelman's Concealment Of The Purported Campaign Contributions Causes Them To Be Disclosed Late, In Violation of State Law.

The AEF (and its predecessor, the AELF) was required to timely disclose contributions received and expenditures made in statements filed with the Alabama Secretary of State. R44-2489-91. The AEF pre-election disclosure statements for the period including July 19, 1999, however, did not disclose the IHS check for $250,000. *See id.* at 2492-99 (testimony about the "45 day" and "10

to 5 day" AEF reporting statements filed August 30 and October 7, 1999, respectively). Nor was the IHS check disclosed, as required by the FCPA, in the AEF's annual report for 1999 that was filed by January 31, 2000. *Id.* at 2499-2500, 2519.[3]

The AEF's annual report for 1999 also served as the AEF's termination report. R44-2522. The AEF filed no other disclosure statements in 2000, even though it had not previously disclosed the IHS check, received the HealthSouth check, and used both checks to pay down the ADP's debt in 2000. *Id.* at 2523-24. Nor did the AEF file any disclosure statements in 2001. *Id.* at 2525. The accountant administratively responsible for the AEF's disclosures, David Kassouf, relied on Siegelman for access to information about the AEF's receipts and expenditures; for example, Kassouf only obtained a copy of records related to the final payoff of the AEF's loan after Siegelman authorized First Commercial Bank to release them. R40-1387-88; R44-2384-91.

On July 26, 2002, the AEF filed an amended annual report for 1999 and an annual report for 2000. R44-2525, 2539. The amended 1999 report disclosed the IHS check as having been received on November 5, 1999, and as coming from

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[3] The annual report for 1999 also failed to disclose other contributions to the AEF (or its predecessor), which ranged from $5,000 to $25,000, R44-2519-20, and were deposited into the checking account for the AEF at First Commercial Bank, *id.* at 2330-55.

IHS. *Id.* at 2543. The 2000 report (originally due by January 31, 2001) disclosed receipt of the HealthSouth check. *Id.* at 2539. The 2000 report also disclosed for the first time that, on March 10, 2000, the AEF made a referendum-related payment of $730,789.29 to the Alabama Democratic Executive Committee. *Id.* at 2534-37.

The AEF's disclosures of the IHS and HealthSouth checks on July 26, 2002, were 30 and 18 months late, respectively. R44-2545-47. The disclosures came only after articles appeared in the *Mobile Press-Register* questioning whether the financial dealings between the ADP and the AEF had been properly reported, *see* R45-2694-99, and only after the Secretary of State's Office wrote a letter to the state Attorney General's Office about the AEF's non-disclosure of the payoff of the ADP's campaign loan, *see id.* at 2713-14; GX261.

Charles Grainger, then-general counsel to the Secretary of State, testified that, after the news articles began to appear, ADP Chairman Redding Pitt told him that the ADP would be amending some of its previous campaign reports. R45-2698-2700. Knowing that those amendments would require the AEF to make reconciling amendments to its own disclosures, Granger contacted Ted Hosp, deputy legal advisor to Governor Siegelman, and made him aware of the issue; Hosp said he would relay the information to the appropriate people. *Id.* at 2700-01. After following up unsuccessfully with Hosp, Granger wrote a letter on July

17, 2002, to Richard Allen, Alabama Deputy Attorney General, regarding the AEF's failure to make a reconciliation filing. *Id.* at 2696, 2702; GX 261. Nine days later, the AEF filed the amended 1999 report and 2000 report; the reports were signed by Robert Segall in his capacity as AEF attorney. R44-2559-67. Segall was also Siegelman's attorney. R36-483.

7. Scrushy Uses The CON Board To Further HealthSouth's Interests.

Scrushy used the CON Board seat obtained from Siegelman to further HealthSouth's interests. For example, even though CON Board rules prohibited ex parte communications between members about pending matters, Scrushy once called Chairwoman Sellers the night before a meeting in which the Board was to consider an application for an MRI machine filed by HealthSouth competitor Brookwood Hospital. R41-1542-46, 1589; R36-332-33, 339. During their phone conversation, Scrushy told Sellers that he was troubled by the project, pointed out discrepancies in Brookwood's application, and asked her to look at it carefully. R42-1542, 1562-63. The next day, the Board denied Brookwood's application, though Scrushy recused himself from the matter. *Id.* at 1558, 1563.

Scrushy resigned from his CON Board seat in a letter to Siegelman dated January 17, 2001. R35-220-21; GX11. By letter dated the next day, Siegelman appointed HealthSouth vice-president Thom Carman to serve out the remainder of Scrushy's term on the CON Board, and reappointed Carman to that seat in July

2001 when Scrushy's initial term expired. R35-221, 223-26; R36-304; GX12; GX13.

Tim Adams, an old friend of Siegelman's, was appointed by Siegelman to the CON Board on July 26, 1999, and served during Siegelman's entire gubernatorial administration. R35-213; R36-524; R42-2010. Skelton testified that, on Scrushy's instructions, she did various things to keep Adams happy so that Adams would not use his CON Board seat to the detriment of HealthSouth. R42-2035-36; *see also id.* at 2034-35 (in response to Skelton's concerns about doing things for Adams, Scrushy said "just basically pacify [Adams] and keep him happy").

In November 2001, while Adams was serving on the CON Board, HealthSouth hired him to prepare a certificate of need application for a mobile PET scanner – a piece of diagnostic equipment primarily designed to show hot spots of cancer. R36-316-17, 331; R42-2017-20. HealthSouth paid Adams $8,000 in February 2002 for preparing the application. R42-2022. Adams, however, had never written a CON Board application, and his work was substandard. *Id.* at 2020, 2023.

On July 17, 2002, the CON Board was to consider HealthSouth's application for a different project – the construction of a $16.7 million rehabilitation hospital in Phenix City. *Id.* at 2025; R36-247. Under Board rules,

five members had to be present for the Board to conduct business. R36-245. If a member recused himself from an application, he did not participate in or count toward the quorum for that matter, but if the member abstained from voting, he remained part of the deliberations and counted toward the quorum. R36-253-56, 305-06. Prior to the July 17th meeting, Adams told Skelton that he did not think he would be able to attend; Skelton said that they would not have a quorum for the meeting, in which case HealthSouth's Phenix City application would have to be heard at the next Board meeting. R42-2024, 2027-28. Skelton and Adams reached a compromise. Skelton agreed to pay Adams $3,000 for additional work he apparently had done on the PET scanner application; Adams then agreed to attend the July CON Board meeting. *Id.* at 2029-30; *see also* R43- 2212 (Skelton acknowledging her grand jury testimony that Adams was paid to secure his presence at July 2002 CON Board meeting and to keep him happy). Scrushy was aware that Adams was paid for working on the PET scanner application. R43-2079, 2082; *see also id.* at 2212-15.

Five other Board members, including Carman, attended the July 17, 2002 meeting. R36-245. Because Carman recused himself from the Phenix City matter, he did not count toward the quorum. *Id.* at 255-56. Adams, however, only abstained from voting, and, therefore, his presence ensured that the Board had a quorum and could vote on the Phenix City project. *Id.* at 256, 260. Adams did not

disclose that he was then being paid by HealthSouth to work on another CON Board application. *Id.* at 258. The Board approved HealthSouth's Phenix City project at the July 2002 meeting. R35-233.

HealthSouth's application for the PET scanner was considered and approved by the CON Board on December 18, 2002. R36-250-52. Carman recused himself from the PET scanner matter, which left five members, including Adams (who only abstained from the voting), to establish a quorum. *Id.* at 341. Adams did not disclose that HealthSouth had paid him to work on the PET scanner application. *Id.* at 258.[4]

B. Siegelman Obstructs Justice After Learning Of The Federal Corruption Investigation.

1. Siegelman's Pay-For-Play Agreement With Young, Bailey, And Hamrick.

While serving as Lieutenant Governor and Governor, Siegelman had an inner circle of associates consisting of Bailey, Paul Hamrick (his chief of staff), and one Lanny Young, a friend with various business dealings whom Siegelman first met through Hamrick during his 1994 campaign for Lieutenant Governor. *See, e.g.*, R36-385, 387, 391, 405, 420; R45-2738, 2767; R46-2891. Bailey and

[4] The mailings charged in Counts 6-9 were the letters appointing and reappointing Carman to the CON Board, and the CON Board orders (mailed to HealthSouth) approving the Phenix City and PET scanner projects. R1-61-36.

Young testified that, for many years, the four had an absolute, pay-for-play agreement whereby Young would provide the others with money, campaign contributions, and other benefits in return for official action, as needed, that benefitted Young's business interests. *See, e.g.*, R36-402, 404-06, 412; R45-2753-54, 2769-73; *see also* R37-764 (Bailey: "I don't believe there's any misunderstanding between me and the Governor and Paul and Lanny that when Lanny wanted something, we'd do everything humanly possible to produce, and vice versa.").[5]

For example, during Siegelman's 1998 gubernatorial campaign, Young contributed hundreds of thousands of dollars in the form of campaign paraphernalia, rides aboard his airplane, payment of half of Bailey's campaign salary, and other things of value. R45-2781-84, 2792-2800, 2818-45; R46-2892. After Siegelman became Governor, in July 1999, Young was working under a contract with Waste Management whereby he would receive $500,000, with a promise of an additional $1.5 million, if he could persuade the Alabama Department of Revenue to reduce the fees charged to Waste Management at its hazardous waste landfill in Emelle, Alabama. R46-2888-89; GX 132. Young

[5] Bailey and Young pleaded guilty to offenses related to the pay-for-play scheme, and testified at trial during the government's case-in-chief. R36-376-77; R45-2763-66.

went to Siegelman (initially, through Bailey) to have him get the Department of Revenue to lower the fees for Waste Management. R46-2894-95. Young testified that Siegelman told him: "we are going to get that revenue ruling you want, but those bastards are going to have to pay for it." *Id*. at 2895. The next day, on July 15, 1999, the Department of Revenue agreed to lower the fees for Waste Management at Emelle. *Id*. at 2894, 2903. On that same day, Siegelman sent Young a handwritten, signed letter stating: "Lanny you are something. I really appreciate your friendship and look forward to us getting to spend more time together. You are special. Don." *Id*. at 2913; GX 142. On July 26, 1999, Waste Management paid Young $500,000 pursuant to their agreement. *Id*. at 2908. On September 7, 1999, representatives of Waste Management, accompanied by Young, personally delivered a $50,000 check to Siegelman made payable to the AELF. *Id*. at 2909-12; GX 189B-1.

2. Young Pays Siegelman $9,200 Pursuant To Their Corrupt Agreement.

On January 20, 2000, Siegelman asked Young to give him $9,200 while the two were meeting in Siegelman's office. R46-2995. Siegelman said that he had found a Honda motorcycle that he wanted to purchase, *id.*; in fact, Siegelman had purchased the motorcycle the previous month for $12,173.35, R56-5364-65. At this time, Siegelman had insufficient funds in his personal expense account to cover a check he had written for his fourth quarter taxes. R56-5369-71. At

Siegelman's direction, Young talked to Bailey and worked out the details of giving Siegelman the $9,200. R46-2995.

On that same day (January 20, 2000), Young purchased a cashier check for $9,200 made payable to Bailey and gave it to him. R46-2996. Acting on Siegelman's instructions, Bailey, in turn, gave Siegelman's secretary a $9,200 check made payable to Lori Allen, Siegelman's wife. R36-459-63. The Lori Allen check was then deposited into Siegelman's expense account at Compass Bank. R56-5366-68. Bailey deposited the cashier check from Young. R36-460.

Young's $9,200 payment to Siegelman was part of the pay-for-play agreement, R36-463-65; R46-2996, and Bailey testified that he wrote the $9,200 check out to Lori Allen, on Siegelman's instructions, as part of the conspiracy to get Siegelman the payment, R37-788. Siegelman used the $9,200, in part, to fund a check he had recently written to pay his personal taxes – a check which would have bounced but for the $9,200 deposit. R56-5369-71.

3. Siegelman, Bailey, And Young Cover Up The $9,200 Payment.

In April 2001, Eddie Curran of the *Mobile Press-Register* began to write articles concerning the state's construction of warehouses for the Alabama Department of Economic and Community Affairs (ADECA) and Alcohol Beverage Control Board. Bailey, having been appointed acting ADECA director by Siegelman, had hired Young – with Siegelman's approval – to be the

construction manager for the warehouse project even though Young lacked the experience for such a large project. *See* R36-429-36; R46-2950-52; R47-3330. As Bailey testified, it was "an opportunity to help Lanny" under the pay-for-play agreement. R36-433. Curran's articles raised questions about Young and the propriety of certain payments under the project. R36-434. This public disclosure led the Alabama Attorney General to announce the commencement of a joint federal-state criminal investigation into the matter. *Id.* at 435-36; R50-3824-25; R52-4388-89.

In June 2001, Siegelman and his staff were aware of that federal-state criminal investigation. R36-435-36, 475. On June 5, 2001, Bailey, using borrowed funds, wrote Young a check for $10,503.39. *Id.* at 474-76. Bailey and Young each testified that the purpose of that check was to cover up the $9,200 payment (from Young to Siegelman) by creating the appearance that Bailey earlier had borrowed $9,200 from Young to purchase an interest in Siegelman's motorcycle; hence, the $10,503.39 check (from Bailey to Young) stated "repayment of loan plus interest." *Id.*; R46-3000-01; *see also* R36-477 (Bailey testifying that he had no intention of buying the motorcycle when he wrote the check). Bailey testified: "The $9200 went from Lanny to Governor Siegelman, and we used the motorcycle to cover it up." R38-886. Siegelman was aware of and approved Bailey's writing of the $10,503.39 check to Young. R36-475-76.

To complete the cover up, Bailey wrote Siegelman a check for $2,973.35 from his personal checking account on October 16, 2001, bearing the notation "balance due on m/c." R36-479-83; GX 190a-7. Bailey gave Siegelman the check at the office of Siegelman's attorney (Robert Segall), who was present for the transfer along with Bailey's own attorney (George Beck). *Id.* at 483. Neither lawyer was told that the purpose of the transaction was to cover up the $9,200 payment from Young to Siegelman. *Id.* Siegelman accepted Bailey's check and, in return, provided Bailey with a bill of sale for the motorcycle, which the attorneys helped finalize. R37-799-803; *see also id.* at 803 (Bailey testifying that he lied about the transaction to lawyers Beck and Segall). Siegelman and Bailey knew that the federal-state investigation was still going on at this time. R36-482. Bailey later lied to federal investigators about the transaction to protect himself and Siegelman. R36-484.

III. Standard of Review

A. The Court reviews the legal correctness of jury instructions *de novo*. *United States v. Campa*, 529 F.3d 980, 992 (11th Cir. 2008). Denial of a requested instruction constitutes reversible error only when the instruction: "(1) was correct; (2) was not substantially covered by the charge actually given; and (3) dealt with some point in the trial so important that failure to give the requested

instruction seriously impaired the defendant[s'] ability to conduct [their] defense." *United States v. Chastain*, 198 F.3d 1338, 1350 (11th Cir. 1999).

B. The Court reviews the legal question of whether evidence was sufficient to support a guilty verdict *de novo*, "view[ing] the evidence in the light most favorable to the government and resolv[ing] all reasonable inferences and credibility evaluations in favor of the jury's verdict." *United States v. Robertson*, 493 F.3d 1322, 1329 (11th Cir. 2007) (internal quotation marks omitted), *cert. denied*, 128 S. Ct. 1295 (2008). The evidence need not "be wholly inconsistent with every conclusion except that of guilt, provided that a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt." *Id*. (internal quotation marks omitted).

Where an appellant challenges the sufficiency of evidence on a ground not raised below, this Court's review is for plain error. *United State v. Hunerlach*, 197 F.3d 1059, 1068-69 (11th Cir. 1999).

C. The Court reviews the admission of a coconspirator statement under Fed. R. Evid. 801(d)(2)(E) for an abuse of discretion, and reviews underlying fact findings for clear error. *United States v. Matthews*, 431 F.3d 1296, 1308 (11th Cir. 2005). Where a party does not object at trial to the statement on the ground asserted on appeal, the Court's review is for plain error. *See United States v. Hawkins*, 905 F.2d 1489, 1493 (11th Cir. 1990).

D. The Court reviews the denial of motions for a new trial or for an evidentiary hearing based on alleged juror misconduct and exposure to extraneous information for an abuse of discretion, *United States v. Venske*, 296 F.3d 1284, 1290 (11th Cir. 2002), and reviews underlying fact findings for clear error, *United States v. Cuthel*, 903 F.2d 1381, 1383 (11th Cir. 1990).

E. The Court reviews the district court's denial of a recusal motion for an abuse of discretion. *United States v. Amedeo*, 487 F.3d 823, 828 (11th Cir.), *cert. denied*, 128 S. Ct. 671 (2007).

F. The Court should review the district court's factual determinations relevant to Scrushy's Sixth Amendment and Jury Selection and Service Act challenge for clear error, and review *de novo* its legal conclusions that no substantial violation of the Act or breach of the Sixth Amendment occurred. *See United States v. Grisham*, 63 F.3d 1074, 1077 (11th Cir. 1995); *United States v. Royal*, 174 F.3d 1, 5 (1st Cir. 1999).

G. The Court reviews a district court's decision to grant an upward departure for an abuse of discretion. *United States v. Melvin*, 187 F.3d 1316, 1320 (11th Cir. 1999); *see also Gall v. United States*, 128 S. Ct. 586, 594 (2007) (overall sentence reviewed for "reasonableness," which is equivalent to "familiar abuse-of-discretion standard of review").

SUMMARY OF THE ARGUMENT

I. The district court's instructions on the bribery, conspiracy, and honest services fraud counts were legally sufficient. The explicit *quid pro quo* standard applicable in campaign contribution prosecutions under the Hobbs Act, *see McCormick v. United States*, 500 U.S. 257, 111 S. Ct. 1807 (1991), does not require an "express" agreement to exchange money for official action, but rather requires only that the parties to the exchange clearly understand its terms. Assuming *McCormick* even applies to this case, the court's supplemental instruction on the bribery counts satisfied that standard. And, even if the court's instructions on the fraud counts did not literally satisfy the *McCormick* standard, they eliminated any chance that the jury convicted defendants for giving and accepting a purported campaign contribution based on the mere *expectation* of official action in the future – the concern in *McCormick*. Moreover, any error in the honest services instruction was harmless in light of the *quid pro quo* instruction on the bribery counts. In any event, a *McCormick* instruction was not required in this case because the bribery and honest services fraud statutes, 18 U.S.C. §§ 666, 1346, are different in language and scope from the statute construed by *McCormick* (the Hobbs Act).

II. The evidence was sufficient to prove any explicit *quid pro quo* requirement. It proved that defendants had an agreement to exchange a $500,000 contribution to the lottery fund for membership on the CON Board, understood and faithfully executed its terms, and concealed their corrupt agreement from all but their most inner circle.

The evidence was sufficient to support Siegelman's honest services fraud convictions on Counts 8 and 9 – a claim subject only to plain-error review.

III. Defendants' bribery convictions were not barred by the statute of limitations. Defendants waived that claim by failing to raise it before or during trial. In any event, there was no reversible plain error because one of the bribe payments occurred within five years of the return of the original indictment.

IV. The evidence was sufficient to prove that Siegelman, aware of the federal-state corruption investigation into his administration, obstructed justice in violation of 18 U.S.C. § 1512(b)(3) by engaging in a sham check transaction to cover up the $9,200 corrupt payment (funneled through Bailey) that he received from Young in January 2000. Siegelman corruptly persuaded Bailey to write a $2,973.35 check to make it appear that Bailey, all along, had been purchasing an interest in Siegelman's motorcycle. Siegelman also misled Bailey's attorney, who unwittingly assisted with the cover-up.

V. The admission of Hanson's out-of-court statement to Martin bragging about getting HealthSouth a seat on the CON Board through the IHS check was not reversible plain error under Fed. R. Evid. 801(d)(2)(E). Defendants did not object to the statement on the sole ground challenged on appeal – that it was not in furtherance of a conspiracy. Hanson's statement predated the second bribe installment, and protected HealthSouth's membership on the CON Board by apprising coconspirator Martin of the status of, and building his confidence in, the conspiracy.

VI. The district court's denial of defendants' motion for a new trial based on alleged juror misconduct was not an abuse of discretion. The court thoroughly investigated the jury's exposure to extraneous information, and properly denied defendants' demand for a broad investigation of juror communications. The court's finding of limited exposure to extraneous information was not clearly erroneous, and the government rebutted any presumption of prejudice arising from that exposure. Nor was the court's denial of defendants' motions for reconsideration an abuse of discretion, as the court appropriately relied on the results of its previous investigation.

VII. Scrushy waived his recusal claim by making an untimely motion. Chief Judge Fuller's denial of his recusal motion on the merits was not an abuse of discretion; the judge's passive investments in companies deriving income from

contracts with the U.S. government having nothing to do with this case did not create the appearance of partiality. And, under the analysis in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 862-64, 108 S. Ct. 2194, 2203-05 (1988), any error does not warrant vacating Scrushy's conviction.

VIII. The Middle District of Alabama's jury selection system did not substantially violate the Jury Selection and Service Act ("JSSA"), 28 U.S.C. §§ 1861-71. Scrushy's challenge parallels the pending challenge in *United States v. Carmichael*, 11th Cir. No. 07-11400-JJ. The challenged practices did not frustrate the JSSA's goals of objectivity and randomness. Nor does Scrushy's fair-cross claim establish a violation of the JSSA or the Sixth Amendment.

IX. The district court's decision to depart upward at sentencing as to Siegelman was not an abuse of discretion. The basis for that ruling was Siegelman's systematic corruption of the executive branch of *state* government, which caused a loss of public confidence in government. *See United States v. Shenberg*, 89 F.3d 1461, 1476-77 (11th Cir. 1996). The court did not rely on Siegelman's statements criticizing prosecutors. In any event, the court clearly stated that, even without the departure, it would have imposed the same sentence.

ARGUMENT

I. THE JURY INSTRUCTIONS ON THE BRIBERY, CONSPIRACY, AND FRAUD COUNTS WERE NOT REVERSIBLE ERROR.

Defendants challenge the jury instructions on a single ground: that the district court erred by not instructing the jury that, to convict them of bribery, conspiracy, and honest services mail fraud, it had to find the existence of an "explicit" *quid pro quo* agreement between Scrushy's corrupt payment of $500,000 in purported campaign contributions and Siegelman's appointment of Scrushy to the CON Board. Siegelman-Br. 27-52; Scrushy-Br. 26 n.1; *see also* Amici-Br. 12. Their argument proceeds from *McCormick v. United States*, 500 U.S. 257, 111 S. Ct. 1807 (1991), which held, in a Hobbs Act prosecution for extortion "under color of official right," that receipt of campaign contributions is "vulnerable under the Act as having been taken under color of official right, . . . 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." 500 U.S. at 273, 111 S. Ct. at 1816 (emphasis added). Defendants do not dispute that no federal appellate court has ever applied *McCormick* to the bribery and honest services fraud statutes at issue in this case. In fact, more than one appellate court has taken a view contrary to defendants' position. *See infra*. For the reasons that follow, this Court should reject defendants' claim of error.

A. *McCormick*, *Evans*, And The Meaning Of An Explicit *Quid Pro Quo*.

McCormick involved a state legislator's acceptance of campaign contributions in exchange for support on legislation benefitting the contributors. 500 U.S. at 259-60, 111 S. Ct. at 1809-10. The jury was instructed that, to find that the legislator had induced the payments "under color of official right," *see* 18 U.S.C. § 1951(b)(2), it needed to find only that the contributors had made the payment with the *expectation* that the legislator would take future action that benefitted him, and that the legislator "accepted the money knowing it was being transferred to him with that *expectation* by the benefactor and because of his office." 500 U.S. at 261 n.4, 111 S. Ct. 1810 n.4 (emphasis added). Reversing the conviction, the Supreme Court expressed concern that the absence of a *quid pro quo* requirement "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." 500 U.S. at 272, 111 S. Ct. at 1816. By requiring an explicit *quid pro quo*, the Court protected honest legislators from criminal liability "when they act[ed] for the benefit of constituents or support[ed] legislation furthering the interests of some of their constituents, shortly before or after campaign contributions [we]re solicited and received from those beneficiaries." 500 U.S. at 272, 111 S. Ct. at 1816.

The following Term, the Court held in *Evans v. United States*, 504 U.S. 255, 256-58, 112 S. Ct. 1881, 1883-84 (1992), that an affirmative act of inducement by a public official, such as a demand or request for payment, is not an element of extortion "under color of official right." The payments in *Evans* were purported contributions to the petitioner's campaign for election to a county board. 504 U.S. at 257, 112 S. Ct. at 1883. Relying on the common-law definition of extortion, the Court held that, to prove extortion under color of official right, "the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." 504 U.S. at 268, 112 S. Ct. at 1889. The Court also held that the district court's instructions, which did not require the jury to find an express promise or agreement between the official and payor, "satisfie[d] the *quid pro quo* requirement of *McCormick*." *Id.*

As the Sixth Circuit has explained, *Evans* clarified that the *McCormick quid pro quo* standard "is satisfied by something short of a formalized and thoroughly articulated contractual arrangement (*i.e.*, merely knowing the payment was made in return for official acts is enough)." *United States v. Blandford*, 33 F.3d 685, 696 (6th Cir. 1994). The Sixth Circuit continued:

> *Evans* provided a gloss on the *McCormick* Court's use of the word "explicit" to qualify its *quid pro quo* requirement. Explicit, as explained in *Evans*, speaks not to the form of the agreement between

> the payor and payee, but to the degree to which the payor and payee were aware of its terms, regardless of whether those terms were articulated. Put simply, *Evans* instructed that by "explicit" *McCormick* did not mean "express."

Id. Other courts agree that, under *Evans*, an "explicit" *quid pro quo* does not require an "express" agreement or promise, but rather requires only that the payor and official clearly understand the terms of the bargain. *See, e.g*, *United States v. Giles*, 246 F.3d 966, 972 (7th Cir. 2001); *United States v. Tucker*, 133 F.3d 1208, 1215 (9th Cir. 1998); *United States v. Hairston,* 46 F.3d 361, 365 (4th Cir. 1995); *see also United States v. Carpenter*, 961 F.2d 824, 827 (9th Cir. 1992) (pre-*Evans*; holding that "[under] *McCormick*, the explicitness requirement is satisfied so long as the terms of the quid pro quo are clear and unambiguous").[6]

Evans largely defeats defendants' and amici's arguments that the jury here did not receive a proper *McCormick* instruction, that the evidence was insufficient to prove a *quid pro quo*, and that a *McCormick* instruction was required in the first

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[6] *Blandford* noted that "[e]xactly what effect *Evans* had on *McCormick* is not altogether clear," but that statement referred to whether *Evans* applies to non-campaign contributions cases. 33 F.3d at 695. In *United States v. Martinez*, 14 F.3d 543, 553 (11th Cir. 1994), this Court held that *Evans* does apply to non-campaign contribution cases. According to *Blandford*, this Court also held in *Martinez* that *Evans* applies only to non-campaign contribution cases and that "the comparatively strict standard of *McCormick* still would govern when the alleged Hobbs Act violation arises out of the receipt of campaign contributions by a public official." 33 F.3d at 695. That reading of *Martinez* is incorrect. *Martinez* did not involve campaign contributions, 14 F.3d at 552-53; the decision did not (and could not) construe the effect of *Evans* in a campaign contributions case.

place. Those arguments depend on the proposition that the parties must articulate an express *quid pro quo*, but *Evans* establishes that an explicit *quid pro quo* does not require an "express" agreement or promise. And while defendants rely on select dictionary definitions of "explicit" and "express" to argue that those terms are necessarily interchangeable, *see* Siegelman-Br. 51, the best evidence of what *McCormick* requires surely came from the Supreme Court itself in *Evans*.

The Court's decision in *United States v. Davis*, 30 F.3d 108 (11th Cir. 1994) ("*Davis II*"), *vacating on rehearing* 967 F.2d 516 (*Davis I*), does not suggest otherwise. *See* Siegelman-Br. 47-48. In *Davis II*, the Court reversed the defendant's conviction for Hobbs Act extortion because the defendant had not received a "reasonably clear" jury instruction to the effect that "an explicit promise by a public official to act or not act is an essential element of Hobbs Act extortion." 30 F.3d at 109. The primary flaw with the instructions in *Davis II*, however, was that the court had "informed the jury that 'a specific quid pro quo is not always necessary for a public official to be guilty of extortion.'" *Id.* Although the Court indicated that the jury should have been instructed to find an "explicit promise" to act by the public official, *id.*, that reasoning was not necessary to the decision – it was dictum and does not bind this Court. *See, e.g.*, *United States v. Ohayon*, 483 F.3d 1281, 1293 (11th Cir. 2007); *United States v. Santa*, 236 F.3d 662, 672 n.14 (11th Cir. 2000). Indeed, reading *Davis II* literally to require an

"explicit promise" instruction is irreconcilable with *Evans*'s holding that an explicit *quid pro quo* requires only that the public official "ha[ve] obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." 504 U.S. at 268, 112 S. Ct. at 1889.

A rule requiring an "express" agreement or promise between the payor and official would allow officials to evade criminal liability through "knowing winks and nods," even where (as here) a meeting of the minds occurred to exchange money for official action. *Evans*, 504 U.S. at 274, 112 S. Ct. at 1892 (Kennedy, J., concurring); *accord Carpenter*, 961 F.2d at 827. Siegelman tries to sow fear over the absence of such a requirement by predicting that it would unduly expand prosecutorial discretion in campaign contribution cases; he claims even that "[p]rosecutorial mindreading will be the order of the day." Siegelman-Br. 37-38. That argument is unsound. Apart from being controlling authority, *Evans* effectuates the purpose of *McCormick* because, as Justice Kennedy explained, a jury is fully capable of giving teeth to a *mens rea* requirement:

> The criminal law in the usual course concerns itself with motives and consequences, not formalities. And the trier of fact is quite capable of deciding the intent with which words were spoken or actions taken as well as the reasonable construction given to them by the official and the payor.

Evans, 504 U.S. at 274, 112 S. Ct. at 1892 (Kennedy, J., concurring); *see also* Part I.C.2, *infra*.

In short, this Court should reject defendants' faulty interpretation of *McCormick* because it ignores *Evans*, would allow officials to escape criminal liability through "knowing winks and nods," and underestimates the jury's fact-finding capacity.

B. The District Court Gave A *McCormick* Instruction On The Bribery Counts, Even Though No Such Instruction Was Required.

The district court instructed the jury that it had to find that defendants had an agreement to exchange official action for a thing of value in order to convict them of bribery under 18 U.S.C. § 666. While that instruction satisfied *McCormick*, it was unnecessary because the court's instructions on the statutory elements of the offense prevented criminal liability from attaching to the particular circumstances outlined in *McCormick*, namely contributions to a candidate's campaign accompanied by the mere expectation of future official action.

The district court instructed the jury on the elements of bribery under § 666(a)(1)(B) (Count 3–Siegelman) and § 666(a)(2) (Count 4–Scrushy) using this Circuit's pattern jury instructions. R66-7303-06. As to both counts, the court supplemented that instruction, over the government's objection, *id.* at 7317, with the following instruction: "A defendant does not commit a crime by giving something of value to a governmental official unless the defendant and the official agree that the official will take specific action in exchange for the thing of value."

Id. at 7304, 7306. In light of that instruction, the jury was required to find an actual *agreement* (a meeting of the minds) on the *specific* terms of the exchange ("specific action in exchange for the thing of value"). The bribery charge, therefore, avoided any hint of the defective instructions in *McCormick* – it prevented the jury from convicting either defendant based on a finding that the $500,000 in lottery fund contributions was given and received with the mere *expectation* of future official action by Siegelman benefitting Scrushy. The court's *quid pro quo* instruction here was equivalent to that approved in *Evans*,[7] and satisfied any reasonable construction of the *McCormick* standard. *See United States v. Mintmire*, 507 F.3d 1273, 1292-93 (11th Cir. 2007) (district court has discretion in phrasing jury instructions provided they correctly state the law).

Siegelman contends (Br. 50 n.12) that the court's *quid pro quo* instruction "spoke only to what [was] necessary to impose criminal liability on the giver" (*i.e.*, Scrushy) and, "[t]aken literally," did not require the jury to find an agreement to convict Siegelman. Jury instructions, however, "must be taken in context, as part of a whole, and interpreted with common sense." *United States v. Solomon*, 686

[7] The instruction in *Evans* stated: "if a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance does constitute [extortion] regardless of whether the payment is made in the form of a campaign contribution." 504 U.S. at 258, 112 S. Ct. at 1884.

F.2d 863, 875 (11th Cir. 1982). The charge on Count 3 otherwise focused exclusively on Siegelman. *See* R66-7303-04. The jury invariably understood the point of the *quid pro quo* instruction – that to convict Siegelman, it had to find an agreement covering "specific action in exchange for the thing of value" between him and Scrushy. And, the jury found the existence of an agreement because it convicted Scrushy on the basis of the same *quid pro quo* instruction in Count 4. R66-7306. Any minor error in the wording of the instruction as to Siegelman, therefore, was harmless. *See United States v. Drury*, 396 F.3d 1303, 1314 (11th Cir. 2005).

In any event, considered in their entirety, the court's bribery instructions were legally sufficient. *McCormick* construed the meaning of "under color of official right" in 18 U.S.C. § 1951(b)(2). *McCormick*, 500 U.S. at 273, 111 S. Ct. at 1816; *see also Evans*, 504 U.S. at 268 n.20, 112 S. Ct. at 1189 n.20 ("'under color of official right' . . . has a well-recognized common-law heritage"). Section 666 contains no such language. Rather, as relevant here, § 666(a)(1)(B) punishes a state official who "corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of [state government] involving any thing of value of $5,000 or more." (Section 666(a)(2) punishes the parallel conduct of the bribe payor.) The

purpose of § 666 is "generally to 'protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence.'" *Sabri v. United States*, 541 U.S. 600, 606, 124 S. Ct. 1941, 1946 (2004) (quoting S. Rep. No. 98-225, p. 370 (1983)); *see generally Salinas v. United States*, 522 U.S. 52, 58-59, 118 S. Ct. 469, 474 (1997).[8] In light of that statutory purpose, this Court has rejected a narrow interpretation of § 666. *United States v. Castro*, 89 F.3d 1443, 1454 (11th Cir. 1996).

Defendants do not challenge the court's instructions on the scienter requirements of § 666. Those requirements preclude the statute from reaching innocent conduct involving campaign contributions. "[T]he term 'corruptly' in criminal laws has a long-standing and well-accepted meaning." *United States v. Aguilar*, 515 U.S. 593, 616, 115 S. Ct. 2357, 2370 (1995) (Scalia, J., dissenting). As the jury was instructed via this Circuit's pattern instructions, "[a]n act is done corruptly if it is performed voluntarily, deliberately and dishonestly for the purpose of either accomplishing an unlawful end or result or [of] accomplishing some otherwise lawful end or lawful result by any unlawful method or means." R66-7304; *see also Arthur Anderson, LLP v. United States*, 544 U.S. 696, 705,

[8] The predicate for a § 666(a) offense is that the state or local entity in question have received $10,000 in federal benefits in a one-year period covering the bribe payment. 18 U.S.C. § 666(b).

125 S. Ct. 2129, 2136 (2005) (finding that "'corrupt' and 'corruptly' are normally associated with wrongful, immoral, depraved, or evil"); *Agan v. Vaughn*, 119 F.3d 1538, 1543 (11th Cir. 1997) (similar). Moreover, the jury was told that § 666 requires, in the case of the public official, corrupt intent *to be influenced or rewarded in connection with official action*, and, in the case of the bribe payor, corrupt intent *to influence or reward the official in connection with official action*. R66-7303, 7305. These statutory requirements prevent § 666 from punishing the giving or receiving of campaign contributions that are accompanied by a mere expectation or hope of future official action – the danger identified in *McCormick*, 500 U.S. at 272-73, 111 S. Ct. at 1816. *See United States v. Griffin*, 154 F.3d 762, 763 (8th Cir. 1998) (holding in Sentencing Guidelines case that "[t]he distinction between a bribe and an illegal gratuity is the corrupt intent of the person giving the bribe to receive a *quid pro quo*"). It is wholly unnecessary, therefore, to apply the *McCormick* regime to § 666.[9]

[9] Nor does this case present the dangers identified by *McCormick* in the context of candidate election campaigns, namely, opening to prosecution the innocent and largely "unavoidable" conduct of elected officials who act for the benefit of constituents shortly before or after campaign contributions are solicited or received. 500 U.S. at 272-73, 111 S. Ct. at 1816. The campaign in question sought to achieve passage of a referendum for a state lottery and was financed through private contributions. *See* Ala. House Bill 73 (enacted Apr. 14, 1999). It was not Siegelman's campaign for political office, and his conduct was not an "unavoidable" byproduct of his elected position.

The decision in *United States v. Ford*, 435 F.3d 204 (2d Cir. 2006), proves the point. Ford, an officer of a state employees' union that received federal funds, was convicted of accepting media services for her union reelection campaign in return for steering union work to the contributor. *Id.* at 206. When instructing the jury on § 666, "the court twice indicated that, with regard to both the word 'corruptly' and the phrase 'intending to be influenced,' it was sufficient for the government to prove that Ford 'understood' or was 'aware' that [the] free media services were given to influence [Ford's] conduct as an officer of the organization." *Id.* at 209. Reversing, the Second Circuit held that the jury should have been "clearly instructed that it is the recipient's intent to make good on the bargain, not simply her awareness of the donor's intent that is essential to establishing guilt under Section 666." *Id.* at 213. The court distinguished a Hobbs Act prosecution from a § 666 prosecution, and stated that the plain language of § 666(a)(1)(B) dictates that "[t]he recipient must take the proffered thing of value 'intending to be influenced.'" *Id.* at 213 n.5; *see also United States v. Gee*, 432 F.3d 713, 714-15 (7th Cir. 2005) (holding, based on language of § 666(a)(1)(B), that "[a] *quid pro quo* of money for a specific legislative act is *sufficient* to violate the statute but it is not *necessary*").

Ford underscores not only that the elements of federal funds bribery arise from the statutory requirements themselves, but that those elements are sufficient

to protect innocent campaign conduct. The payment in *Ford* – donated services to a union election campaign – is similar to a monetary campaign contribution; the Second Circuit even noted that "accepting volunteer services and related goods in an election campaign [] is, *by itself*, not only innocuous but also rather commonplace." 435 F.3d at 212 (emphasis in original). But nowhere did the court suggest that, apart from a proper instruction on the statutory elements of § 666, any other instruction was required to convict the recipient of donated campaign services.

The Ninth Circuit has specifically rejected the argument that the *McCormick* standard applies to a state bribery statute. In *United States v. Jackson*, 72 F.3d 1370 (9th Cir. 1995), a RICO case, the defendant argued that the jury had to be given an explicit *quid pro quo* instruction to find that he had violated California bribery law by giving campaign contributions to a state senator. *Id.* at 1373, 1375-76. The California bribery statute resembles § 666 by prohibiting the giving of anything of value to a state legislator "with a corrupt intent to influence, unlawfully" the legislator "in his or her action, vote, or opinion, in any public or official capacity." *Id.* at 1374 n.1 (quoting Cal. Penal Code §§ 7(6), 85). The Ninth Circuit aptly recognized that "*McCormick* was a case of statutory construction," and found that an explicit *quid pro quo* instruction was not required

as a matter of California law. *Id.* at 1376. Critically, the court also "decline[d] to read such a requirement into First Amendment jurisprudence." *Id.*

The foregoing authorities (and the plain language of § 666) amply refute Siegelman's suggestion (Br. 42) that the government has no case support for its position that the *McCormick* standard does not apply to § 666. It is Siegelman who has failed to cite any case involving § 666 to support his position. *See* Siegelman-Br. 39-42.[10] Siegelman relies extensively (Br. 40-41) on *United States v. Allen*, 10 F.3d 405 (7th Cir. 1993), but the discussion of bribery there was dictum; the court's actual holding was that the lack of a *McCormick* instruction was harmless because the defendant was not convicted of the RICO charge for which state bribery law had supplied the predicate offense. *Id.* at 411-12. Moreover, the § 666 instructions in this case do not implicate the court's concern that "[v]ague expectations of some future benefit should not be sufficient to make a payment a bribe." *Id.* at 411. Siegelman's attempt (Br. 41 n.9) to breathe life into *Allen*'s dictum by noting that this Court cited *Allen* in *Davis II* lacks merit;

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[10] Citing *United States v. Sun-Diamond Growers*, 526 U.S. 398, 404-05, 119 S. Ct. 1402 (1999), Scrushy states that "[t]he Supreme Court has expressly ruled that the *quid pro quo* requirement is an element of a 18 U.S.C. § 666 violation." Scrushy-Br. 28 n.2. Scrushy is wrong. *Sun Diamond* construed the requirements of 18 U.S.C. § 201 (federal official bribery statute), not § 666, and its reference to a *quid pro quo* was to § 201(b)'s *mens rea* requirement of "a specific intent to give or receive something of value *in exchange* for an official act." *Sun Diamond*, 526 U.S. at 404-05, 119 S. Ct. at 1406.

Davis II was a Hobbs Act case. 30 F.3d at 109. *Allen* does not support the weight Siegelman places on it.

Siegelman also contends (Br. 38-39) that *McCormick* requires a "clear statement" before Congress may criminalize conduct involving a campaign contribution without requiring an explicit *quid pro quo*. He relies on the fact that *McCormick* cited *United States v. Enmons*, 410 U.S. 396, 93 S. Ct. 1007 (1973), where the Court rejected a broad interpretation of federal labor law that would have represented "an unprecedented incursion into the criminal jurisdiction of States," based on the absence of a clear statement from Congress to effect that change. *Id.* at 411, 93 S. Ct. at 1015. But *McCormick* cited *Enmons* for only tangential support, and not in the paragraph setting forth the *quid pro quo* requirement itself. *McCormick*, 500 U.S. at 272-73, 111 S. Ct. at 1816. Regardless, the "clear" or "plain" statement rule does not apply to unambiguous statutes, and the Supreme Court refused to apply it to § 666 when it held that the government is not required to prove that the bribery affected the federal funds received by the state or local government. *Salinas*, 522 U.S. at 58-60, 118 S. Ct. at 474-75. Because § 666 unambiguously conveys Congress's intent to criminalize any "thing of value," including a campaign contribution that is given or received with the requisite intent, any applicable clear statement rule is satisfied. *Cf. Agan*, 119 F.3d at 1542-45 (rejecting facial and as-applied First Amendment challenge to

Georgia bribery statute containing corrupt intent element in campaign contribution case).

The district court's bribery charge provides no basis to disturb defendants' convictions. The court gave an explicit *quid pro quo* instruction, and its instructions on the elements of § 666 further eliminated any *McCormick*-based concerns.

C. The District Court's Instructions On The Honest Services And Conspiracy Counts Were Not Reversible Error.

The district court correctly instructed the jury on the law of honest services fraud and conspiracy, and those instructions did not risk punishing innocent campaign contributions or result in an unconstitutional application of the honest services statute. But even if the district court should have given a *McCormick* instruction, that error was harmless in light of the court's *quid pro quo* instruction on the bribery counts.

1. The Instructions Were Legally Sufficient.

To establish honest services mail fraud, the government must prove that a defendant intentionally devised or participated in a "scheme or artifice to deprive another of the intangible right of honest services," and used the mails in furtherance thereof. 18 U.S.C. §§ 1341, 1346; *accord United States v. Browne*, 505 F.3d 1229, 1265 (11th Cir. 2007), *cert. denied*, 2008 WL 743954 (2008);

United States v. Hasner, 340 F.3d 1261, 1269-71 (11th Cir. 2003). "Public officials inherently owe a fiduciary duty to the public to make governmental decisions in the public's best interest." *United States v. deVegter*, 198 F.3d 1324, 1328 (11th Cir. 1999). "If the official instead secretly makes his decision based on his own personal interests – as when an official accepts a bribe or personally benefits from an undisclosed conflict of interest – the official has defrauded the public of his honest services." *United States v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997). Honest services fraud requires proof that the defendant acted with the intent to defraud. *United States v. Paradies*, 98 F.3d 1266, 1285-86 (11th Cir. 1996).

The district court here followed this Circuit's pattern instructions when instructing the jury on the elements of honest services mail fraud, including the requirement of an intent to defraud. R66-7292; 11th Cir. Criminal Instruction 50.2 (2003). In defining the meaning of "honest services," the court stated:

> Public officials and public employees inherently owe a duty to the public to act in the public's best interest. If, instead, the official or employee acts or makes his decisions based on the official's own personal interests, such as accepting a bribe or receiving personal benefit from the undisclosed conflict of interest, the official has defrauded the public of the official's honest services even though the public agency involved may not suffer any monetary loss in the transaction.

Id. at 7293. The district court supplemented the instructions as follows:

> You are further instructed as to the honest services mail and wire fraud counts that you must find not only that the defendants intended to deprive the public of their honest services, but also that they intended to deceive the public and that they intended to alter their official actions as a result of the receipt of campaign contributions....

Id. at 7293-94. As to the conspiracy count, the court instructed the jury that it had to find that defendants had come to a "mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment." *Id.* at 7307.

The court's instructions correctly stated the elements of honest services fraud, and defendants do not claim otherwise. Their sole claim is that the jury should have been instructed to find an explicit *quid pro quo*. The honest services statute, however, does not contain the "under color of official right" language giving rise to the holding in *McCormick*. Nor did the court's instructions here repeat the defect in *McCormick* by permitting the jury to convict defendants upon finding that Scrushy contributed to the lottery campaign "with the *expectation* that [Siegelman] would extend to him some benefit or refrain from some harmful action, and [that] [Siegelman] accepted the money knowing it was being transferred to him with that *expectation* by [Scrushy] and because of his office." 500 U.S. at 261 n.4, 111 S. Ct. at 1810 n.4 (emphasis added). To the contrary, the jury had to find that Scrushy and Siegelman intended to deprive the public of their right to honest services *and* intended to deceive the public, *and* that Siegelman intended to alter his official actions *as a result of* Scrushy's purported campaign

contributions. This heightened instruction alleviated any *McCormick*-based concern because it required a linkage between Siegelman's intent to alter his official actions and his receipt of the payments from Scrushy.[11]

Moreover, the fraudulent scheme charged in this case was not limited to corrupt payments. The indictment charged Siegelman and Scrushy with engaging in a scheme to defraud the state of Alabama of their honest services "in their capacities as Governor . . . and [as] a member of the CON Board, respectively, as well as other members of the CON Board, performed free from deceit, favoritism, bias, self-enrichment, self-dealing, and conflict of interest concerning the [CON] Board." R1-61-34. The purpose of the scheme was to "give HealthSouth official membership on, representation at, and influence over the CON Board by means of hidden payments and financial relationships, and to conceal these activities." *Id.* The scheme involved not only Scrushy's making of "disguised and concealed payments" to Siegelman and Siegelman's appointment of Scrushy (and his

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[11] Given the linkage required by that instruction, the jury also would have understood the court's reference to accepting a "bribe," R66-7293, to connote the payment of money to influence official action. *See, e.g.*, American Heritage Dictionary of the English Language 230 (4th ed. 2006) (defining "bribe" as "[s]omething, such as money or a favor, offered or given to a person in a position of trust to influence that person's views or conduct"); New Oxford American Dictionary 212 (2d ed. 2005) (defining "bribe" as a "sum of money or other inducement offered or given" in a way such as to "persuade (someone) to act in one's favor, typically illegally or dishonestly").

successor) to the CON Board, but also Scrushy's use of the CON Board to affect the interests of HealthSouth and its competitors, including by bribing another Board member. *Id.* at 34-35.

The charged scheme finds ample support in precedent. The honest services statute covers an "extremely broad" spectrum of conduct. *United States v. Walker*, 490 F.3d 1282, 1297 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 1649 (2008). While "the paradigm case of honest services fraud is the bribery of a public official," *deVegter*, 198 F.3d at 1327-28, such fraud also occurs where an official benefits from an undisclosed conflict of interest, *see Hasner*, 340 F.3d at 1270-73, misuses public office for private gain, *see United States v. Woodard*, 459 F.3d 1078, 1086 (11th Cir. 2006), and fails to disclose material information, *see United States v. Waymer*, 55 F.3d 564, 571-72 (11th Cir. 1995). For example, in *Hasner*, the city official (Hasner) had an interest in a real estate project with a prospective consultant to the city (Fisher); Hasner was to get a referral fee from Fisher on a real estate project her firm was putting together. 340 F.3d at 1265. Without disclosing that outside association, Hasner voted on Fisher's consulting contract. This Court upheld Hasner's (and Fisher's) convictions, concluding that "Hasner breached his fiduciary duties by voting on Fisher's consulting contract without disclosing the agreement he had with Fisher to receive a referral fee, if the Chelsea Commons real estate transaction was completed." *Id.* at 1271. The Court found

additional evidence of fraud in the defendants' steps to conceal Hasner's interest in the project. *Id.* at 1271-72; *see also Woodard*, 459 F.3d at 1082, 1086-87 & n.8 (officer with Atlanta Police Department (APD) conspired with wife to deprive city of his honest services by misusing his office for private gain and benefitting from an undisclosed conflict of interest; after helping form company that reclaimed property from APD, officer obtained confidential APD information for company and tried to conceal ties to company).

Here, the jury heard evidence that the fraudulent scheme involved not only corrupt payments, but, as in *Hasner* and *Woodard*, an undisclosed conflict of interest and the misuse of official authority. Siegelman's undisclosed conflict of interest was his appointment of Scrushy and Scrushy's successor to the CON Board while actively concealing his receipt of Scrushy's payments, a conflict from which Siegelman personally benefitted in light of his guarantee on the AEF loan to which the payments were applied. *See* pp. 16-21, *supra*. And while every participant in a scheme to defraud need not benefit from the fraud, *see, e.g.*, *United States v. Spano*, 421 F.3d 599, 603 (7th Cir. 2005), Scrushy also benefitted from the undisclosed conflict of interest – which he also helped to conceal (pp. 8-12, *supra*) – because he obtained membership on and influence over a state healthcare board that was critical to the company he founded and ran. He then misused that position to unduly influence the workings of the Board to HealthSouth's

advantage, including by having HealthSouth lawyer Skelton take steps to keep another Board member, Tim Adams, "happy" in order to ensure that HealthSouth's interests were protected. *See* pp. 21-24, *supra*.[12]

In short, the fraudulent scheme here did not rest exclusively on a bribery theory, thus providing another reason why an explicit *quid pro quo* instruction was unnecessary. *See United States v. McDonald*, 178 Fed. Appx. 643, 646-47 (9th Cir. 2006) (unpublished) (upholding honest services fraud conviction based on public official's failure to disclose, and active attempt to conceal, source of campaign contribution; government not required to prove that official's decisionmaking on local water board affected by contribution), *cert. denied*, 127 S. Ct. 1148 (2007); *see also United States v. Sawyer*, 239 F.3d 31, 39-40 & n.8 (1st Cir. 2001) (rejecting requirement under § 1346 of linkage between illegal gratuities and specific acts, noting Congress's expansive intent in enacting § 1346, and holding, based on *Lopez-Lukis*, that theft of honest services occurs when public official secretly makes official decision based on personal interests); *United States v. Woodward*, 149 F.3d 46, 62 (1st Cir. 1998) (legislator's fraudulent intent inferable from failure to disclose gratuities received from lobbyist).

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[12] Defendants also deprived the state of Adams's honest services as a Board member by causing him to take official action that benefitted HealthSouth without disclosing his relationship to HealthSouth. R1-61-34; *see* Part II.C, *infra*.

Defendants do not point to a single appellate decision applying an explicit *quid pro quo* standard to the honest services fraud statute. The district court cases they rely upon (Siegelman-Br. 39, 41-42) do not provide persuasive support for applying *McCormick* to 18 U.S.C. § 1346. None of those cases reconciles the Hobbs Act offense in *McCormick* with the different language and focus of the honest services statute. *See Luzerne County Ret. Bd. v. Makowski*, 2007 WL 4211445, *42-43 (M.D. Pa. Nov. 27, 2007); *United States v. Malone*, 2006 WL 2583293, *1-2 (D. Nev. Sept. 6, 2006); *United States v. Zucchet*, Case No. 03cr2434 JM (S.D. Cal. Nov. 10, 2005) (Siegelman-Br., App. A).[13]

Nor should this Court credit Siegelman's allegation (Br. 39-40) that the government is here advancing an interpretation of the honest services statute that it is unwilling to advance in *United States v. Zucchet,* 9th Cir. No. 05-50960. In that case, Zucchet (a San Diego councilman) was convicted of Hobbs Act extortion and honest services mail fraud based on his acceptance of campaign contributions for official action. *Over the government's objection*, the district court gave a *McCormick* instruction on the honest services counts, and the jury went on to convict Zucchet. *See* Gov't Br., 9th Cir. No. 05-50960, at 33. The district court,

[13] Scrushy cites *United States v. Sawyer*, 85 F.3d 713, 741 (1st Cir. 1996) and *United States v. Martin*, 195 F.3d 961, 966 (7th Cir. 1999), as "requir[ing] proof of an express *quid pro quo*" to support a conviction for honest services fraud, Scrushy-Br. 28 n.2, but those cases do not support that position.

however, found insufficient evidence of a *quid pro quo*, and set aside the verdict and/or granted a new trial on all counts. Siegelman-Br., App. A.[14] In appealing that decision, the government has elected to defend the sufficiency of the evidence based on the case submitted to the jury. But the government never conceded that an explicit *quid pro quo* instruction was required to prove honest services fraud. Moreover, this case involves different facts and jury instructions than *Zucchet*, not to mention a different posture on appeal – the government is not seeking to reinstate a jury verdict. Siegelman's charge of inconsistency is spurious.

Because the district court's instructions correctly stated the law of honest services fraud, did not risk punishing campaign contributions given with only the expectation of favorable official action, enhanced the government's burden of proof, and accurately reflected the fraudulent scheme in this case, they contain no error justifying relief.

2. Neither The First Or Fifth Amendments, Nor The Rule Of Lenity Requires An Explicit *Quid Pro Quo* Standard.

Defendants contend (Siegelman-Br. 43-47) that, absent an explicit *quid pro quo* requirement in campaign contribution cases, the honest services statute would

[14] *Zucchet* actually undermines Siegelman's arguments on the requirements of *McCormick* because it recognizes that "[t]he explicitness of the quid pro quo 'need not be verbally explicit.'" Siegelman-Br., App. A at 3 (quoting *Carpenter*, 961 F.2d at 827).

violate the First Amendment (by burdening protected speech) and the Fifth Amendment (by being unduly vague) as applied to them, and urge the Court to adopt a narrowing construction under the rule of lenity. Those contentions lack merit.

In *Waymer*, this Court rejected an overbreadth challenge to the honest services statute, holding that any "marginal applications of section 1346" raising First Amendment concerns could be addressed on a case-by-case basis. 55 F.3d at 569. The fraudulent conduct charged and proven in this case was not protected by the First Amendment, even if the payments are considered legitimate campaign contributions. Scrushy was free to contribute to the lottery campaign, and Siegelman was free to solicit contributions. Defendants, however, did not engage in such innocent conduct, but rather perpetrated a fraud on the citizens of Alabama by actively concealing the payments in furtherance of their scheme to give HealthSouth a seat on and influence over the CON Board.[15] Moreover, the jury

[15] The facts belie any notion that criminalizing the conduct in this case risks chilling genuine issue advocacy. For example, not only did Scrushy's first $250,000 payment originate with a third party (IHS) as a result of his efforts to disguise his "contribution" to an issue campaign neither he nor HealthSouth supported, but Siegelman deposited that payment into a secretly opened bank account and did not disclose that payment, or the HealthSouth check, until the Alabama Secretary of State's Office referred the failure to report a related expenditure to the Alabama Attorney General's Office. *See* pp. 8-12, 15-21, *supra*.

here found not only that defendants intended to deprive the public of their honest services and to deceive the public, but also that Siegelman intended to alter his official conduct as a result of the payments. Defendants have cited no authority showing that the First Amendment protects their deceitful conduct in this case, and the relevant precedent is to the contrary. *Cf. United States v. Williams*, 128 S. Ct. 1830, 1841 (2008) ("Offers to engage in illegal transactions are categorically excluded from First Amendment protection.").

Siegelman cites *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (plurality opinion), for the principle that an intent standard is insufficient to protect First Amendment rights. Siegelman-Br. 47. The plurality in that case, however, declined to adopt an intent standard for an as-applied challenge to whether an advertisement constitutes a prohibited "electioneering communication" under the Bipartisan Campaign Reform Act, 2 U.S.C. § 441b(b)(2) – a test which would have required an amorphous inquiry into whether the speaker actually intended to affect an election. *Id.* at 2658, 2665-66. The context of that case is entirely different from this case. "[A] particular intent is more often than not the *sine qua non* of a violation of a criminal law," *Apprendi v. New Jersey*, 530 U.S. 466, 493 n.18, 120 S. Ct. 2348, 2364 n.18 (2000), and the jury here was fully capable of determining defendants' fraudulent intent based on their words and

actions, *see, e.g.*, *United States v. McDowell*, 250 F.3d 1354, 1366-67 (11th Cir. 2001) (acts of concealment evince guilty knowledge and intent).

Defendants' Fifth Amendment challenge fails for a similar reason. Siegelman concedes (Br. 45) that courts have upheld § 1346 against vagueness claims in the past. *See, e.g.*, *United States v. Williams*, 441 F.3d 716, 724-25 (9th Cir.), *cert. denied*, 127 S. Ct. 294 (2006); *Paradies*, 98 F.3d at 1283. To survive a vagueness challenge, the statute must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298-99 (1972). The Constitution, however, does not impose "impossible standards of clarity," *Kolender v. Lawson*, 461 U.S. 352, 361, 103 S. Ct. 1855, 1860 (1983) (internal quotations omitted), and "[t]he constitutionality of a vague statutory standard is closely related to whether the standard incorporates a requirement of *mens rea*." *Waymer*, 55 F.3d at 568. In *Castro*, this Court rejected a vagueness challenge to § 1346 because the jury found that the defendants had acted with a specific intent to deprive the state of Florida of its honest services. 89 F.3d at 1455. The jury here was instructed to find that defendants acted with the intent to defraud, which the district court defined to "mean[] to act knowingly and with the specific intent to deceive someone." R66-7292-93. That requirement cured any vagueness problem.

The case relied on by Siegelman (Br. 45), *United States v. Williams*, *supra*, confirms that point. In *Williams*, the Supreme Court relied largely on the scienter requirements of a child pornography law in rejecting the contention that the statute was so vague as to give law enforcement "virtually unfettered discretion." 128 S. Ct. at 1846. The Court aptly recognized that "courts and juries every day pass upon knowledge, belief and intent – the state of men's minds – having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred." *Id.* (quoting *American Communications Assn. v. Douds*, 339 U.S. 382, 411, 70 S. Ct. 674 (1950)).

The rule of lenity does not rescue defendants' arguments. Like the clear statement rule, that rule applies only to ambiguous statutes. *See United States v. Hurtado*, 508 F.3d 603, 610 n.8 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 2903 (2008). But the mere existence of ambiguity is insufficient to trigger the rule; "there must be a 'grievous ambiguity or uncertainty in the statute,'" *United States v. Maupin*, 520 F.3d 1304, 1307 (11th Cir. 2008) (quoting *Muscarello v. United States*, 524 U.S. 125, 138, 118 S. Ct. 1911, 1919 (1998)), and any ambiguity is measured only after applying traditional rules of statutory construction, *United States v. Camacho-Ibarquen*, 410 F.3d 1307, 1315 (11th Cir. 2005). Congress passed § 1346 after the Supreme Court held in *McNally v. United States*, 483 U.S. 350, 107 S. Ct. 2875 (1987), that the scope of the mail fraud statute encompassed

only schemes to defraud another of money or property, and not, as previous courts had held, schemes to defraud another of intangible rights. *deVegter*, 198 F.3d at 1327. By passing § 1346, Congress overruled *McNally* and reinstated prior case law. *Id.* That law recognized honest services fraud based on a public official's undisclosed conflict of interest, *see, e.g.*, *Silvano*, 812 F.2d at 760, and active concealment of corrupt payments, *see, e.g.*, *United States v. Holzer*, 816 F.2d 304, 307-08 (7th Cir.), *vacated*, 484 U.S. 807, 108 S. Ct. (1987) – the type of fraudulent conduct involved in this case. Defendants' invocation of lenity is unavailing.

3. Any Error In The Lack Of A *McCormick* Instruction Was Harmless.

Even if this Court holds that the district court should have instructed the jury to find an explicit *quid pro quo* on the honest services and conspiracy counts, the omission was harmless.

A district court's failure to instruct the jury on an offense element is reviewed for harmless error. *See Browne*, 505 F.3d at 1267. "The correct focus of harmless-error analysis is whether it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty in the absence of the error." *Id.* at 1267-68.

The jury would have convicted defendants of honest services mail fraud and conspiracy even if the court had instructed it to find an explicit *quid pro quo*. Not

only did the jury hear sufficient evidence of an explicit *quid pro quo* (*see* Part II.B, *infra*), but the jury received a *McCormick* instruction on the bribery counts for which it convicted Siegelman and Scrushy. That is, the jury found that defendants "agree[d]" that Siegelman would take "specific action" (*i.e.*, appoint Scrushy to the CON Board) "in exchange for the thing of value" (*i.e.*, $500,000). R66-7304, 7306. In *Hairston*, the Fourth Circuit held that the district court's failure to give a *quid pro quo* instruction on a Hobbs Act count was harmless because the evidence proved a *quid pro quo* and the court's instructions on other counts for which the jury had convicted the defendants "included the concept of quid pro quo." 46 F.3d at 373-74; *see also United States v. Malpeso*, 115 F.3d 155, 165-66 (2d Cir. 1997) (similar holding in § 924(c) context). The same result obtains here. Any error in not giving a *McCormick* instruction on the fraud and conspiracy counts was harmless.

II. THE EVIDENCE WAS SUFFICIENT TO PROVE AN EXPLICIT *QUID PRO QUO* AND TO SUPPORT SIEGELMAN'S CONVICTIONS ON COUNTS 8 AND 9.

Defendants claim that the evidence was insufficient to prove that they engaged in an explicit *quid pro quo*. While that argument erroneously assumes the requirement of an explicit *quid pro quo*, the evidence amply proved one. Siegelman's claim that the evidence was insufficient to support his conviction on two mail fraud counts is likewise deficient.

A. The Standard Of Review.

Siegelman erroneously contends that the Court should independently review the evidence because this case purportedly implicates First Amendment concerns. Siegelman-Br. 56. Not only does this case not broach First Amendment principles, but neither *McCormick* nor *Evans* base the *quid pro quo* requirement under the Hobbs Act on First Amendment grounds. Courts routinely review sufficiency claims in Hobbs Act, campaign contribution cases under the normal standard, *i.e.*, viewing the evidence – including issues of witness credibility – in the light most favorable to the guilty verdict. *See, e.g.*, *United States v. D'Amico*, 496 F.3d 95, 101-02 (1st Cir. 2007), *vacated on other grounds*, 128 S. Ct. 1239 (2008); *Carpenter*, 961 F.2d at 826-28; *see also United States v. Cruzado-Laureano*, 404 F.3d 470, 482 (1st Cir. 2005) (applying reasonable jury standard to whether payment constituted campaign contribution). This Court has no reason to deviate from that settled practice.[16]

Siegelman also erroneously suggests that an explicit *quid pro quo* must be proven by direct evidence of a conversation between the bribe payor and recipient. Siegelman-Br. 54. To the contrary, a *quid pro quo* may be inferred from

[16] The sole case relied on by Siegelman, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 566-67, 115 S. Ct. 2338, 2344 (1995), is not a criminal case and does not involve campaign contributions.

circumstantial evidence, *United States v. Massey*, 89 F.3d 1433, 1439 (11th Cir. 1996); *Carpenter*, 961 F.2d at 827, and from "an ongoing course of conduct," *Tucker*, 133 F.3d at 1215. *See also McCormick*, 500 U.S. at 283, 111 S. Ct. at 1822 (noting "evidentiary significance" of defendant's actions after accepting campaign contributions) (Stevens, J., dissenting on other grounds). Courts and juries rely on such evidence as a matter of course. Siegelman's position would make it virtually impossible to prosecute bribery in campaign contribution cases absent the cooperation of the bribor or official (or a third party witness to a verbal exchange). It should be rejected.

B. The Evidence Proved An Explicit *Quid Pro Quo*.

In arguing that the evidence did not prove an explicit *quid pro quo*, defendants and Siegelman's amici apply an exacting analysis to a snippet of the trial testimony. *See* Siegelman-Br. 52-56; Scrushy-Br. 26-31; Amici-Br. 3-4. Their truncated analysis fails to account for the overwhelming evidence of guilt even under the *McCormick* standard.[17] That evidence included the testimony of

[17] The source of amici's description of the government's so-called "recitation of the facts" is a mystery. *See* Amici-Br. 3-5. Even a cursory review of the government's closing argument at trial (R66-7334-7405; R67-7603-32), shows that the jury heard far more evidence probative of defendants' *quid pro quo* than the narrow portion recounted in amici's brief. Siegelman's amici are free to disagree with the government's view of what the evidence proves, but, at a minimum, amici (and defendants) should accurately represent the quantum of evidence before the jury.

each defendant's trusted confidant (Siegelman/Bailey, Scrushy/Martin) about both the terms of the *quid pro quo* and the actions each defendant took to execute and conceal the *quid pro quo*; the corroborating testimony of other witnesses, many of whom also worked for Siegelman or Scrushy; and corroborating documentary evidence.

Evidence establishing the explicit agreement between defendants was first provided by Bailey when testifying about the conversations he and Siegelman each had with Hanson about reconciling the rift between Siegelman and Scrushy following the 1998 gubernatorial election. The substance and upshot of those conversations, as recounted *supra* at pp. 7-8, were that Siegelman would appoint Scrushy to the CON Board in exchange for Scrushy's payment of $500,000. Those conversations also established that Scrushy wanted control of the CON Board from Siegelman. R37-545-47. Based on this testimony, a reasonable jury could find that the terms of an agreement were set: if Scrushy paid $500,000, then Siegelman had to appoint him to and provide him control over the CON Board.

Bailey's testimony about the explicit agreement, however, did not end with the conversations involving Hanson. Bailey further testified that, in or around July 1999, Scrushy met alone with Siegelman in Siegelman's office. R37-732-36; R39-1112. Sometime after that meeting, Siegelman showed Bailey the check from IHS to the AELF dated July 19, 1999, said that it was from Scrushy, and said that

Scrushy was "halfway there." R36-504-12. Bailey asked "what in the world is he [Scrushy] going to want for that?" *Id.* at 507. Siegelman replied, "the CON Board." *Id.* Bailey then asked, "I wouldn't think that would be a problem, would it?"; Siegelman responded, "I wouldn't think so." *Id.*

Bailey's conversation with Siegelman shows that Scrushy was carrying out his end of the bargain and that Siegelman had accepted its terms. Parsing Bailey's testimony, Siegelman maintains (Br. 53-55) that the conversation proves only that he (Siegelman) believed that Scrushy *wanted* a seat on the CON Board ("what is he going to want"), not that he had *agreed* to give him one, and that Siegelman only said he "wouldn't think" appointing Scrushy would be a problem (instead of "it won't be" a problem). But it was Bailey's choice of words to which Siegelman was responding. Siegelman's responses demonstrate his understanding of the connection between Scrushy's payment of money and his appointment to the CON Board. Jurors are presumed to use common sense when evaluating the evidence, *see United States v. Mosquera*, 779 F.2d 628, 630 (11th Cir. 1986), and a reasonable jury here could conclude that Siegelman knew that Scrushy was then in the process of giving him $500,000 in return for a seat on the CON Board. *See Evans*, 504 U.S. at 268, 112 S. Ct. at 1889. Siegelman's cursory critique

notwithstanding, this conversation with Bailey alone establishes his explicit *quid pro quo* with Scrushy.[18]

Indeed, Bailey testified repeatedly and without qualification on cross-examination that there was an agreement and a *quid pro quo*. *See, e.g.*, R39-1117-18 (Siegelman's receipt of the HealthSouth check was "the fulfillment of Mr. Scrushy's $500,000 commitment, yes sir."); *id.* at 1118 ("I'm saying Mr. Scrushy committed $500,000. This [HealthSouth check] was the finalization of that commitment for $500,000 for seats on the CON Board."); *id.* (admitting that he, Bailey, participated "in this process of an exchange of official action for money"); *id.* (when asked "was the second $250,000 a bribe or not?," agreeing that it was "the fulfilment of Mr. Scrushy's $500,000 for seats on the CON Board,

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[18] In their briefs, both defendants point to alleged confusion in Bailey's testimony about when the conversation with Siegelman about the IHS check occurred. Scrushy-Br. 7-9; Siegelman-Br. 9. Bailey, however, simply could not recall the precise date when he saw Scrushy at the Governor's office, or whether his conversation with Siegelman about the IHS check occurred on the same day he saw Scrushy meet with Siegelman. R36-504, 515-16. Siegelman's receipt of the IHS check, however, is not seriously disputed, and Bailey's testimony about the substance of his conversation with Siegelman was itself uncontroverted. As the government argued during summation, because Scrushy obtained the IHS check (dated July 19, 1999) after the July 14th meeting, the jury easily could find that Scrushy met again with Siegelman to deliver the check, R66-7370, especially given Martin's testimony that Scrushy was going to personally deliver the check to Siegelman, *see* pp. 11-12, *supra*. Even Siegelman's attorney admitted at trial that defendants had to have met after July 19, 1999, if the date on the check was legitimate (which it was, R42-1969). R41-1834.

Yes sir."); *id.* at 1122 ("As I recall, Mr. Leach, Mr. Scrushy's contributions were made for seats on the CON Board."). Indeed, even defense counsel had to acknowledge that Bailey had testified unambiguously about a *quid pro quo*. *See, e.g.*, R38-1007-08 (counsel for Scrushy: "I want to set the checks aside. I'm talking about your testimony that there was some exchange of official action for the payments that Mr. Scrushy gave, all right?"). The district court, recognizing that Bailey was unwavering in his testimony about "the agreements" despite extensive cross-examination, eventually directed counsel to "try to move on." R39-1123.

Bailey equally neutralized defendants' argument (repeated in this Court) that Siegelman had considered appointing Scrushy to the CON Board long before they brokered their unlawful agreement; Bailey testified bluntly that "[s]ometimes you bargain and shop before you buy." R37-739. When pressed about whether he had enough experience with political payoffs to know what was going on, Bailey responded "[e]nough to make that call." *Id.*

Martin's testimony concerning the first bribe installment (the IHS check), discussed *supra* at pp. 8-12, corroborated Bailey's testimony on the *quid pro quo*. Martin's testimony did not leave the jury to wonder about the terms of the exchange: "He [Scrushy] told me that if we raised that money, then we would have a spot on the CON Board." R42-1865; *see also id.* at 1800 (Martin: "we were

making a contribution . . . in exchange for a spot on the CON Board."). Even Siegelman's attorney appeared to accept the substance of Martin's testimony, asking him on cross-examination, "Well, if you thought that you were paying money to get a seat on the CON Board, you wouldn't even have to think about whether or not that was illegal, would you?," to which Martin replied, "No, sir." *Id.* at 1800-01. Unable to refute any of the testimony by Martin or Bailey establishing a *quid pro quo*, defendants and Siegelman's amici ignore almost all of it in their briefs.

Cline's testimony corroborated key details of Bailey's and Martin's testimony concerning Siegelman's and Scrushy's agreement to swap $500,000 for a seat on the CON Board. Cline testified that Siegelman and Bailey told him that Scrushy was responsible for the IHS check and "[t]hat there was another $250,000 that would be coming" from Scrushy. R40-1252-53. Cline also testified about his conversation with Siegelman around the time of the IHS check concerning Scrushy's possible appointment to the CON Board. Cline told Siegelman that he "didn't think it was right to appoint him [Scrushy] to the CON Board because he didn't help [them] during the gubernatorial campaign and there were other people, like the Nursing Home Association, that had helped [them] during the campaign." R40-1253-54. Siegelman did not respond to Cline's comment. *Id.* at 1254. Cline further testified: "I don't know if he [Scrushy] got anything for whatever he raised

or gave. I just know that he ended up on the CON Board. I know that he was interested in it from conversations with the Governor and Nick. I said my piece and let it go." *Id.* at 1375-76.

Scrushy's attempt to conceal his purported contributions to the lottery campaign was also probative of a *quid pro quo*. Scrushy did not want the first payment to come from either HealthSouth or himself because neither had supported the lottery, R41-1768-69, and so he instructed Martin to have HealthSouth's investment banker, McGahan, make a large contribution. R41-1622, 1768-69, 1775-76. When McGahan resisted, Scrushy threatened to fire him, something Martin found "highly unusual." *Id.* at 1773. Working together, Hanson and McGahan persuaded IHS to cut the $250,000 check to the AELF in exchange for a $267,000 reduction in fees IHS owed UBS. *See* pp. 10-11, *supra*. Scrushy repeatedly told Martin that he (Scrushy) had to personally have the IHS check because he was to hand deliver the check to Siegelman; Martin personally gave Scrushy the IHS check when it arrived at HealthSouth. *See* pp. 11-12, *supra*. Scrushy's concealment of his own and HealthSouth's involvement in the first $250,000 contribution, the size and structuring of that contribution, and the urgency he attached to the payment (despite having not previously supported the lottery) provided substantial evidence that Scrushy was engaged in a corrupt deal with Siegelman.

McGahan corroborated Martin's testimony about the IHS check, R41-1622-31, 1650, 1655-64, 1668-69, and testified that, in a conversation with Scrushy between September and November 1999, Scrushy expressed astonishment when telling McGahan that the IHS check had not been cashed; after McGahan told him that IHS was possibly facing bankruptcy, Scrushy said that he had to "go get on that." *Id.* at 1669-71. The jury reasonably could conclude that Scrushy was getting his information about the status of the IHS check from Siegelman (directly or through Hanson), and that he wanted to make sure the check was cashed before IHS went bankrupt so that he would be assured of having satisfied the first half of his $500,000 bribe to Siegelman.

The timing of Scrushy's payment of the bribe installments and Siegelman's taking official action to benefit Scrushy was highly probative of their *quid pro quo*. Siegelman appointed Scrushy to the CON Board one week after the date on the IHS check. R36-517-18; GX 6B. At Siegelman's direction, Bailey contacted Sellers, the chair-designee of the CON Board, and told her to ensure that the Board elected Scrushy vice-chair; Sellers did so, even though she had another person in mind for the position. R36-518-20; R41-1538-41, 1558-59. Bailey testified that the reason Siegelman made Scrushy vice-chair was because "[Scrushy] asked for it." R36-519. Scrushy paid the second bribe installment on approximately May 18, 2000, only three weeks before the AEF loan at First Commercial Bank – for

which Siegelman was unconditionally liable as a guarantor – became due. R44-2359-62. Approximately eight months later, and only one day after Scrushy resigned from the Board in January 2001, Siegelman appointed HealthSouth Vice-President Carman to Scrushy's Board seat. R35-220-23; GX 12. The timing of Siegelman's and Scrushy's actions on behalf of each other corroborated Bailey's, Martin's, and McGahan's testimony, and further established defendants' *quid pro quo*.

Moreover, the jury heard evidence that Siegelman concealed both payments he received from Scrushy. Siegelman initially instructed Cline to hold the IHS check until they decided what to do with it. R36-512; R40-1233, 1290. Siegelman and Bailey later falsely told Cline that they were going to return the IHS check, R40-1235-37, 1380, 1385 – a lie that had the effect of leading Cline to believe that Siegelman had not accepted Scrushy's money (a "colossal" amount, R40-1368) despite having appointed Scrushy to the CON Board.

At Siegelman's direction, Bailey opened a new checking account for the AEF with First Commercial Bank in Birmingham, and deposited the IHS check into that account, R36-522; R44-2331, even though the ADP had an official account and an outstanding lottery campaign debt with Colonial Bank, *see* R44-23667, 2402-03; GX 237. The proceeds of the IHS check and the HealthSouth check from Scrushy were later used to pay down the AEF campaign loan. *See* pp.

17-18, *supra*. Siegelman did not report the receipt or expenditure of either check until the AEF's disclosures came under scrutiny in July 2002. *See* pp. 18-21, *supra*.[19] As with Scrushy, a reasonable jury could conclude that Siegelman's concealment of the contributions evidenced the existence of, and his intent to cover up, a *quid pro quo*.

As detailed in the Statement of Facts, the record contains far more evidence of an explicit *quid pro quo*, including documentary evidence corroborating witness testimony. *See, e.g.*, R41-1781-82 (Martin testifying that, at HealthSouth retreat in 1999, Hanson bragged about the fact that he was able to get HealthSouth a seat on the CON Board with the help of the IHS check); R43-2089-90, 2223 (Skelton testifying that she had primary responsibility in HealthSouth for coordinating political contributions, but that she first learned of IHS and HealthSouth checks from newspaper); GX 6B, 12 (letters appointing Scrushy and Carman to the CON Board); GX 21 (IHS check); GX 27B (HealthSouth check); GX 47 (amended AEF disclosure for 1999 dated July 26, 2002).

In sum, the evidence proved not only that defendants had an agreement to exchange a $500,000 contribution to the lottery fund (Scrushy's *quid*) for

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[19] Cline testified that Siegelman "called the shots" on the lottery campaign. R40-1388-89. Siegelman's directives to Bailey about the IHS check provided a basis for the jury to conclude that Siegelman made the decision not to disclose the payments.

membership on the CON Board (Siegelman's *quo*), but that they also understood and faithfully executed its terms, and concealed their corrupt agreement from all but their most inner circle. It was more than sufficient to prove an explicit *quid pro quo*, to the extent such proof was required in this case.

C. The Evidence Was Sufficient To Support Siegelman's Honest Services Fraud Convictions On Counts 8 And 9.

Siegelman challenges (Br. 29-30) his convictions on Counts 8 and 9 on the ground that the evidence did not prove he had any connection to the conduct underlying those counts.[20] Siegelman did not raise this issue with the district court (and does not appear to contend otherwise, Siegelman Br. 3-4), despite having moved for acquittal as to the honest services counts during trial, and renewing that motion at the close of evidence. *See* R62-6539-6600; R65-7209-40; R5-456. Accordingly, this Court's review is only for plain error. *United States v. Hunerlach*, 197 F.3d 1059, 1068-69 (11th Cir. 1999). Reversal under that standard requires: (1) an error (2) that is plain (3) that affects substantial rights, and (4) that "seriously affects the fairness, integrity, or public reputation of the

[20] Scrushy does not purport to adopt this claim under Fed. R. App. P. 28(i), *see* Scrushy-Br. 26 n.1, let alone adapt Siegelman's fact-specific arguments to himself, as he must, *see United States v. Elder*, 90 F.3d 1110, 1118 (6th Cir. 1996).

judicial proceedings." *United States v. Olano*, 507 U.S. 725, 732, 113 S. Ct. 1770, 1776 (1993).

There is no error, let alone plain error. A defendant's mail fraud conviction does not require evidence that the defendant committed each element of the offense; the evidence must prove only that the defendant knowingly and willfully participated in the fraudulent scheme, and that a co-schemer used the mails or caused them to be used in furtherance of the scheme. *United States v. Ward*, 486 F.3d 1212, 1222-23 & n.7 (11th Cir.), *cert. denied*, 128 S. Ct. 398 (2007); *United States v. Funt*, 896 F.2d 1288, 1292 (11th Cir. 1990). Nor must the use of the mails be foreseeable to the particular defendant. *Funt*, 896 F.2d at 1292. And, even if a defendant has disassociated himself from the fraudulent scheme at the time of the predicate mailings (which Siegelman had not), he may still be convicted of mail fraud. *United States v. Hewes*, 729 F.2d 1302, 1324 (11th Cir. 1984); *see also Schmuck v. United States*, 489 U.S. 705, 715, 109 S. Ct. 1443, 1450 (1989) ("innocent" or "routine" mailings can satisfy mailing requirement).

The evidence was sufficient to prove that Siegelman knowingly participated in the fraudulent scheme charged in Counts 8 and 9 – to "give HealthSouth official membership on, representation at, and influence over the CON Board by means of hidden payments and financial relationships, and to conceal these activities." R1-61-34. It proved not only that Siegelman engaged in a corrupt transaction with

Scrushy, *see* Part II.B, *supra*, but also that he had an undisclosed conflict of interest when he appointed Scrushy and Scrushy's successor (Carman) to the CON Board, *see* p. 56, *supra*. It was, therefore, unnecessary to establish Siegelman's connection to the predicate mailings – the certificate of needs mailed to HealthSouth for the Phenix City and PET scanner projects on August 2, 2002, and January 2, 2003, respectively – or the underlying bribing of Tim Adams that facilitated issuance of the certificates. *See* pp. 21-24, *supra*. In any event, Siegelman's participation in the fraudulent scheme around the time of the mailings is shown by the fact that the amended AEF disclosures (filed July 26, 2002) did not list Scrushy or HealthSouth as the ultimate source of the IHS check. GX 47.

Nor is this a case where any plain error warrants correction under *Olano*'s fourth prong. Siegelman's connection to Counts 8 and 9 is hardly attenuated. Not only was he still governor when the CON Board approved the Phenix City and PET scanner projects, but all of the Board members served at his complete discretion. R35-205. Given the importance of the CON Board to HealthSouth, it was certainly foreseeable to Siegelman that Scrushy would bribe another Board member to further HealthSouth's interests. After all, Scrushy paid Siegelman $500,000 to get HealthSouth a seat on the Board in the first place. Siegelman's claim has no merit.

III. THE BRIBERY CONVICTIONS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS.

Defendants contend that their bribery convictions are time-barred because the statute of limitations began to run no later than the date of Siegelman's receipt of the IHS check (on or around July 19, 1999) or Scrushy's appointment to the CON Board (on July 26, 1999), and the bribery charges were first brought over five years later (on May 17, 2005). Siegelman-Br. 57-61; Scrushy-Br. 25. Defendants waived that claim. But even if not waived, it provides no basis for overturning their convictions.

A. Defendants Waived Their Limitations Claim.

Defendants do not dispute that they first raised their limitations claim in motions for judgment of acquittal under Fed. R. Crim. P. 29(c) over one month after the verdict.[21] Defendants' delay results in a waiver for two reasons.

First, defendants were required to raise their claim in a pretrial motion. Rule 12 provides that "a motion alleging a defect in the indictment" must be raised before trial. Fed. R. Crim. P. 12(b)(3)(B). In *United States v. Ramirez*, 324 F.3d 1225 (11th Cir. 2003), this Court rejected a limitations defense raised during trial in a Rule 29 motion after finding that the defense was, in effect, a challenge to the

[21] Siegelman raised the limitations argument, R5-456-31-39; Scrushy adopted it, R5-454-4 n.1. The district court denied defendants' motions without addressing the limitations issue. R6-468.

sufficiency of the indictment. *Id.* at 1227. The Court held that "when a statute of limitations defense is clear on the face of the indictment and requires no further development of facts at trial, a defendant waives his right to raise that defense by failing to raise it in a pretrial motion." *Id.* at 1228-29. *Ramirez* controls defendants' claim, notwithstanding their belief (Siegelman-Br. 61 n.15) that the case was wrongly decided.

The Second Superseding Indictment gave defendants notice that the bribery counts were based on Scrushy's payment of $500,000 to Siegelman and Scrushy's appointment to the CON Board, and alleged that the conduct underlying the counts began on or about July 19, 1999. R1-61-29-31. The original indictment, unsealed on October 26, 2005 (R1-6), contained specific allegations concerning the amounts and dates of the first and second bribe payments, and the date of Scrushy's CON Board appointment. R1-3-6-8.

Further, in an evidentiary hearing on March 14, 2006, attended by multiple attorneys for each defendant, government counsel testified that the original indictment was returned to address potential statute of limitations issues on the § 666 counts. R20-87, 97, 128. Counsel also testified that, in July 2004, the government began having conversations with attorneys for both defendants and entered into separate, 30-day tolling agreements with defendants; during those conversations, the government gave defense counsel "specific information that

indicated the dates [it] believed the criminal activity occurred," including the date of the first bribe payment. *Id.* at 128-129. At the same hearing, Scrushy's counsel admitted that the government had disclosed in July 2004 that the bribe consisted of two $250,000 payments and discussed the government's concern that the statute of limitations on the bribery counts might run at or near the time of the second bribe payment. *Id.* at 13-14; *see also id.* at 116-17 (government describing July 8, 2004 meeting).

In light of the allegations in the indictments, the information provided to the defense in July 2004, the tolling agreements, and the testimony at the March 14, 2006 hearing, defendants' claim that the government sought to conceal an alleged statute of limitations defect, Siegelman-Br. 60, is disingenuous. Defendants had actual notice of the specific bribe payments before trial. They rely on nothing more than the dates of those payments and Scrushy's CON Board appointment in pressing their current claim. By failing to assert that claim in a pretrial motion, defendants waived it.

In any event, defendants have no excuse for failing to assert their claim at trial. This Court and its predecessor have firmly held that "the statute of limitations is a matter of defense that must be asserted at trial by the defendant," and that the failure to do so results in a waiver. *United States v. Najjar*, 283 F.3d 1306, 1308 (11th Cir. 2002); *accord Capone v. Aderhold*, 65 F.2d 130, 131 (5th

Cir. 1933).[22] Other circuits agree. *See, e.g.*, *United States v. Arky*, 938 F.2d 579, 581-82 (5th Cir. 1991); *United States v. Gallup*, 812 F.2d 1271, 1280 (10th Cir. 1987); *United States v. Karlin*, 785 F.2d 90, 92-93 (3d Cir. 1986). Moreover, this Court (relying on *Najjar*) and the Fifth Circuit have both held that a limitations claim is waived when raised for the first time in a post-trial motion. *See United States v. Daniels*, 135 Fed. Appx. 305, 310-11 (11th Cir. 2005) (unpublished); *United States v. Mulderig*, 120 F.3d 534, 540 (5th Cir. 1997).

The waiver rule makes sense because "if the limitations defense is not jurisdictional, . . . it is difficult to conceive why it alone, of all the defendant's affirmative defenses, should not be waived if not asserted at trial." *Arky*, 938 F.2d at 582. Requiring a defendant to assert a limitations defense at trial gives the prosecution a fair opportunity to rebut the defense through additional evidence, *see Aderhold*, 65 F.2d at 131, or during summation. *See United States v. Oliva*, 46 F.3d 320, 324-25 (3d Cir. 1995) ("The determination of when the crime has been committed for statute of limitations purposes . . . is ordinarily a question of fact for the jury.").

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[22] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

Defendants seek refuge in the language of Fed. R. Crim. P. 29(c)(3) allowing a defendant to move for judgment of acquittal for the first time after the jury is discharged. Siegelman-Br. 59. But that provision says nothing about whether an affirmative defense may be raised for the first time in such a post-trial motion. Indeed, the First Circuit has stated that allowing a defendant to raise a limitations defense for the first time in a post-verdict Rule 29 motion "is inconsistent with the characterization of the statute of limitations as an affirmative defense and would unfairly sandbag the government." *United States v. Thurston*, 358 F.3d 51, 63 (1st Cir. 2004), *vacated on other grounds*, 543 U.S. 1097, 125 S. Ct. 984 (2005)). (The court in *Thurston* found the limitations claim forfeited, not waived, based on First Circuit precedent. *Id.*) Nor are defendants better served by *United States v. Phillips*, 843 F.2d 438 (11th Cir. 1988). The Court there did not address whether the defendant's claim was preserved. *Id.* at 441-43.

Defendants made a strategic decision not to present a statute of limitations defense at trial. Such a defense would have required them to make an argument to the jury that assumed their guilt on the bribery charges. The balancing act required by such an argument is apparent from Siegelman's own brief to this Court. *See* Siegelman-Br. 58 ("But the § 666 crime – if there was one, which there was not – was complete well before [May 17, 2000]."). Defendants were free to conclude that such an argument might unduly affect the focus of their trial

defense. But they must now live with that strategic decision. Defendants' claim is waived.

B. In Any Event, Defendants' Claim Does Not Satisfy The Plain-Error Test.

Even if their limitations claim is not waived, defendants are entitled, at most, to plain-error review. *Thurston*, 358 F.3d at 63. Their claim fails for multiple reasons.

To begin with, there was no error because the bribery charges were not time-barred.[23] The statute of limitations normally begins to run once the crime is complete. *United States v. Gilbert*, 136 F.3d 1451, 1453 (11th Cir. 1998). Because the bribery counts were first brought in the original indictment returned on May 17, 2005, R1-3, the government had to show that the crime was committed on or after May 17, 2000. 18 U.S.C. § 3282. Scrushy paid Siegelman the second bribe installment on or near May 18, 2000 (the date of the HealthSouth check). R37-537-38, 552. It was this second payment, rather than the first, that started the limitations clock.

Various courts have held that, where the charged offense involves a corrupt or extortionate scheme that straddles a relevant deadline for statute of limitations or *ex post facto* purpose, the offense is not complete until the conduct underlying

[23] The government has never conceded that defendants' bribery convictions are barred by the statute of limitations.

the scheme terminates. In *United States v. Morales*, 11 F.3d 915 (9th Cir. 1993), the defendant was convicted of bribery based on transactions that both preceded and followed the effective date of a Sentencing Guidelines provision that had resulted in the grouping of the transactions. *Id.* at 917-18. The court rejected an *ex post facto* challenge to the provision because the transactions were part of conduct that "extended beyond the time when the relevant Guideline provision became effective." *Id.* In *United States v. Bustamante*, 45 F.3d 933, 942 (5th Cir. 1995), the Fifth Circuit relied on *Morales* in rejecting a limitations challenge to the defendant's gratuity conviction; the court explained that he had been charged with accepting illegal gratuities over a period of time that extended into the five-year limitations period. And, in *United States v. Provenzano*, 334 F.2d 678, 684-85 (3d Cir. 1964), the court held that an extortion conviction based on payments that straddled the limitations period was not time-barred because the "payments were the consummation of the extortionate scheme which was a single and unified one." *See also United States v. DiSalvo*, 34 F.3d 1204, 1209, 1218 (3d Cir. 1994) (extortion conviction involving $120,000 loan repayment not time-barred where $30,000 in payments made within limitations period).

In this case, the first and second corrupt payments were part of a unified bribery scheme. Defendants had an agreement to exchange $500,000 for a seat on the CON Board. Part II.B, *supra*. It was $500,000, not $250,000, that was buying

Scrushy official action from Siegelman, and defendants have never argued that both bribe payments were improperly charged in the same count. Under *Morales*, *Bustamante*, and *Provenzano*, the bribery convictions were not time-barred because the final payment fell within the limitations period.

The case relied on by defendants, *United States v. Yashar*, 166 F.3d 873 (7th Cir. 1999), is distinguishable. The defendant there was convicted of embezzlement under 18 U.S.C. § 666(a)(1)(A) based on his unlawful receipt of over $9,000 in wage payments and benefits from the city. 166 F.3d at 875. Disagreeing with *Morales*, the court held that the statute of limitations began to run as soon as all of the offense elements had been completed, including the aggregated receipt of $5,000, even though the defendant continued to receive payments beyond that point. *Id.* at 878-80. *Yashar*, however, did not involve a bribery scheme; the court, therefore, did not consider whether the final installment of a previously agreed-upon bribe should be the event that starts the limitations clock. Moreover, the concern in *Yashar* – that prosecutors would try to avoid a limitations defect by broadening the conduct charged in a single count, *id.* at 878-79 – is wholly inapplicable here, where the scope of the bribery scheme ($500,000 for a CON Board seat) was set by the defendants themselves.

Even if this Court agrees with *Yashar*, defendants have cited no case from the Supreme Court or this Court holding that the limitations period begins to run

before the final installment of a single bribe, and the relevant circuit decisions discussed above are, at best, in conflict. Any error underlying defendants' bribery convictions, therefore was not "plain." *United States v. Humphrey*, 164 F.3d 588, 588 (11th Cir. 1999); *see also United States v. Neusom*, 159 Fed. Appx. 796, 798-99 (9th Cir. 2005) (unpublished) (any statute of limitations error in theft conviction was not "plain" in light of conflict between *Yashar* and *Morales*).

Finally, under *Olano*'s fourth prong, letting the bribery convictions stand risks no injustice, as defendants made a strategic decision not to raise the statute of limitations at trial, and much of their conduct fell within the limitations period. Relief is not warranted.

IV. THE EVIDENCE WAS SUFFICIENT TO PROVE THAT SIEGELMAN OBSTRUCTED JUSTICE.

The evidence proved that Siegelman, Bailey, and Young, in June through October 2001, after learning of the federal-state corruption investigation into Siegelman's administration, attempted to conceal a $9,200 corrupt payment from Young to Siegelman in January 2000 by engaging in sham check transactions. These transactions sought to make it appear that Bailey, all along, was purchasing an interest in a motorcycle Siegelman had purchased in December 1999, rather than being a conduit for the corrupt payment from Young to Siegelman. *See* pp. 28-29, *supra*. Siegelman's conviction for obstructing justice was based on the

final step in that cover-up: Bailey's payment of a $2,973.35 check with the notation "balance due on m/c" to Siegelman in the presence of Siegelman's and Bailey's attorneys. *See* p. 29, *supra*.

Count 17 charged, and the jury found, that Siegelman knowingly corruptly persuaded another person (Bailey), and engaged in misleading conduct toward another person (Bailey's lawyer), with the intent to hinder, delay, or prevent the communication of information to a law enforcement officer concerning the commission or possible commission of federal offenses related to the corrupt payment from Young, in violation of 18 U.S.C. § 1512(b)(3). R1-61-40. Siegelman does not challenge the broader evidence of a cover-up, *see, e.g.*, R38-886, but claims that the evidence was insufficient to prove that he corruptly persuaded Bailey or that he engaged in misleading conduct toward Bailey's lawyer. Siegelman-Br. 62-70. Siegelman is wrong.

A. The Evidence Proved That Siegelman Corruptly Persuaded Bailey.

As to the corrupt persuasion prong, Siegelman does not dispute that the evidence proved he acted "knowingly" and "corruptly." *See Arthur Andersen LLP*, 544 U.S. at 705-06, 125 S. Ct. at 2136 (holding that to "knowingly . . . corruptly persuad[e]" requires consciousness of wrongdoing). Rather, his sole contention (Br. 62-63) is that he did not "persuade" Bailey to write the $2,973.35 check.

The meaning of "persuade" under § 1512(b)(3) includes "to coax," "to plead with," and "to win over by an appeal to one's reason and feelings, as into doing or believing something." *United States v. Khatami*, 280 F.3d 907, 911 (9th Cir. 2002) (quoting dictionary definitions). A person can corruptly "persuade" another person by making a request. *See United States v. Morrison*, 98 F.3d 619, 629-30 (D.C. Cir. 1996). In *United States v. Shotts*, 145 F.3d 1289, 1301 (11th Cir. 1998), this Court held that the defendant's response to his secretary's question about what she should tell the FBI – "He said just not say anything and I wasn't going to be bothered" – was sufficient evidence of persuasion. In *United States v. Moore*, 525 F.3d 1033, 1048-49 (11th Cir. 2008), the Court found sufficient evidence of corrupt persuasion where the defendant, a prison guard in a contraband-for-sex scheme, "gave [an inmate] cigars and told her it was for 'not telling.'"

The evidence that Siegelman "persuaded" Bailey to write the $2,973.35 check fits within these precedents. It was Siegelman's request to Young for $9,200 that gave rise to the cover-up. R46-2995. The jury heard evidence that Siegelman directed the initial effort to conceal the $9,200 payment: Siegelman instructed Young to work out the details of the payment with Bailey, *id.*, and later instructed Bailey – who received a cashier check from Young – to make his check payable to Siegelman's wife (Lori Allen), rather than to Siegelman himself, and to give that check to Siegelman's secretary, R36-459-63. Eighteen months later,

while aware of the federal-state corruption investigation, Siegelman approved Bailey's payment of a $10,503.39 check to Young as part of an effort to make it appear that Young originally had lent Bailey $9,200 to buy the motorcycle. *Id.* at 474-76.

The evidence also established that Siegelman and Bailey agreed to the $2,973.35 check transaction ("balance due on m/c") as the final step in disguising the $9,200 payment, R36-479-83, GX 190a-7; that the exchange took place in the office of Siegelman's own attorney, *id.* at 483; and that Siegelman later cashed the $2,973.35 check, *id.* at 484. In light of Siegelman's direction of the earlier stages of the cover-up, the jury reasonably could find that Siegelman "persuaded" Bailey – whether by coaxing, asking, suggesting, directing or otherwise – to write the $2,973.35 check. In so finding, the jury could also rely on the fact that Siegelman was Bailey's longtime boss and the Governor of Alabama, and on the testimony of Siegelman's top fundraiser that Bailey "blindly" did whatever Siegelman wanted done. R40-1249. *See United States v. Tocco*, 135 F.3d 116, 126-27 (2d Cir. 1998) (finding sufficient evidence that defendant attempted to persuade witness to lie before grand jury; jury could infer that defendant had strong influence over witness as her landlord and employer). Indeed, Bailey testified that he initially lied to federal investigators about the transaction to protect himself and his "boss." R36-484. Drawing all reasonable inferences and credibility evaluations in the

government's favor, the evidence was sufficient to prove that Siegelman corruptly "persuaded" Bailey.

B. The Evidence Proved That Siegelman Misled Bailey's Attorney.

Alternatively, the evidence proved that Siegelman engaged in misleading conduct toward another person. Siegelman contends (Br. 63-68) that § 1512(b)(3) does not criminalize conduct that directly misleads federal investigators, but, even assuming that contention is correct, it is besides the point: Siegelman here was charged with and convicted of misleading Bailey's attorney, George Beck, by using Beck as an unwitting accomplice in the creation of false and misleading evidence. That conduct fits within the plain language and purpose of the statute and is amply supported by the evidence.

As relevant here, a violation of § 1512(b)(3) required proof that (1) Siegelman knowingly and willfully engaged in misleading conduct toward another person, (2) with the intent to hinder, delay, or prevent the communication of information to a federal law enforcement officer, (3) about the commission or possible commission of a federal crime. *United States v. Tampas*, 493 F.3d 1291, 1300 (11th Cir. 2007). Section 1512(b)(3)'s reference to misleading "another person" is "easily and commonly understood to mean *any* person, regardless of whether he possessed knowledge of the commission or possible commission of a federal crime." *United States v. Veal*, 153 F.3d 1233, 1245 (11th Cir. 1998)

(emphasis in original). The statute covers "a wide range of conduct that thwarts justice," including "activities designed to create witnesses as part of a cover-up and to use unwitting third parties or entities to deflect the efforts of law enforcement agents in discovering the truth." *Id.* at 1247.

In *Veal*, three police officers gave false statements to state investigators (later shared with the FBI) about beating a drug dealer to death, and another officer fabricated evidence by tearing his own shirt after the beating and having a technician photograph it. 153 F.3d at 1246-47 & n.16. Holding that those actions violated the statute, the Court emphasized that, among other things, the defendants had used the police and police personnel "as conduits to create false and misleading evidence about the events resulting in [the drug dealer's] death." *Id.* at 1247. And, even though the defendants misled state investigators, the federal nexus was satisfied because there existed "the *possibility* or *likelihood* that their false and misleading information would be transferred to federal authorities . . . ." *Id.* at 1251-52 (emphasis in original).

In *United States* v. *Ronda*, 455 F.3d 1273 (11th Cir. 2006), police officers planted guns at the scene of various police shootings first investigated by state authorities, and made false and misleading statements to those authorities. 455 F.3d at 1277-78. The Court held that "[t]he fabrication of evidence to mislead federal investigators violates § 1512(b)(3)," regardless of whether the potential

federal investigation would have uncovered sufficient evidence of a crime. *Id.* at 1290.

Siegelman's conduct is similar to the cover-ups in *Veal* and *Ronda*. On October 16, 2001, in the presence of Beck and Siegelman's own attorney (Segall), Siegelman received a $2,973.35 check from Bailey and gave Bailey a bill of sale for the motorcycle, which their lawyers helped finalize at the meeting. *See* p. 29, *supra*. This conduct was plainly "misleading" under 18 U.S.C. § 1515(a)(3) because it, *inter alia*, generated documents (*i.e.*, the check and bill of sale) and witnesses (*i.e.*, Beck and Segall) designed to give legitimacy to the sham motorcycle transaction. The check bore the false statement "balance due on m/c," *see* GX 190a-7, when, in truth and fact, the transaction was part of a cover-up – there was no outstanding "balance due" because Bailey had not been purchasing an interest in Siegelman's motorcycle, *see* R36-474-77; R46-3000-01. Siegelman invited reliance on that check by using it in the sham transaction and cashing it. R36-484. And, Siegelman plainly intended to mislead Beck, who believed the October transaction was legitimate, R36-483, so that Beck would be an "unwitting third part[y]," *Veal*, 153 F.3d at 1247, a witness who could provide favorable information about the purported motorcycle sale. Finally, Siegelman's intent was to hinder, delay, or prevent the communication to law enforcement concerning a potential federal offense because, as Bailey testified, Siegelman was then aware of

the federal-state investigation and the $2,973.35 transaction was the final step in the cover-up. *Id.* at 482-83. Accordingly, the evidence was sufficient to prove a misleading conduct offense under § 1512(b)(3).

Siegelman erroneously contends (Br. 69) that, because Bailey did not testify that he intended to mislead Beck, such an intent should not be imputed to Siegelman. In fact, Bailey twice testified that he "lied" to Beck (and Segall). R37-803-04; R38-884-85. That testimony, along with Bailey's testimony that he and Siegelman undertook the $2,973.35 transaction as the final step in the cover-up, could certainly lead the jury to find that Siegelman also intended to mislead Beck.

Siegelman also challenges the evidence of his intent on the ground that he "ha[d] [no] reason to believe that Bailey's lawyer would tell the Government about crimes that Bailey had allegedly participated in." Siegelman-Br. 69. But that argument relies on a strawman. The purpose of having Beck assist with the sham transaction was not to prevent Beck from incriminating Bailey or Siegelman to federal investigators; it was to give the transaction an aura of legitimacy. *See Veal*, 153 F.3d at 1247.[24] This was not the first time that Siegelman and Bailey

[24] That a client would call on his lawyer to provide favorable information in connection with a criminal investigation or trial is hardly far-fetched. Indeed, Segall testified as a character witness for Siegelman at sentencing in this case, R33-194-227, and testified to his belief that Siegelman had been honest in his

used lawyers in the cover-up, as the June 2001 check (for $10,503.39) from Bailey to Young was delivered to the office of Young's lawyer. R48-3377. The jury reasonably could find that Siegelman would not have gone to the trouble of having two attorneys assist with a simple conveyance of a motorcycle between longtime friends unless their presence furthered the purpose of the cover-up. Indeed, Siegelman even introduced a copy of the bill of sale at trial. Siegelman-Ex. 48.

Finally, Siegelman contends that, as a matter of law, his conduct did not violate § 1512(b)(3) because "[m]isleading one's own lawyer – or working with an alleged partner to mislead that partner's own lawyer – is not witness tampering within the intended coverage of the statute." Siegelman-Br. 70 n.20. Holding otherwise, Siegelman continues, would make it a crime for a criminal defendant to falsely proclaim innocence to his lawyer while hoping that the lawyer will then profess the client's innocence to the government. *Id.* Siegelman again sets up a strawman. Count 17 was not based on a client's false protestation of innocence to his lawyer; it was based on Siegelman's active deployment of a lawyer to assist with concealing evidence of a federal crime. The use of an attorney in that manner – with or without the attorney's knowledge – erects no shield to criminal liability. "Under [the crime-fraud] exception, the attorney-client privilege does not extend

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dealings with him, *id.* at 198.

to communications made for the purpose of furthering a crime or fraud." *In re Grand Jury Proceedings*, 142 F.3d 1416, 1419 n.4 (11th Cir. 1998). Thus, multiple courts have upheld the admissibility of, or the issuance of subpoenas for, evidence concerning attorney-client communications in obstruction-of-justice cases when those communications concern the falsification of evidence. *See In re Grand Jury*, 475 F.3d 1299, 1303-06 (D.C. Cir. 2007); *United States v. Ruhbayan*, 406 F.3d 292, 295-97, 299 (4th Cir. 2005); *United States v. Dyer*, 722 F.2d 174, 176-79 (5th Cir. 1983); *see also United States v. Cleckler*, 265 Fed. Appx. 850, 853-54 (11th Cir.) (unpublished) (holding that attorney's testimony regarding conversation with defendant about fabricated documents satisfied crime-fraud exception; defendant submitted documents to IRS through attorney), *cert. denied*, 2008 WL 2076513 (2008). Moreover, in *United States v. Kirsch*, 54 F.3d 1062 (2d Cir. 1995), the court upheld a sentence enhancement for obstruction of justice based on the defendant's deliberately false statement to his own attorney, which the attorney used in an affidavit filed on the defendant's behalf. *Id.* at 1073-74. These cases refute Siegelman's bald assertion that, because he used a lawyer in his cover-up scheme, he is somehow immune from criminal liability.

Section 1512(b)(3) must be read in light of the need to "protect[] against the rare type of conduct that is the product of the inventive criminal mind and which also thwarts justice." *Veal*, 153 F.3d at 1247 (quoting S. Rep. No. 97-532 at 18

(1982), *reprinted in* 1982 U.S.C.C.A.N. 2515, 2524). Because Siegelman's misleading conduct falls within the plain terms of the statute, is similar to the conduct in *Veal* and *Ronda*, and was amply proven at trial, his conviction on Count 17 should stand.

V. THE ADMISSION OF COCONSPIRATOR HANSON'S STATEMENT WAS NOT REVERSIBLE PLAIN ERROR.

Defendants challenge the admission of Hanson's out-of-court statement to Martin at a HealthSouth retreat in the fall of 1999. Siegelman-Br. 71-76; Scrushy-Br. 25. Martin testified that Hanson "was bragging about the fact that he was able to get [HealthSouth] a spot on the CON Board with the help of the [IHS] check." R41-1781; *accord id.* at 1787. The district court admitted that testimony under Fed. R. Evid. 801(d)(2)(E), which excludes from the definition of hearsay coconspirator statements made during and in furtherance of the conspiracy. *See Hasner*, 340 F.3d at 1274 (setting forth requirements for admission under Rule 801(d)(2)(E)). Defendants do not seriously challenge the evidence that a conspiracy existed to get Scrushy a CON Board seat in exchange for $500,000, or that they and Hanson were part of that conspiracy.[25] Rather, their sole claim is that

[25] Siegelman makes the perfunctory argument that he was not part of any conspiracy with Hanson, Siegelman-Br. 73, but the overwhelming evidence of the *quid pro quo* scheme proves otherwise.

Hanson's statement was not in furtherance of the conspiracy. Siegelman-Br. 73.[26] Defendants are wrong.

As a threshold matter, defendants' claim is reviewable only for plain error because they did not object below to Hanson's out-of-court statement about the IHS check on the ground now asserted on appeal. *See* Fed. R. Evid. 103(a)(1); *United States v. Hawkins*, 905 F.2d 1489, 1493 (11th Cir. 1990). Scrushy's counsel objected to Hanson's statement by referencing Scrushy's previous objection to different out-of-court statements by Hanson, about which McGahan had testified. R41-1779-81. The basis for that previous objection was the alleged lack of evidence that Hanson had participated in any conspiracy. *See id.* at 1631-46. The district court overruled the objection, finding "sufficient evidence . . . that Eric Hanson participated in the conspiracy to raise money through Mr. McGahan at UBS for the initial payment of $250,000 for the benefit of Mr. Richard Scrushy," *id.* at 1646, and the court referenced that ruling when it overruled Scrushy's objection to Martin's testimony. *Id.* at 1779, 1781. Defendants never challenged Hanson's statement on the ground that it was not "in furtherance of" the conspiracy, thereby depriving the district court of the opportunity to consider

[26] In a footnote, Siegelman refers to, but does not actually challenge, other coconspirator statements admitted at trial under Rule 801(1)(2)(E). Siegelman-Br. 72 n.21. Defendants have thereby waived any claim as to those statements. *See United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990).

that issue. *Hawkins*, 905 F.2d at 1493 n.1. Accordingly, defendants forfeited their instant claim. *See United States v. Burton*, 126 F.3d 666, 671-73 (5th Cir. 1997) (holding that objection to coconspirator statements based on insufficient evidence of conspiracy did not preserve claim that statements were not in furtherance of conspiracy); *United States v. Greenwood*, 974 F.2d 1449, 1463 (5th Cir. 1992) (similar).

The admission of Hanson's statement was not erroneous. This Court applies a liberal standard in determining whether a statement was in furtherance of a conspiracy. *United States v. Santiago*, 837 F.2d 1545, 1549 (11th Cir. 1988); *United States v. James*, 510 F.2d 546, 549-50 (5th Cir. 1975). "The statement need not be necessary to the conspiracy, but must only further the interests of the conspiracy in some way." *United States v. Miles*, 290 F.3d 1341, 1351 (11th Cir. 2002). "[I]f the statement 'could have been intended to affect future dealings between the parties,' then the statement is in furtherance of a conspiracy." *United States v. Caraza*, 843 F.2d 432, 436 (11th Cir. 1988) (quoting *United States v. Patton*, 594 F.2d 444, 447 (5th Cir. 1979)). Moreover, "[s]tatements between conspirators which provide reassurance, serve to maintain trust and cohesiveness among them, or inform each other of the current status of the conspiracy further the ends of the conspiracy . . . ." *United States v. Ammar*, 714 F.2d 238, 252 (3d Cir. 1983); *accord United States v. Rahme*, 813 F.2d 31, 35-36 (2d Cir. 1987).

And, as defendants concede (Siegelman-Br. 74-75), boasting or bragging is in furtherance of a conspiracy if the statements are directed at obtaining the confidences or allaying the suspicions of coconspirators. *Santiago*, 837 F.2d at 1549.

Hanson's statement at the HealthSouth retreat furthered the conspiracy. Given Martin's own involvement in obtaining the IHS check, *see* pp. 8-12, *supra*, there was sufficient evidence that he himself was a conspirator in the scheme to buy HealthSouth a seat on the Board. By bragging to Martin about purchasing the CON Board seat "with the help of" the IHS check, Hanson, HealthSouth lobbyist and Siegelman's longtime friend, informed Martin that their plan had worked – that the IHS check had influenced Siegelman's official decision to appoint Scrushy to the Board. But, apart from advising Martin of the status of the conspiracy, Hanson's statement affected future dealings. Hanson knew that Scrushy was required to pay $500,000, not $250,000, for the CON Board seat. *See* pp. 7-8, *supra*. When Hanson bragged to Martin about the IHS check, Scrushy had not yet made the second $250,000 payment, and Siegelman had complete discretion to remove Scrushy from the CON Board. R35-205. By reminding Martin, Scrushy's confidant, of the role of the first $250,000 payment, Hanson sought to ensure that Scrushy followed through with the second payment and that Martin provided assistance should he again be called upon to do so. Hanson's

statement served to protect the conspiratorial goal – HealthSouth's CON Board membership.

Even if Hanson's statement was not "in furtherance of" the conspiracy, any error in admitting the statement was not "plain" given this Court's liberal construction of the "in furtherance" standard and the case law recognizing that the type of statement involved here, bragging about a past event, often satisfies it. *Olano*, 507 U.S. at 734, 113 S. Ct. at 1777. Nor can defendants carry their burden of proving that any "plain error" affected their substantial rights or that it should be corrected. *Id*. at 734-36, 113 S. Ct. at 1777-79. The jury heard overwhelming evidence supporting defendants' convictions; Hanson's statement was not the deciding factor. *See Santiago*, 837 F.2d at 1549. Defendants overstate the government's reliance on Hanson's statement during rebuttal argument. Siegelman-Br. 71-72. The government's rebuttal, like its initial summation (R66-7349-74, 7378-80), discussed the range of evidence proving the CON Board scheme. *See* R67-7610-12, 7617-19, 7629-31. Defendants' unpreserved claim should be denied.

VI. THE DISTRICT COURT'S DENIAL OF DEFENDANTS' MOTION FOR A NEW TRIAL BASED ON ALLEGED JUROR MISCONDUCT WAS NOT AN ABUSE OF DISCRETION.

Defendants contend that the district court abused its discretion by denying their motion for a new trial (and related motions for reconsideration) based on alleged juror misconduct and their related demand for a far-reaching investigation of juror conduct. Scrushy-Br. 31-79; Siegelman-Br. 84. Defendants largely rely on purported emails allegedly exchanged between jurors during trial and deliberations, copies of which were allegedly mailed anonymously to the defense; the anonymous source of that material, however, rendered it highly dubious. Defendants also gloss over the district court's extensive inquiry of jurors at a post-verdict hearing, the ample precedent supporting the scope of the court's investigation, the evidence supporting the court's finding that the jury was exposed to only limited extraneous information, and the absence of prejudice to defendants from that exposure. Defendants' claim should be rejected.[27]

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[27] Scrushy has filed a motion for this Court to appoint a special master under Fed. R. App. P. 48 to investigate the purported juror emails. That motion is based on information provided to him by the government concerning the Postal Inspector's investigation of a collateral matter involving two jurors. In light of that investigation, Scrushy effectively contends that the government's opposition to the defense request for an investigation of the purported emails attached to their motion for reconsideration was disingenuous. We respectfully refer the Court to our response to that motion (filed concurrently with this brief), which shows that the government's position was consistent and appropriate, and that appointment of a master is wholly unnecessary.

A. The District Court Has Broad Discretion When Investigating Alleged Juror Misconduct, But Fed. R. Evid. 606(b) Substantially Limits Any Post-Verdict Interrogation of Jurors.

The Sixth Amendment guarantees every criminal defendant the right to trial by an "impartial jury." U.S. Const. amend. VI. The jury is presumed to be impartial. *United States v. Winkle*, 587 F.2d 705, 714 (5th Cir. 1979). Accordingly, a defendant's mere allegation of misconduct does not trigger a duty by the district court to investigate. *United States v. Cuthel*, 903 F.2d 1381, 1382-83 (11th Cir. 1990). Rather, a defendant must make a "colorable showing" of misconduct. *United State v. Barshov*, 733 F.3d 842, 851 (11th Cir. 1984). "To justify a post-trial hearing involving the trial's jurors," the defendant must come forward with "clear, strong, substantial and incontrovertible evidence" of "a specific, nonspeculative impropriety." *Cuthel*, 963 F.2d at 1383 (internal quotation marks and citations omitted). "The more speculative or unsubstantiated the allegation of misconduct, the less the burden to investigate." *United States v. Caldwell*, 776 F.2d 989, 998 (11th Cir. 1985).

The district court has broad discretion when investigating alleged juror misconduct. *See, e.g.*, *United States v. Dominguez*, 226 F.3d 1235, 1246 (11th Cir. 2000); *United States v. Watchmaker*, 761 F.2d 1459, 1465 (11th Cir. 1985). "[T]hat discretion is at its broadest when the allegation involves internal misconduct such as premature deliberations, instead of external misconduct such

as exposure to media publicity," and "'extends even to the initial decision of whether to interrogate the jurors.'" *Dominguez*, 226 F.3d at 1246 (quoting *United States v. Yonn*, 702 F.2d 1341, 1345 (11th Cir. 1983)).

Nevertheless, after the jury has rendered its verdict, the district court may not interrogate a juror about "any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict . . . or concerning the juror's mental processes in connection therewith." Fed. R. Evid. 606(b). The sole exceptions relevant here permit inquiry into: "(1) whether extraneous prejudicial information was improperly brought to the jury's attention, [and] (2) whether any outside influence was improperly brought to bear upon any juror." *Id.*; *accord Cuthel*, 903 F.2d at 1383.

"[Rule] 606(b) is grounded in the common-law rule against admission of jury testimony to impeach a verdict and the exception for juror testimony relating to extraneous influences." *Tanner v. United States*, 483 U.S. 107, 121, 107 S. Ct. 2739, 2748 (1987). The rule not only serves the interest of finality in litigation and protects jurors from harassment by the defeated party, but also ensures the viability of the jury system itself: "full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a

system that relies on a decision of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct." *Id.* at 119-21, 107 S. Ct. at 2747-48.

A defendant who alleges juror misconduct in the form of exposure to extraneous information has the burden of proving that the exposure in fact occurred. If the defendant does so, "prejudice is presumed and the burden shifts to the government to rebut the presumption" by showing "that the jurors' consideration of extrinsic evidence was harmless to the defendant." *Ronda*, 455 F.3d at 1299 (citing *Remmer v. United States*, 347 U.S. 227, 229, 74 S. Ct. 450, 451 (1954)).[28] The Court considers the totality of the circumstances to determine whether a reasonable probability exists that the extraneous information influenced the jury. *Id.* at 1299-1300.

B. The District Court Denied Defendants' New Trial Motion After Investigating And Considering Their Allegations Of Juror Misconduct.

On September 29, 2006, defendants filed a joint motion for a new trial under Fed. R. Crim. P. 33(a), alleging that the jury had been exposed to extrinsic evidence and that some jurors had deliberated prematurely and with fewer than all

[28] *Ronda* noted an apparent conflict in this circuit over whether *Remmer*'s presumption of prejudice actually applies when jurors are shown to have considered extrinsic evidence, but declined to consider the matter further because the government had sufficiently rebutted the presumption. 455 F.3d at 1299 & n.36. For the same reason, the Court here need not consider that apparent conflict.

jurors present. R6-467. Defendants attached multiple exhibits to their motion, including news articles and faxed copies of affidavits by Juror 5 (and his wife and his wife's pastor). *Id.*, Exs. 1-9. Some of the material suggested that, during deliberations, Juror 7 may have reviewed information on the internet about his role as foreman, *id.*, Ex. 1, and that Juror 40 may have seen a headline about the case on the internet, *id.*, Ex. 5-B at 24. Juror 5's affidavits suggested that the district court had pressured the jury to return a unanimous verdict and that the jury had been exposed to information obtained by Juror 40 from the internet. *Id.*, Exs. 8 & 9.

Defendants also submitted copies of four purported emails allegedly sent via U.S. mail from an anonymous source to Scrushy and defense counsel in envelopes postmarked September 5, 15, & 21, 2006. R6-467, Exs. 10-14. Defendants later submitted a copy of another purported email allegedly mailed anonymously to Siegelman's counsel. R6-471, Ex. 15. The five purported emails allegedly were exchanged between Jurors 7 and 40, and between Juror 40 and possibly two other jurors; according to defendants, if authentic, they showed that some jurors were communicating about the case before and during deliberations and may have considered information about the penalty applicable upon a conviction. *Id.* at 1-2; R6-467-11-12.

In the alternative to a new trial, defendants sought a sweeping investigation of juror conduct. Specifically, they requested that: defense counsel or the court interview each juror; the court order Jurors 7 and 40 to preserve any computers used during jury service, and order every juror to provide it with all email and text-messaging addresses, and all Internet Service Providers (ISPs) and telephone companies providing text-messaging services which were in effect between the date of the juror summonses (March 2006) and the verdict (June 29, 2006); the court authorize defendants to issue subpoenas to ISPs and telephone companies for all emails and text messages relating to the case sent by any juror between the date of the summonses and July 31, 2006; and the court hold an evidentiary hearing at which defense counsel be permitted to question every juror under oath. R6-467-13-15; *see also* R6-469, 472, 474.

On October 31, 2006, the district court held an evidentiary hearing to determine whether the affidavits by Juror 5 (R6-467, Exs. 8 & 9) had been obtained by defense counsel in violation of Local Rule 47.1 of the Middle District of Alabama, which prohibits parties or anyone on their behalf from contacting jurors about their deliberations, absent court permission. R28-6. The court heard testimony from two notaries, Juror 5, Juror 5's wife and his wife's pastor, a Birmingham pastor named Charles Winston and his wife Debra Bennett Winston. The hearing revealed several irregularities in the affidavits, including that the first

affidavit had been written by Charles Winston, did not represent Juror 5's own words (even though his purported statements appeared in quotation marks), and had not been sworn to or signed by Juror 5 in front of a notary. *Id.* at 31-40, 153-58, 250-51. The evidence also established that Debra Winston had provided copies of both affidavits to Siegelman's attorneys, but not to the court or the government, and that she had obtained the second affidavit from Juror 5 *after* meeting with Siegelman's attorneys and learning of their plans to file a motion for a new trial. *Id.* at 202-04, 213, 231-39; *see also* R7-518-20-22 (summary of evidence).[29]

The district court expressed serious concerns about whether the affidavits had been obtained in violation of Local Rule 47.1, but found insufficient evidence of a violation. R7-492-7-8. The court rejected much of the evidence proffered in support of defendants' new trial motion as irrelevant, speculative, and barred by Rule 606(b), and denied defendants' motions for an order requiring the preservation of evidence. *Id.* at 7, 9. Nevertheless, the court found that defendants had "made [a] colorable showing of extrinsic influence on the jury

[29] Charles Winston previously had met Siegelman and Scrushy, and had attended religious services at which Scrushy spoke; Debra Winston knew Scrushy from having worked for his boss 20 years ago. R28-150-51, 214-15.

sufficient to warrant further inquiry by the Court into certain aspects of the jury's conduct during the trial." *Id.* at 8 & n.9.

The court held a second hearing on November 17, 2006. The court subpoenaed all twelve jurors to testify and to bring with them any material related to outside information that they or any other juror considered during trial or deliberations. R7-518-22-23 & n.14. Each juror testified under oath in response to twelve detailed questions, and specific follow-up questions, posed by the district court concerning whether the jury had been exposed to any outside influences or extraneous information. R29-10-12.

The district court denied defendants' new trial motion on December 13, 2006. Based on the hearing testimony (discussed *infra*), the court found that Jurors 7 and 40 had downloaded an unredacted copy of the Second Superseding Indictment off the district court's website, and that Juror 7 had briefly viewed information on the role of a jury foreperson from that website. R7-518-26-31. The court found no evidence that Jurors 7 or 40 were aware of the difference between the unredacted and redacted indictments; the redacted version removed Siegelman from Count 4 and Scrushy from Count 3 in light of the court's ruling that those counts were multiplicitous (*see* n. 1, *supra*). R7-518-46 & n.32. The court found that the extrinsic material was discussed only briefly with other jurors. *See id.* at 29 (role-of-foreperson information discussed "no more than a few

minutes"); *id.* at 31 (jury discussed fact that Juror 40 had downloaded indictment for no more than 30 minutes; Juror 7 referred to unredacted indictment during two days of deliberations but then discarded document). The court also found that Jurors 7, 22, and 40 had inadvertent contact with media coverage relating to the trial but had avoided the content of that coverage almost entirely. *Id.* at 30.

In finding that the jury's exposure to extraneous information was limited to three minor areas, the district court made specific credibility determinations about the November 17th hearing testimony. *See* R7-518-27-31. The court found that certain jurors either had exaggerated the misconduct of other jurors or had assumed misconduct that did not, in fact, occur. *Id.* at 27. The court concluded that no reasonable possibility existed that the limited exposure to extraneous information had prejudiced defendants, and denied their new trial motion to the extent it relied on such exposure. *Id.* at 44-50.

The court also denied defendants' claims that the jury had deliberated prematurely and with fewer than all members present. R7-518-50-55. The court had "serious concerns" about the factual predicate for the claim – the purported juror emails – but concluded that Rule 606(b) barred it from questioning jurors about matters unrelated to extraneous information and outside influences, *id.* at 51, and that relevant precedent did not support an investigation into such matters, *id.* at 52 (citing cases). Even assuming *arguendo* that the purported emails were

authentic, the court concluded that they showed only limited premature deliberations and limited deliberation by fewer than all twelve jurors. *Id.* at 53. The court further held that defendants had not been prejudiced by any misconduct given "the strength of the Government's evidence on the counts of conviction, the length of the jury deliberations, the Court's instructions to the jury, . . . [and] the split verdict reached by the jurors." *Id.* at 53-55.

On December 28, 2006, defendants filed motions for reconsideration or, in the alternative, for a new trial based on newly-discovered evidence. R7-519, 520. The motions relied on two more purported juror emails, copies of which allegedly were mailed to Scrushy and defense counsel by an anonymous source in envelopes post-marked December 20, 2006 – just one week after the denial of defendants' new trial motion. R7-519, Exs. 23-25; R7-520, Exs. 23-25. The purported emails appeared to have been sent from Juror 40's email address to Juror 7's email address during the course of the jury's deliberations, and, according to defendants, provided allegedly strong evidence that the jurors had been exposed to extrinsic evidence obtained from the internet and showed that Jurors 7 and 40 were biased against defendants. R7-519-4-7. Defendants renewed their request for an independent investigation of the purported emails, even asking the court to obtain the computers of Jurors 7 and 40. *Id.* at 19; R7-520-7.

On February 26, 2007, Scrushy moved to supplement his motion with another anonymously-mailed copy of another purported juror email – this last one allegedly sent from Juror 7 to Juror 40. R7-532, Exs. 26 & 27.

The district court denied defendants' motions on June 22, 2007. R10-611. The court did not find anything in the motions that undermined its ruling on the scope of its investigation of juror conduct or its denial of a new trial. *Id.* at 3-4. The court made clear that, despite its concerns about the source of the purported juror emails, none of its rulings was based on a finding that the purported emails were not authentic; the court had assumed their authenticity. R10-611-4 n.9. The court found defendants' request for a broad investigation of Jurors 7 and 40 "unprecedented." *Id.* at 6. In light of the "full blown public hearing" on November 17, 2006, the court found that "the only reason for a further inquiry would be to attempt to impeach the jurors' prior testimony" about internet searches and other alleged exposure to extraneous information. *Id.* at 6-7. The court found that the additional purported emails were largely cumulative of the exhibits on which the original new trial motion had been based; even if authentic, they simply "show[ed] communications between two jurors about the case during the period when the jury was only meant to be discussing the case as a whole" and suggested jury exposure to extraneous information. *Id.* at 10-11 n.15. Because it already had conducted a broad investigation into alleged juror exposure to

extraneous information, further investigation was unnecessary. *Id.* at 11. And, because the newly submitted documents were merely impeaching and cumulative, the court denied defendants' renewed motions for a new trial. *Id.* at 11-13.

C. The District Court's Denial Of Defendants' Motion For A New Trial Was Not An Abuse of Discretion.

The district court properly investigated defendants' allegations of juror misconduct in response to their joint new trial motion, and its finding that jurors were exposed only to limited extraneous information during deliberations was not clearly erroneous. The court's investigation provided no reason to undertake the sweeping investigation demanded by defendants, much of which was barred by Rule 606(b). The court's denial of defendants' motion was not an abuse of discretion.

1. The District Court Broadly Investigated The Jury's Potential Exposure To Extraneous Information And Outside Influences.

The court conducted a broad investigation into the jury's alleged exposure to extrinsic material, including by holding two evidentiary hearings. The first hearing, held to determine whether copies of the Juror 5 affidavits were obtained in violation of Local Rule 47.1, was necessary because defendants failed to explain in their new trial motion how they had acquired copies of those affidavits. R6-467-6-8. *See United States v. Venske*, 296 F.3d 1284, 1291-92 (11th Cir.

2002) (no abuse of discretion in exclusion of affidavit obtained in violation of local rule prohibiting contact with jurors).

Notwithstanding the irregularities in the affidavits uncovered at the first hearing, the district court went on to conduct a full-day hearing at which all twelve jurors testified about whether they had been exposed to any outside influence or extraneous information during trial or deliberations. The court's questions focused on exposure to not only the extrinsic material alleged in defendants' new trial motion (*e.g.*, information from media sources and the internet, information concerning the role of jurors, *etc.*), but also to new areas not raised in their motion, such as outside influences (*e.g.*, conversations with non-jurors). R29-10-11. The court did not simply rely on jurors' accounts of their own conduct, but also asked each juror if he or she had reason to believe that other jurors had been exposed to extraneous information. *Id.* at 11. Moreover, the court asked probing follow-up questions, as necessary, to the jurors' responses. *See, e.g.*, *id.* at 31-33, 81-84, 120-24, 127-29, 137. The breadth of the court's inquiry is also evident in the fact that the court's subpoena directed each juror to provide it with any documents related to the jury's exposure to extraneous information. *Id.* at 12; R7-518-22-23 & n.14.

None of defendants' challenges to the procedures employed by the court at the November 17, 2006 hearing has merit. Defendants complain (Scrushy-Br. 58)

that the court's definition of "extraneous" information was confusing for jurors and "bur[ied] in three-plus pages of instructions." To the contrary, the court's definition was straight-forward, mirrored language both in the subpoena received by each juror (R7-518-23 n.14) and in the court's instructions at the close of trial (R66-7272-73), and came toward the beginning of instructions far shorter than any jury charge at trial. R29-25, 85-86.

Equally misplaced is defendants' contention (Scrushy-Br. 56-57) that the district court "foreclosed any meaningful input from the parties" on what questions to ask the jurors. Not only did the court have the benefit of the parties' briefing on the new trial motion before the hearing, it also allowed each party to raise objections to the court's planned questioning before it questioned the jurors. R29-12-23.[30] Having considered those objections, the court certainly had the discretion to determine the scope and manner of its examination, balancing the purpose of the hearing with the limits on interrogating jurors set by Rule 606(b) and the need to minimize the burden of the hearing on jurors. *See* R29-17; *see*

[30] Scrushy (Br. 57) tries to show that the government found the court's questions confusing, but he fails to explain that the government was primarily concerned about the length of that questioning. *See* R29-12-14, 22. Moreover, the government did not ask the court to inquire about the purported emails; it stated that it "could conceive of the Court wanting to ask them if they generated those e-mails." *Id.* at 12-13; *accord id.* at 21-22.

generally Dominguez, 226 F.3d at 1246 ("The most salient aspect of the law in this area is the breadth of discretion given to judges . . . .").[31]

The district court's decision to examine all twelve jurors about their exposure to extraneous information at an evidentiary hearing over four months after the verdict shows that it gave careful consideration to the allegations in defendants' new trial motion. *See United States v. Gilsenan*, 949 F.2d 90, 98 (3d Cir. 1991) ("Jurors who complete their service should rarely, if at all, be recalled for [an evidentiary hearing]."). Defendants' arguments to the contrary ring hollow.

2. The District Court Properly Limited Its Post-Verdict Inquiry To Matters Concerning Exposure To Extrinsic Material And Outside Influences.

Defendants contend (Scrushy-Br. 49-56, 61) that the investigation into juror conduct was inadequate because the district court declined to interrogate jurors about whether they had deliberated prematurely or with fewer jurors present, or to investigate the authenticity of the purported juror emails attached to their new trial motion. The scope of the court's investigation was not an abuse of discretion.

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[31] Defendants' complaint (Scrushy-Br. 57) that the judge asked Juror 30 leading questions about Juror 40's consideration of the unredacted indictment is misplaced. The court asked open-ended questions. *See*, *e.g.*, R29-95 (asking Juror 30: "Did Juror Number 40 bring in anything else other than that document?" and "Did anyone else bring in any other documents?").

Rule 606(b) prohibits post-verdict questioning of jurors on matters unrelated to their exposure to extraneous information or outside influences; that prohibition applies "even where the inquiry concerns misconduct prior to the deliberations." *Cuthel*, 903 F.2d at 1383; *see also Tanner*, 483 U.S. at 120-21, 125-27, 107 S. Ct. at 2747-48, 2750-51 (Rule 606(b) barred post-verdict testimony by jurors concerning possible juror intoxication during trial). In *Venske*, this Court held that post-verdict information originating with a juror indicating that jurors may have passed notes during trial making fun of some witnesses was inadmissible under Rule 606(b) because it involved the jury's internal deliberative process. 296 F.3d at 1287-88, 1290. In *United States v. Prosperi*, 201 F.3d 1335 (11th Cir. 2000), the Court held that the district court had correctly decided not to investigate, *inter alia*, an allegation that two jurors had engaged in a heated exchange away from other jurors, noting that "a contrary decision may have invited reversible error." *Id.* at 1340-41. Other circuits have likewise held that premature deliberations or alleged juror communications outside the jury room are internal matters for purposes of Rule 606(b). *See United States v. Logan*, 250 F.3d 350, 378, 381 (6th Cir. 2001) (Rule 606(b) prohibited post-verdict interrogation of jurors concerning potentially premature deliberations); *United States v. Caldwell*, 83 F.3d 954, 956 (8th Cir. 1996) (alleged intrajury statements overheard by non-juror during course of trial did not require investigation and could not be used to

impeach jury's verdict); *United States v. McElhiney*, 85 Fed. Appx. 112, 117 (10th Cir. 2003) (unpublished) (district court complied with Rule 606(b) by refusing to interview jurors about conversation before government rested in which some jurors purportedly indicated belief defendant was guilty); *United States v. Fails*, 51 Fed. Appx. 211, 215-16 (9th Cir. 2002) (unpublished) (inquiring into discussion by some jurors during short break from deliberations risked violating Rule 606(b)). In light of this case law, the district court did not abuse its discretion by declining to ask jurors whether they had deliberated prematurely or with fewer than all jurors present, or whether they had communicated with one another about the case via email or text messaging.

In any event, "the failure to hold a hearing constitutes an abuse of discretion only where there is evidence that the jury was subjected to influences by outside sources." *Watchmaker*, 761 F.2d at 1465. Only one of the five purported emails suggested juror exposure to extrinsic information, *see* R6-467, Ex. 12 ("penalty 2 severe"), and the November 17, 2006 hearing thoroughly explored that question. In declining to investigate potential internal communications outside the jury room prior to or during the course of deliberations, the court reasonably relied on the length of the jury's deliberations, the split verdict, and the court's instructions (including not to discuss the case prematurely and to base their verdict solely on the trial evidence). R7-518-12, 53-54. Those factors showed that jurors did not

prematurely decide the case, closely considered the evidence, and returned an impartial verdict. *See Dominguez*, 226 F.3d at 1247-48; *Cuthel*, 903 F.2d at 1383. Moreover, the limited nature of the alleged misconduct militated against relief. *See United States v. Harris*, 908 F.2d 728, 734 (11th Cir. 1990) (upholding district court's decision not to interview jurors about juror remark "these guys sitting across from us think they're going to get off on this"); *United States v. Klee*, 494 F.2d 394, 395-96 (9th Cir. 1974) (upholding denial of mistrial, even though eleven jurors prematurely discussed case during recesses and nine jurors expressed opinions about defendant's guilt).

The court's denial of defendants' related request for documentary evidence concerning juror communications was likewise proper. Defendants' request was broad on its face; for example, defendants sought permission to issue subpoenas under Fed. R. Crim. P. 17(c) directing all relevant ISPs and telephone companies to search for and produce copies of all emails and text-messages "relating to the subject matter of the case" from any juror between the date of the jury summonses (March 2006) and July 31, 2006. R6-467-13-15. The potential harm from such an investigation was not limited to an invasion of the jurors' privacy; the specter of jurors being investigated so extensively, and at the instigation of defendants they had just convicted, could have had a chilling effect on citizens' willingness to serve as jurors in the future. And, the anonymous delivery of the purported emails

to the defense provided a flimsy basis for such a far-reaching investigation. *See Caldwell*, 776 F.2d at 999.

Defendants cite no federal case to support their request for access to juror emails and text messages, and the sole state authority they rely upon, *Commonwealth v. Guisti*, 434 Mass. 245, 747 N.E.2d 673 (2001) (*Guisti I*), and 449 Mass. 1018, 867 N.E.2d 740 (2007) (*Guisti II*), is inapposite. *See* Scrushy-Br. 54-56. There, one juror posted a message on an internet mail service recounting her then-ongoing service in a rape trial; the juror's message stated, in part, "Just say he's guilty and lets [*sic*] get on with our lives!" *Guisti* I, 434 Mass. at 249-50. In *Guisti I*, the court held that the lower court should have granted the defendant's post-verdict motion for voir dire of the juror, but limited the scope of the inquiry on remand to *responses* that the juror had received to her posting; the court held that the juror's statement itself did not concern an extraneous matter that could be used to impeach the jury's verdict. *Id.* at 252-53. The court later remanded the case a second time for the lower court to determine the feasibility of locating and retrieving any of the emails sent to the juror. *Guisti II*, 449 Mass. at 1018-19.

The purported emails in this case were fundamentally different than the communications subject to investigation in *Guisti*; they concerned alleged *internal* communications between jurors covered by Rule 606(b), not *outside* communications from non-jurors, and their anonymous source made them

inherently suspect. Moreover, defendants here did not request the limited type of investigation ordered by the court in *Guisti*, but rather sought an open-ended investigation into emails relating to the case sent by *any* juror during more than four months in 2006. *Guisti*, therefore, is a far cry from this case; it does not support the unprecedented investigation of jurors sought by defendants.

3. The District Court's Finding That Jurors Were Exposed To Limited Extraneous Information Was Not Clearly Erroneous.

The district court's finding that the jurors were exposed only to limited extraneous information – *i.e.*, the unredacted Second Superseding Indictment, information concerning the role of the foreperson, and incidental media coverage – was amply supported by the hearing testimony and not clearly erroneous. *See United States v. De Varon*, 175 F.3d 930, 945 (11th Cir. 1999) (holding that an appellate court will rarely find clear error where trial court's decision is supported by the record and does not involve a misapplication of the law).

The jurors unanimously testified that they were not exposed to any outside influences,[32] did not attempt to independently investigate facts related to the case,[33] did not overhear any conversation related to the case between a juror and

[32] R29-29, 36, 49, 64, 76-77, 68-69, 89-90, 101, 109, 116, 132, 140.

[33] R29-30, 37, 50, 65, 69, 78, 90, 102, 110, 124, 133, 140.

non-juror,[34] were not exposed to any information concerning the applicable penalty upon a conviction,[35] and were not exposed to extraneous information about the law applicable to the case or to factual material related to the case.[36] Moreover, nine jurors testified that they did not view any extraneous information related to the case from media sources or the internet,[37] and Juror 22 testified that she was briefly exposed to, but did not listen to the content of, television reporting about the case.[38]

Jurors 7 and 40 testified concerning their exposure to limited extraneous information. Juror 40 testified that she saw a headline about the case on the internet site for the *Montgomery Advertiser*, but did not read the article, and that she had downloaded a copy of the indictment from the court's website during deliberations, but only read it once and, despite mentioning that fact to other jurors, did not bring it into the jury room. R29-77-78, 81-84. Juror 7 testified that he inadvertently saw headlines about the case in the newspaper, but did not read

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[34] R29-30, 37, 50, 65, 70, 79, 90, 102, 110, 124, 133, 141.

[35] R29-30, 37, 50, 65, 70, 79, 91, 102, 110, 124, 133, 141.

[36] R29-34, 41, 62, 66, 72, 80, 95, 106, 113, 126, 137, 143. (In responding to this question by the court, Juror 7 referred to the indictment and foreperson information about which he had already testified. *See infra*.)

[37] R29-36-37, 49-50, 64-65, 69-70, 90, 101-02, 109-10, 132-33, 140-41.

[38] R29-29-30.

the articles. *Id.* at 116. He also testified that he had downloaded a copy of the indictment from the court's website and made "organizational-type notes" on it at home because he believed that he "might be able to better understand it and to help better to lead the discussion if [he] had some private time with the indictment." *Id.* at 119-20. Despite bringing the indictment into the jury room, Juror 7 did not recall sharing the document or his notes with anyone, and stopped using it after two or three days. *Id.* at 119-23. Finally, Juror 7 testified that he read, but did not print out, information about the foreperson's role on the court's website. *Id.* at 120, 122; *see also id.* at 128 (Juror 7 recalled reading words to effect: "In this District jurors elect a foreperson. The foreperson presides over the jury's deliberations and must give every juror a fair opportunity to express his or her views.").

At least six other jurors corroborated the testimony of Jurors 7 and 40 concerning their limited consideration of extraneous information. When asked about their knowledge of other jurors' exposure to extraneous information: Jurors 16, 22, and 68 testified only that Juror 7 had reviewed information about the role of the foreperson, R7-29-31-33, 111-12, 141-42; Juror 29 testified only that Juror 7 had reviewed information about the role of the foreperson and that Juror 40 had reviewed a copy of the indictment obtained from the internet, *id.* at 103-06; Juror 5 testified only to his belief that Juror 40 had reviewed a copy of the "foreman's

book," which appeared to be a reference to the indictment, *id.* at 135-37; and Juror 8 testified that he was not aware of *any* extraneous information considered by *any* juror, *id.* at 65.[39] All of this corroborating testimony buttresses the district court's finding that the jury was exposed to only limited extraneous information.

The district court had discretion to reject the testimony of Jurors 30, 38, and 66 suggesting that Jurors 7 and 40 had consulted additional extraneous material during deliberations. R7-518-29-30. The court's responsibility at any evidentiary hearing is to judge the credibility of witnesses based on the content of their testimony and their demeanor on the witness stand. *See United States v. Copeland*, 20 F.3d 412, 413 (11th Cir. 1994). The case relied on by defendants (Scrushy-Br. 73) supports that basic principle. *See United States v. Brantley*, 733 F.2d 1429, 1440 (11th Cir. 1984) (discussing permissible "credibility choice" made by trial court in *United States v. Sedigh*, 658 F.2d 1010, 1014 (5th Cir. Unit A Oct. 9, 1981)). As the court here found (R7-518-29-30), much of the testimony by Jurors 30, 38, and 66 was unsubstantiated or speculative. *See, e.g.*, R29-39-40 (Juror 38 testifying that Juror 7 did not give details of what he had looked up on

[39] Juror 63's knowledge of extraneous information before the jury was also limited to Jury 40's consideration of the indictment. R29-92-95. Scrushy contends (Br. 38) that Juror 63 "insisted" that Juror 40 brought a document into the jury room, but her testimony was more equivocal; after recalling that the court had provided the jury with a copy of the indictment, Juror 63 stated that she was not "sure" that Juror 40 had brought the indictment from outside. *Id.* at 94.

the internet); *id.* at 71-73 (Juror 30 testifying that he "assumed" or that it "looked like" Jurors 7 and 40 had accessed information from the internet). The court chose to reject that testimony in favor of the testimony of Jurors 7 and 40 and at least six other jurors. That choice was not clearly erroneous. *See Anderson v. City of Bessemer*, 470 U.S. 564, 573-74, 105 S. Ct. 1504, 1511-12 (1985).[40]

4. The District Court Correctly Concluded That The Jury's Exposure To Limited Extraneous Information Posed No Reasonable Possibility of Prejudice To Defendants.

The district court is in the best position to gauge the effect of any jury irregularity. *Barshov*, 733 F.2d at 851. The court here correctly concluded that the government had rebutted any presumption of prejudice to defendants resulting from the jury's exposure to extraneous information. *See* R7-518-44-50.

To begin with, the nature of that information and the manner in which it reached the jury were innocuous. *See Ronda*, 455 F.3d at 1300. The exposure to incidental media coverage was inconsequential and, given the publicized nature of the case, almost inevitable. *See United States v. Rowe*, 906 F.2d 654, 656 (11th

[40] Likewise, the court's decision to credit Juror 5's sworn hearing testimony over his two affidavits (to the extent they conflicted) was not clearly erroneous, particularly given the questions surrounding the provenance of Juror 5's affidavits. *See* R7-518-29. Scrushy also contends (Br. 60) that Juror 5's affidavit statement that the jury allegedly discussed whether Siegelman put the bribe money into his personal account proves exposure to additional extraneous material. Juror 5's statement shows, at most, a misunderstanding of the evidence, and Rule 606(b) barred direct inquiry into those deliberations.

Cir. 1990). And, the role-of-the-foreperson information reviewed by Juror 7 was non-substantive, merely facilitated deliberations, was consistent with the court's jury instructions, and was discussed briefly toward the start of deliberations. *See, e.g.*, R29-104-05; R7-518-44. This Court has found no reasonable possibility of prejudice based on a jury's exposure to similar material. *See United States v. De la Vega*, 913 F.2d 861, 869-71 (11th Cir. 1990) (foreman read book entitled "What You Need to Know For Jury Duty"); *see also United States v. Warner*, 498 F.3d 666, 681-84 (7th Cir. 2007) (finding no prejudice from exposure to information about jury's deliberative process in case of former Illinois governor), *cert denied*, 128 S. Ct. 2500 (2008).

The circumstances surrounding the unredacted indictment were likewise benign. As defendants concede, the difference between the redacted and unredacted indictments was small, Scrushy-Br. 71; the evidence did not show that Jurors 7 and 40 were even aware of that difference. R7-518-46 n.32. Juror 7 downloaded the document to help organize his thoughts, and Juror 40 did so for the chance to read it at her leisure. R7-29-82, 119. Defendants' exaggerated claim (Scrushy-Br. 71) that Jurors 7 and 40 thereby became "superjurors" ignores the district court's finding that they did not use the document extensively, R7-518-30-31, and that the district court provided all jurors with their own copy of the redacted indictment soon after the start of deliberations, *id.* at 14. Moreover, the

district court instructed the jury that the indictment was not evidence of guilt, R66-7271, an instruction militating strongly against prejudice, *see United States v. Klein*, 93 F.3d 698, 704 (10th Cir. 1996); *United States v. Haynes*, 573 F.2d 236, 242 (5th Cir. 1978).

The harmlessness of the jury's exposure to the extraneous information is also apparent from the court's thorough examination of the jurors, most of whom minimized the nature of and exposure to that information. The split verdict and the court's instructions to render a verdict based solely on the evidence (R66-7271) further dispel any notion that the jury here was influenced by the extrinsic material. *See Dominguez*, 226 F.3d at 1247-48; *Cuthel*, 903 F.2d at 1383. Finally, the court's finding of harmlessness properly relied on the strength of the government's evidence on the counts of conviction. R7-518-45 n.31, 49. *See Ronda*, 455 F.3d at 1300. Defendants point to the length of the deliberations and the fact that the jurors deadlocked, Scrushy-Br. 74, but the jury heard evidence over the course of six weeks in a case involving multiple defendants, corrupt schemes, and statutes; that the jury took time in deliberating and returning a split verdict confirms the strength of the government's evidence on the counts of conviction.

None of the extraneous information concerned factual matters related to the case or defendants' guilt. The denial of defendants' new trial motion was not an abuse of discretion.

D. The Denial Of Defendants' Motions For Reconsideration Or, In The Alternative, For A New Trial Was Not An Abuse Of Discretion.

Defendants' motions for reconsideration or, in the alternative, for a new trial relied on copies of three more purported juror emails, two of which were allegedly mailed anonymously to Scrushy and defense counsel just one week after the denial of their new trial motion. *See* R7-519, 520, 532. The district court's denial of that motion (R10-611) was a proper exercise of its broad discretion.

If authentic, the three purported emails suggested that some jurors had deliberated outside the presence of the entire jury and – by referring to "statue" [*sic*], "links," "articles," and "surf[ing]" – that some jurors had reviewed extraneous information about the case. R7-519, Exs. 23, 24; R7-532, Ex. 26. The district court correctly concluded that its previous examination of jurors would have prompted jurors to testify about the extrinsic matters referenced in those purported emails. For example, the court's questions at the November 17, 2006 hearing covered exposure to, *inter alia*, information from internet and media sources, information about the law and penalty applicable to the case, and extraneous factual information. R10-611-8-10. To the extent the purported emails

raised questions about deliberations with fewer than all twelve jurors present, that allegation was likewise raised in the original new trial motion – and Rule 606(b) barred post-verdict inquiry into those communications. *See* pp. 118-19, *supra*.

Because the three purported emails were cumulative of material previously submitted by defendants and raised questions about issues already explored at the November 17, 2006 hearing, the district court correctly concluded that the sole purpose for investigating the purported emails would be to impeach the previous testimony of jurors.[41] And the sole foundation for that impeachment were copies of documents anonymously mailed to the defense. Even if the purported emails were authentic, as the district court assumed them to be (R10-611-4 n.9), they only provided evidence of emails exchanged between the email accounts of Jurors 7 and 40, not of emails actually authored or received by those jurors.[42] Defendants

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[41] Defendants contend (Scrushy-Br. 65) that the three purported emails were not cumulative because, unlike the previous five purported emails, they were "specific" and "explicit" in their reference to extraneous material. Setting aside whatever inferences about authenticity may be drawn from the timing and asserted specificity of the second batch of purported emails, the type of extraneous material to which they referred was thoroughly investigated at the November 17, 2006 hearing.

[42] Defendants contend (Scrushy-Br. 64) that, if the emails are authentic, they *must* have been exchanged between Jurors 7 and 40. That contention is speculative given the mysterious circumstances under which all of the purported emails were allegedly delivered to the defense. The fact that the source of the purported emails remains anonymous indicates that, if authentic, the emails were obtained through unauthorized access to the computers or email accounts of the

have cited no case holding, let alone suggesting, that a district court abuses its discretion when, after examining all twelve jurors at a lengthy, post-verdict hearing, it declines to reopen its investigation into juror misconduct on the basis of material subsequently and mysteriously delivered to the party alleging misconduct. The relevant precedents, in fact, are to the contrary. *See Cuthel*, 903 F.2d at 1382-83 (post-trial hearing involving jurors requires "clear, strong, substantial and incontrovertible evidence" of "a specific, nonspeculative impropriety"); *Caldwell*, 776 F.2d at 999 ("the anonymity of the call in our minds simply creates no burden to investigate"). Moreover, because the emails were cumulative and/or impeaching, they did not justify a new trial based on newly-discovered evidence. *See, e.g.*, *United States v. DiBernardo*, 880 F.2d 1216, 1224 (11th Cir. 1989).

The broad investigation of jurors sought by defendants' motions was further reason to deny them. Among other things, defendants asked the district court to order Jurors 7 and 40 "immediately to produce all hard drives, Blackberries, cell phones, or any other device capable of sending email or text messages" used during the course of the trial, R7-520-7, and to conduct another evidentiary hearing to obtain testimony from Jurors 7 and 40 and at least two other jurors, R7-

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jurors, possibly through criminal activity. It is certainly conceivable that one or more individuals who were willing and able to gain unauthorized access to juror email accounts could have and did compose the emails.

519-19. The district court's concern for the burden on jurors from such an intrusive investigation was wholly legitimate:

> We already have asked a great deal of the members of this jury. This was a lengthy trial. During the trial, the members of the jury were asked to sacrifice their time. They were kept away from their jobs and their families more than any of them would have wanted to be. This was also a high-profile trial which has engendered intense media scrutiny and significant public discussion. Certainly, these facts increased the imposition on these jurors. At some point, we have asked enough of these citizens.

R10-611-7 n.12. Equally well founded was the court's belief that a rule requiring a second examination of jurors in this case – for the purpose of impeaching jurors' prior testimony based on documents "mysteriously delivered" to the defeated party in litigation – "would potentially destroy the entire jury system." *Id.* at 7. Such a rule reasonably could be expected to lead to juror harassment and to affect the public's willingness to perform jury service in the future. *See Tanner*, 483 U.S. at 120, 107 S. Ct. at 2747-48.

The district court aptly recognized that further investigation into juror conduct would reveal little or no new evidence in light of its previous investigation, but would impose substantial new burdens on jurors. The court's denial of defendants' motions was not an abuse of discretion.

E. This Case Does Not Warrant Reassignment.

Defendants contend (Scrushy-Br. 66-67) that, in the event this Court remands the juror misconduct issue for further proceedings, it should reassign the case to a different judge. That contention is misplaced. Chief Judge Fuller's handling of defendants' allegations of juror misconduct creates no inference that he would not be able to "put[] his previous views and findings aside," and does not make reassignment necessary "to preserve the appearance of justice." *United States v. Torkington*, 874 F.2d 1441, 1447 (11th Cir. 1989). Despite having reasonable concerns over the defense's potential violation of Local Rule 47.1, the Chief Judge conducted a lengthy public hearing into defendants' allegations of juror misconduct. His denial of defendants' request for a new trial or for a broader investigation was based on his interpretation of the evidence and applicable legal precedent. If those judgments prove to be erroneous – and we do not believe they are – there is no reason to believe that Chief Judge Fuller cannot comply with this Court's mandate, just as any district court must do when it gets reversed.

Chief Judge Fuller is thoroughly familiar with the issues and evidence related to defendants' misconduct claim as a result of holding two evidentiary hearings, ruling on numerous motions, and presiding over a lengthy trial in which he daily interacted with the jury. Reassignment would surely result in "waste and

duplication out of proportion to gains realized from reassignment." *Torkington*, 874 F.2d at 1447. Defendants' request should be denied.

VII. THE DENIAL OF SCRUSHY'S RECUSAL MOTION WAS NOT AN ABUSE OF DISCRETION.

Scrushy contends (Scrushy-Br. 80-86) that he is entitled to a new trial because Chief Judge Fuller should have disclosed his "extraordinary extra judicial income from business contracts with the United States Government pursuant to 28 U.S.C. § 455(a)."[43] Scrushy's claim repackages an earlier recusal claim that he raised for the first time over nine months after trial. R7-550, R8-551. In a post-trial motion, Scrushy contended that Chief Judge Fuller should have recused himself based on the appearance of partiality, or sought a waiver of the conflict under § 455(e), because he owned stock in, earned income from, and appeared to be a director, officer, or registered agent of two privately-owned companies – Doss Aviation, Inc., and Doss of Alabama, Inc. (collectively the "Doss companies") – that engaged in business with agencies of the U.S. government.

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[43] Siegelman does not adopt Scrushy's recusal claim, Siegelman-Br. 84, despite having notice that Scrushy would assert it on appeal; Scrushy raised it in his August 24, 2007 bail motion to the Eleventh Circuit, a copy of which was served on Siegelman's counsel. The Court should find that Siegelman has waived any right to adopt Scrushy's recusal claim. *Cf. United States v. Martinez-Larraga*, 517 F.3d 258, 261 n.2 (5th Cir. 2008) (citing authority against allowing co-appellant to adopt, in his reply brief, claim in co-appellant's opening brief, but declining to decide the question).

R8-551. Scrushy did not (and does not now) claim that the judge had a "financial interest in the subject matter" of this case under § 455(b)(4).

Chief Judge Fuller noted the tardiness of Scrushy's motion, clarified that he has been only a shareholder in the Doss companies since taking the bench in 2002, and noted that he had disclosed his income from and investments in those companies in his annual Financial Disclosure Reports. R8-567-4 n.7, 5 n.8. The judge denied Scrushy's motion, holding that "[t]he 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 [him] from presiding over federal criminal prosecutions brought by the United States government." *Id.* at 10-11.

The denial of Scrushy's post-trial motion should be affirmed because: (1) Scrushy's motion was untimely; (2) the judge did not abuse his discretion by denying it on the merits, as no objective observer reasonably could question his impartiality; and (3) any error in the judge's ruling was harmless. *See United States v. Simmons*, 368 F.3d 1335, 1342 (11th Cir. 2004) (holding that Court may affirm on any ground supported by the record).

A. Scrushy's Post-Trial Motion Was Untimely.

A motion for recusal based on the appearance of partiality must be timely made when the facts on which it relies are known; the untimeliness of such a

motion is alone a basis to deny it. *Phillips v. Amoco Oil Company*, 799 F.2d 1464, 1472 (11th Cir. 1986); *United States v. Slay*, 714 F.2d 1093, 1094 (11th Cir. 1983) (per curiam). The rule has been applied where the movant is not aware of all the facts purportedly supporting recusal but those facts are public knowledge. *See National Auto Brokers Corp. v. General Motors Corp.*, 572 F.2d 953, 957-59 (2d Cir. 1978). The timeliness requirement "conserve[s] judicial resources and prevent[s] a litigant from waiting until an adverse decision has been handed down before moving to disqualify the judge." *Summers v. Singletary*, 119 F.3d 917, 921 (11th Cir. 1997).

Scrushy's recusal motion (R7-550, R8-551) was filed on April 18, 2007 – *after* the court had denied defendants' post-trial motions for an acquittal *and* their joint new trial motion based on alleged juror misconduct – by lawyers added to his defense team following the verdict. *See* R8-567-3; *see also* R6-485, 486, 487 (notices of appearance). On February 21, 2007, those newly-added lawyers hired a private investigator, Michael Magrino, and, over a one-week period, Magrino conducted an investigation that produced the information used by Scrushy to seek recusal. R8-551-2-3 & Ex. 28. Magrino's affidavit indicates that he obtained almost all of that information from the internet, R8-551-Ex. 28 ¶¶ 1-22, including copies of Chief Judge Fuller's Financial Disclosure Reports (obtained from "the

website for Judicialwatch.org"), *id.*,¶¶ 8-10, and information about Doss Aviation's 2006 contract with the Air Force, *id.*, ¶ 17.

The timing and circumstances of Scrushy's motion show that Scrushy, dissatisfied with the jury's guilty verdict and the court's post-trial rulings, was searching for new ways to undo his conviction. It is common knowledge that judges annually file disclosure reports, and Magrino's own affidavit confirms that the information supporting the recusal motion was publicly and easily accessible. As the district court found, "all of the[se] materials would have been equally accessible to Scrushy at any point prior to or during the trial." R8-567-4 n.7. Scrushy certainly was not oblivious to recusal issues, as he had moved unsuccessfully to disqualify the magistrate judge before trial. *Id.* at 3 n.5. This Court should reject Scrushy's eleventh-hour litigation ploy, and hold that his untimely recusal claim is waived.

B. No Objective Observer Reasonably Could Question Chief Judge Fuller's Impartiality.

The district court's denial of Scrushy's recusal motion on the merits was not an abuse of discretion. Section 455(a) provides that a "judge . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The test under § 455(a) "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." *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 (11th Cir. 1988).

Scrushy contends (Br. 82-83) that, under § 455(a), "the threshold issue is not recusal, but whether the judge should have disclosed" his income from the Doss companies. Scrushy is wrong. Section 455(a) is a recusal statute, not a disclosure statute. The remedy sought in Scrushy's post-trial motion was Chief Judge Fuller's disqualification and a new trial based on his past failure to disqualify himself *sua sponte*. R8-551-1, 22. Under *Parker*, the correct analysis is whether the circumstances surrounding the judge's investment in the Doss companies (including, to be sure, the extent it was disclosed) would lead an "objective, disinterested, lay observer" reasonably to question his impartiality.

Scrushy's theory of recusal would preclude Judge Fuller from presiding in any criminal case and in any civil case in which the federal government is a party. In a nutshell, Scrushy claims that an objective observer would question whether Chief Judge Fuller made rulings in this case that favored the government because he derived allegedly significant income from companies doing business with other government offices.[44] Chief Judge Fuller is not a director, officer, or fiduciary of

[44] Scrushy's statement (Br. 82-83) that Chief Judge Fuller "apparently" receives "multimillion dollar income" from the Doss companies is unsubstantiated. Scrushy's admits (Br. 81) that the judge reported earning between $100,001 and $1,000,000 from each of the two Doss companies per year

the Doss companies; he is only a shareholder, R8-567-5 n.8, and he has publicly reported his passive investment in the companies in annual filings, R8-551-Exs. 8-10. The competitively-bid contracts between the Doss companies and the government, many of which predated this case, were completely unrelated to the prosecution of defendants. *Id.*, Exs. 12-18; R8-567-10. The outcome of this case, therefore, in no way affected the Doss companies, the industry in which it operates, or the government contracts in question. Given these facts, the notion that Chief Judge Fuller's impartiality reasonably could be questioned is nothing more than "unsupported, irrational, [and] highly tenuous speculation." *United States v. Greenough*, 782 F.2d 1556, 1558 (11th Cir. 1986). *See United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456, 463-64 (5th Cir. 1977) (recusal under §455(a) not warranted where judge's son was associate in law firm representing party to litigation but had no involvement in litigation)*; In re Beard*, 811 F.2d 818, 830-31 (4th Cir. 1987) (judge's passive investment with local counsel in office building unrelated to the litigation created no reasonable doubt about judge's impartiality); *In re Placid Oil Co.*, 802 F.2d 783, 786-87 (5th Cir.

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in 2003-05. Only by assuming that the judge received the *maximum* amount in that range from *each* company can Scrushy's statement be correct; the judge, of course, may have received much less.

1986) (holding that judge's impartiality could not reasonably be questioned when he owned stock of company in the same industry as a party to the case).

Moreover, an "objective, disinterested, lay observer" would see that Chief Judge Fuller made numerous rulings favorable to the defense in this case – rulings that further undercut Scrushy's theory of an appearance that the judge was beholden to the government. For example, the judge: regularly sustained evidentiary objections made by the defense during trial, *see, e.g.*, R41-1526-30, 1548-51, 1668; R43-2068; R46-3023; R50-3991-99; R57-5473-74; gave limiting instructions that certain witnesses' testimony could not be considered against certain defendants, *see, e.g.*, R39-1203-06; R48-3460; struck the entire testimony of one government witness from the record, R44-2311-28, and precluded another government witness from testifying altogether, R57-5480-89; ruled that Counts 3 and 4 were multiplicitous, *see* note 1, *supra*; gave two supplemental instructions to the jury during deliberations over strong objections by the government, R68-7697-7701; R73-7849-57; substantially extended the time within which defendants could file post-trial Rule 29 and Rule 33 motions, R4-443; and sentenced each defendant below his Guidelines range based on Guidelines calculations with which the government disagreed, R33-151-54, 158-62; R34-289, 298. No objective observer, informed of these and other rulings favorable to the defense, reasonably could question the judge's impartiality.

Scrushy's claim would require Chief Judge Fuller to recuse himself from any case in which the federal government was a party (absent waiver under § 455(e)), or to divest his Doss company holdings. Scrushy's claim is far too speculative to require that result. The denial of his motion was not an abuse of discretion.

C. Any Error Was Harmless.

In *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S. Ct. 2194 (1988), the Supreme Court held that "[t]here need not be a draconian remedy for every violation of § 455(a)." *Id.* at 862-64, 108 S. Ct. at 2203-04. In determining whether a judgment should be vacated for such a violation,"it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." *Id.* at 864, 108 S. Ct. at 2205.

The *Liljeberg* factors weigh heavily against a new trial. Scrushy has not pointed to a "particular circumstance[]" related to the basis for recusal that created a risk of injustice to him. *United States v. Cerceda*, 172 F.3d 806, 813-14 (11th Cir. 1999) (en banc). Moreover, any violation of § 455(a) was not serious because Chief Judge Fuller was a passive investor in companies completely unrelated to this case. *Id.* By contrast, vacating Scrushy's conviction will risk an

injustice to the government (not to mention a panel of new jurors) by forcing it to devote substantial resources to retrying the counts against Scrushy. *Id.* at 814. Vacating Scrushy's conviction also risks undermining the public's confidence in the judicial system, *id.* at 815; *Parker*, 855 F.2d at 1526-27, as Scrushy raised recusal as an eleventh-hour litigation ploy only after he was convicted by a jury, based on evidence of guilt beyond a reasonable doubt that was presented at a trial overseen by a judge whose actual impartiality has not been, and cannot be, questioned.

If this Court concludes that Chief Judge Fuller abused his discretion in denying the recusal motion, it should find that error harmless.

VIII. THE JURY SELECTION SYSTEM DID NOT SUBSTANTIALLY VIOLATE THE JURY SELECTION AND SERVICE ACT OR VIOLATE THE SIXTH AMENDMENT.

Scrushy was indicted by a grand jury drawn from the 2001 Qualified Jury Wheel (QJW) for the Middle District of Alabama; the indicting grand jury was 24% African-American. R8-576-52. He was tried by a petit jury drawn from the District's 2005 QJW; seven African-Americans served on his petit jury. R10-612-2. African-Americans comprise 30.466% of the citizens 18 and over in the Middle District. R8-576-62. Scrushy argues (Br. 86-115) that the Middle District substantially violated the Jury Selection and Service Act (JSSA), 28 U.S.C. §§ 1861-71, and the Sixth Amendment by *inter alia* substantially underrepresenting

African-Americans in grand and petit juries drawn from the 2001 and 2005 QJWs.[45]

The district court carefully considered and rejected each of Scrushy's claims. First, in a 76-page Recommendation and Order, the magistrate judge scrutinized the Middle District's process for filling the QJW and found no basis for granting Scrushy any relief. R8-576. After an "independent review of the file," the district court adopted "the well-written and thorough" Recommendation in part and supplemented it in part, and overruled each of Scrushy's objections. R8-612-2. In so ruling, Chief Judge Fuller also relied on *United States v. Carmichael*, 467 F. Supp. 2d 1282 (M.D. Ala. 2006) (Thompson, J.), appeal pending No. 07-11400-JJ (argued April 16, 2008), which contains "lengthy and comprehensive discussions of many of the same issues," as they relate to the 2001 QJW. R8-612-2. Like the court here, the *Carmichael* court found that the Middle District's jury selection process did not violate the JSSA or systematically underrepresent African-Americans in the 2001 QJW and the jury pools selected from that QJW.[46] Scrushy offers no credible basis for disturbing these rulings.

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[45] Siegelman has not adopted Scrushy's claim.

[46] Scrushy's claims essentially mirror Carmichael's, even though Carmichael targets only the 2001 QJW, whereas Scrushy's claims also includes the 2005 QJW (the grand jury which indicted Scrushy and the petit jury which convicted him were selected from the former and latter, respectively). Scrushy's

A. The Jury Selection System Did Not Substantially Violate the JSSA.

Only a "substantial failure" to comply with the JSSA is actionable. 28 U.S.C. § 1867(a); *United States v. Bearden*, 659 F.2d 590, 600 (5th Cir. Unit B 1981).[47] A substantial violation occurs only when a practice frustrates the JSSA's principles of random selection of jurors and sole use of objective criteria to determine juror disqualifications, excuses, exemptions, and exclusions. *Bearden*, 659 F.2d at 600-01. "Mere 'technical' deviations from the Act or even a number of them are insufficient" to raise a statutory claim. *Id*. at 601. Moreover, "random selection" under the Act means only a "system of selection that affords no room for impermissible discrimination against individuals or groups." *Id*. at 602 (quotations omitted). Scrushy has the burden of proof of showing a substantial violation of the JSSA. 28 U.S.C. § 1867(a); *United States v. Rodriguez*, 776 F.2d 1509, 1511 (11th Cir. 1985).

In *Bearden*, the investigation into the clerk's office revealed multiple errors in the selection of juries. 659 F.2d at 609. Those errors warranted correction but

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2005 QJW claims, however, add nothing because the majority of the practices about which he complains did not occur during the 2005 QJW and the absolute disparity for the 2005 QJW is below ten percent. R8-576-61.

[47]After October 1, 1981, the decisions of the continuing Fifth Circuit's Administrative Unit B are binding in the Eleventh Circuit. *Stein v. Reynolds Sec. Inc.*, 667 F.2d 33, 34 (11th Cir. 1982).

did not violate the JSSA or justify the district court's dismissal of the indictments. *Id*. at 610. The Court recognized that:

> In sorting out the details of statutory procedures, there is perhaps a tendency to lose sight of the fundamental purpose of the law. The purpose of the Act is to prevent discrimination, whether it be on account of "race, color, religion, sex, national origin, or economic status." 28 U.S.C.A. § 1862. Where the procedural errors made by those in charge of selecting juries do not raise the possibility of frustrating this goal, a court should be hesitant to order the drastic remedy of the dismissal of indictments.

Id. at 609. Similarly, in this case, Scrushy's searching investigation uncovered errors in implementing the Middle District's Jury Plan adopted in the wake of *United States v. Clay*, 159 F. Supp. 2d 1357 (M.D. Ala. 2001).[48] But any error or combination thereof was at most a technical violation of the JSSA, and does not warrant relief, because it did not frustrate the JSSA's goals. R8-576-56; *Carmichael*, 467 F. Supp. 2d at 1305, 1314.

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[48] *Clay* held that the combination of three factors violated the randomness prong of the JSSA: (1) a liberal deferral practice,(2) the jury administrator's complete discretion in determining how many deferred jurors to use in a given jury pool, and (3) the consistent placing of deferred jurors at the top of the jury pool. 159 F. Supp. 2d at 1368. Even Scrushy's expert, who was also the defense expert in *Clay* (and in *Carmichael*), admits that the practices in *Clay* are past. R26-652-56.

1. The Liberal Deferral Practice Did Not Frustrate The Act's Goal Of Objectivity.

Scrushy claims that the clerk substantially violated the JSSA by granting "thousands of improper deferrals" which frustrated the Act's goal of objectivity and "render[ed] § 1866(c)(1) meaningless." Scrushy-Br. 93. Scrushy, however, fails to show how this liberal deferral practice frustrated the Act's goal of objectivity. R8-576-41, 42.

The JSSA requires the clerk only to make an "objective," not necessarily "right," choice in granting a deferral. *Bearden*, 659 F.2d at 608. The clerk in this case did not make deferral decisions based on subjective criteria because she used an absolutely objective criteria – all requests were granted regardless of the juror's demographics. R25-479; R8-576-40. The clerk properly did not use "extrastatutory, subjective criteria in the selection process." *Beardon*, 659 F.2d at 607.

Scrushy cannot rely on *United States v. Kennedy*, 548 F.2d 608 (5th Cir. 1977). Unlike there, *id*. at 612, the prospective jurors here could not opt in or out of jury service, R8-576-41. In fact, as the magistrate noted, R8-576-41, the clerk's employment of a more rigorous screening process would likely lead future defendants to argue that deferral decisions were based on impermissible subjective criteria. *See United States v. Evans*, 526 F.2d 701, 706 (5th Cir. 1976).

Consequently, the liberal deferral policy did not substantially violate the JSSA. *See Paradies*, 98 F.3d at 1280; *United States v. Barnette*, 800 F.2d 1558, 1568 (11th Cir. 1986).

2. The Clerk's Office's Practices Did Not Frustrate The JSSA's Goal Of Random Selection.

Scrushy argues that the clerk's office committed errors in implementing the Jury Plan that led to the nonrandom selection of jurors. Scrushy-Br. 94-98. As the district court concluded in *Carmichael* and this case, these errors, described *infra*, are at most technical violations of the JSSA because they did not frustrate the Act's goal of random selection of jurors. R8-576-34, 38, 49, 54; R10-612-9; *Carmichael*, 467 F. Supp. 2d at 1300-05.

a. Exceeding The 15% Limit On Deferred Jurors Did Not Frustrate The Randomness Principle of the JSSA.

The Plan caps at 15% the number of deferred jurors in any criminal petit jury pool, but this limit does not apply to grand juries.[49] R8-576-22, 31. The 15% limit was not violated during the 2005 QJW. R8-576-33. During the 2001 QJW, this cap was exceeded for 27 of the last 44 jury pools, JCH Gov't Exhibit A at Exh. VIII, because (1) on five occasions the jury administrator manually

[49] The deferred maintenance pool (DMP), created after *Clay,* was a separate section of the QJW where individuals receiving a deferral were placed until expiration of their deferment period – at which time they could be summoned to a jury pool. R8-576-22; *Carmichael*, 467 F. Supp. 2d at 1288.

transferred 1093 individuals from the DMP to the QJW, R24-117-26, and (2) for four of the last five pools drawn from the 2001 QJW, a newly hired jury administrator unknowingly drew more than 15% of prospective jurors from the DMP. R25-276-82.

These two actions contravened the Plan and resulted in 193 more deferred jurors being summoned than the maximum number of deferred jurors permitted under the 15% cap. JCH Gov't Exhibit A at Exh. VIII; *Carmichael*, 467 F. Supp. 2d at 1303-04.[50] Significantly, however, the average of the percentage of deferred jurors on the jury pools was only 13% for the 2001 QJW. *Carmichael*, 467 F. Supp. 2d at 1303-04.

Scrushy claims that summoning these additional deferred jurors substantially violated the JSSA by "causing a preference for the disproportionately white previously deferred jurors to appear on the pools." Scrushy-Br. 94. Scrushy's argument fails, however, because he does not show how the presence of 193 additional deferred jurors dispersed over several jury pools defeated the random selection of jurors. Rather, Scrushy's expert, R26-602, and the district court acknowledged that a computer program randomly selected all the individuals

[50] Scrushy properly uses the government's definition of "deferred juror" because his expert had "incorrectly inflated the number of deferred jurors for many of the 44 pools at issue." *Carmichael*, 467 F. Supp. 2d at 1303; R8-576-34 n.47.

drawn for jury pools from both the QJW and DMP and randomly dispersed these individuals on the pools without regard to their race. R8-576-38; *Carmichael*, 467 F. Supp. 2d at 1304. The clerk in this case, unlike in *Clay*, did not preferentially place deferred jurors on the venire list; instead, they were given no preference for selection. *Carmichael*, 467 F. Supp. 2d at 1304-05. The clerk had no control over who would be summoned or placement on the jury pool, and thus no control over a particular individual's or group's probability of being selected. *Id*. The summoning of 193 additional deferreds simply did "not result or have the potential to result in discrimination among cognizable groups of prospective jurors." *Bearden*, 659 F.2d at 602. *See United States v. Gregory*, 730 F.2d 692, 699 (11th Cir. 1984).

The insubstantial number of individuals affected by the clerk's practices relative to the total number of jurors summoned (193 out of 12,978, JCH Gov't Exhibit A at Exh. VI) supports a finding that the inclusion of additional deferreds in the jury pools did not substantially violate the JSSA. *Bearden*, 659 F.2d at 609. Moreover, the inclusion of additional deferreds on jury pools did not empower any individual to opt in or out of jury service, as in *Kennedy*, 548 F.2d at 612. Finally, that Scrushy's grand jury pool consisted of more than 15% deferred jurors is irrelevant because the 15% limit did not apply to grand juries. R8-576-33.

b. Deferred Jurors Were Not "Clustered" On The Jury Pools So As To Frustrate The Act's Goal of Random Selection.

Scrushy argues (Scrushy-Br. 95) that the clerk violated the randomness principle because the computer "clustered" deferred jurors on the jury lists. Scrushy's "clustering" argument is based on a "software glitch" that affected only three jury pools during the 2001 QJW, Scrushy-Br. 95, and his claim that seven of the first ten jurors on his grand jury pool were deferred jurors. *Id*. at 96. His argument falls short, however, because neither instance resulted or had the potential to result "in discrimination among cognizable groups of prospective jurors." *Bearden*, 659 F.2d at 602.

The "software glitch" applied only to "double draw" pools (*i.e.*, a jury pool created by two draws from the QJW and DMP). *Carmichael*, 467 F. Supp. 2d at 1301-02. In a double draw pool, the computer placed the deferred jurors from the second draw at the top of the second list of jurors that began at the end of the names randomly drawn and dispersed from the first draw. *Id*. Scrushy's grand jury pool was not one of the three double draw pools. R26-596-99. No individual from a second draw was ever considered for jury service. *Carmichael*, 467 F. Supp. 2d at 1301. The clerk's office has remedied this error. *Id*. at 1302.

The creation of these three double draw pools was not a substantial violation of the JSSA. R10-612-3-4. No one in the clerk's office even knew

about this "software glitch," unlike the routine stacking of deferred jurors in *Clay*. R26-653-54; *Clay*, 159 F. Supp. 2d at 1362-63. *See Bearden*, 659 F.2d at 603. The insignificant number of double draw pools further supports a finding that their creation was not a substantial violation of the Act, *Bearden*, 659 F.2d at 609, as does the clerk's office's quick remedy of this error. *Carmichael*, 467 F. Supp. 2d at 1302; *Bearden*, 659 F.2d at 603. Finally, the double draw pools never resulted in any discrimination in the selection of jurors because the individuals chosen in the second draw were never considered for jury service. *Carmichael*, 467 F. Supp. 2d at 1301. *See Gregory*, 730 F.2d at 699.

Scrushy fails to explain why having seven deferred jurors in the first ten names on his grand jury pool substantially violates the JSSA. Scrushy-Br. 96. In fact, these seven deferred jurors were actually the only deferred jurors in the first fifteen names on his grand jury pool, R26-659, thus significantly detracting from his alleged "clustering" phenomenon. His reliance on *Kennedy* is unavailing for nothing about the number of deferred jurors in Scrushy's grand jury pool gives a juror the discretion to participate *vel non* in jury service. 548 F.2d at 612. Further, the basis for his "clustering" claim, ¶ 14(d)(iii) of the Plan, does not apply to grand juries. R8-576-33.

The Act does not require "statistical randomness" in jury selection, but rather a "system of selection that affords no room for impermissible discrimination

against individuals or groups." *Id*. (quotations omitted). The Middle District adopted such a system by having the computer select and disperse jurors for each jury pool. R26-602. The district court found that Scrushy had adduced no evidence that the jury pools were created in a nonrandom manner or that the manner of creating the pools gave preferential treatment to any person. R8-576-33 n.46 & 38.

c. The Two Year Excusal Policy Did Not Frustrate the Randomness Principle of the JSSA.

Scrushy intimates that the district court did not address his argument that the granting of two, rather than one, year excusals from jury service for summoned jurors for the 2001 QJW, in contravention of ¶ 16(e) of the Plan, was a substantial violation of the JSSA. Scrushy-Br. 96. Scrushy fails to acknowledge, much less refute, that the district court adopted the *Carmichael* court's reasons for rejecting this argument. R10-612-9.

Though outside the Plan, the clerk's granting of two-year excusals had no effect on the selection of jurors. *United States v. Smith*, 588 F.2d 111, 115 (5th Cir. 1979). In this case, as in *Smith*, all jurors, including those excused for two years, were "still selected at random from a large group of names," *id*. at n.21, by the computer program. R26-602. The two-year excusal policy neither gave a cognizable group of jurors a preferential placement for selection (as in *Clay*), nor

gave any juror discretion to opt in or out of jury service (as in *Kennedy*). The district court in *Carmichael* thus correctly concluded that "[a] two-year excusal period of unneeded jurors, in and of itself, has not been shown to make the selection of any given juror more or less likely in a way that could create a potential for discrimination." *Carmichael*, 467 F. Supp. 2d at 1300-01.

d. Ten "Bleed-Over Jurors" On The 2005 QJW Did Not Frustrate the Randomness Principle Of The JSSA.

Scrushy contends that having ten jurors from the 2001 QJW on the 2005 QJW violated the randomness principle of the JSSA. Scrushy-Br. 97. But as the district court correctly concluded here, and in *Carmichael*, 467 F. Supp. 2d at 1297-98, the presence of a few "bleed-over" jurors did not substantially violate the JSSA because it did not affect the random selection of jurors. *Bearden*, 659 F.2d at 600.

On August 25, 2005, the jury administrator, as part of creating the 2005 MJW, emptied the 2001 QJW, including the DMP. R4-405-1-5. She did not realize, however, that ten jurors had been summoned from the 2001 QJW prior to August 25, 2005, but deferred until after that date. *Id.* These ten jurors remained in the DMP after August 25, 2005, and were carried over to the 2005 QJW. *Id.* The computer then selected these ten "bleed-over" jurors and placed them on seven different jury pools. *Id.* One "bleed-over" juror was #267 out of 300 jurors

summoned for Scrushy's petit jury pool, but was not considered for jury service. R8-567-54. As of May 8, 2006, none of the ten remained on the 2005 QJW. R4-405-1-6.

The ten "bleed-over" jurors were a product of an oversight by the jury administrator, not a product of nonrandom selection. They were randomly selected for service by the computer. They could not volunteer for service like the jurors in *Kennedy*, upon which Scrushy relies. Having these ten "bleed-over" jurors among the 17,637 individuals who initially composed the 2005 QJW, R7-528, for a few months is a quintessential harmless error. *See Royal*, 174 F.3d at 12; *Bearden*, 659 F.2d at 609.

B. Scrushy Failed To Establish A Fair Cross-Section Claim Under The JSSA Or Sixth Amendment For The 2001 And 2005 QJWs.

Scrushy incorrectly asserts that the district court did not analyze his fair cross-section claims under the JSSA. Scrushy-Br. 98. In fact, the magistrate considered and rejected his claim under the JSSA. R8-576-58-59,70-73. Scrushy (Scrushy-Br. 98-99) contends that *Duren v. Missouri*, 439 U.S. 357, 99 S. Ct. 664 (1979), does not apply to the JSSA – an argument crushed by contrary authority. *See, e.g.*, *Rodriguez*, 776 F.2d at 1510 n.1; *United States v. Else*, 743 F.2d 1465, 1470 n.3 (11th Cir. 1984); *Royal*, 174 F.3d at 6; *United States v. Allen*, 160 F.3d 1096, 1102 (6th Cir. 1998); *Shinault*, 147 F.3d at 1270.

In disposing of Scrushy's fair cross-section claims, the district court first analyzed the second element of *Duren*, found lacking his proof of an absolute disparity as to each QJW, R8-576-57-70, and then ruled that he had also not proven systematic exclusion of African-Americans under *Duren*'s third prong. *Id*. at 70-73. Because a failure on any *Duren* element is fatal to his claims, *Pepe*, 747 F.2d at 649, this Court should deny Scrushy's fair cross-section claims based on his failure to prove systematic exclusion of African-Americans during the jury selection process. This procedure avoids issues under *Duren's* second prong raised by the magistrate's analysis but peripheral to this appeal, though the government agrees that Scrushy has not shown the requisite absolute disparity for either the 2001 or 2005 QJW.

1. The Jury Selection Process Did Not Systematically Exclude African-Americans From The 2001 Or 2005 QJW.

Scrushy must show that any underrepresentation of African-Americans was due to "their systematic exclusion in the jury-selection process." *Duren*, 439 U.S. at 366, 99 S. Ct. at 669. "Systematic" means that the cause of the exclusion was "inherent in the particular jury-selection process utilized." *Id*; *Rioux*, 97 F.3d at 658; *Gibson v. Zant*, 705 F.2d 1543, 1549 (11th Cir. 1983). The magistrate correctly noted that "systematic exclusion" is "complete," "uniform," "long-

standing," "consistent," and "disproportionate" exclusion. R8-576-71, 72. *See Carmichael*, 467 F. Supp. 2d at 1312-13.

Scrushy cannot identify any feature or combination of features inherent in the Middle District's selection process that led to any sustained, disproportionate underrepresentation of African-Americans. He cannot point to a feature akin to those condemned in *Duren*, 439 U.S. at 366, 99 S. Ct. at 669, *United States v. Osorio*, 801 F. Supp. 966 (D. Conn. 1992), and *Gibson* 705 F.2d at 1548. The transfers of deferred jurors from the DMP to the 2001 QJW were unplanned and sporadic. JCH Gov't Exhibit A at Exh. VII. Exceeding the 15% limit on deferred jurors in four of the last five jury pools for the 2001 QJW was an unexplained phenomenon during the watch of a newly employed jury administrator. R25-277-84. No violation of the 15% limit occurred during the 2005 QJW. Scrushy-Br. 115.

The only repeated actions Scrushy identifies are the alleged use of outdated mailing addresses, failure to supplement the voter registration lists ("VRLs") to create the QJW, and liberal deferral practice. *Id*. The undeliverable questionnaires, however, are produced by an external force (*i.e*., demographic changes), and are not internal to the selection process. *United States v. Orange*, 447 F.3d 792, 800 (10th Cir. 2006); *Rioux*, 97 F.3d at 658. Moreover, Scrushy "failed to show that any one of those undeliverable questionnaires went to [an

African-American]," *Rioux*, 97 F.3d at 658, despite having the name and address of each member of the 2001 QJW. R26-496. The JSSA includes "no requirement that the district court clerk take measures to correct a low response rate, so long as it is high enough to generate enough names for the qualified jury wheel to enable staffing the required number of juries." *United States v. Gometz*, 730 F.2d 475, 480 (7th Cir. 1984) (Posner, J.) (*en banc*). No evidence suggests that the juries were inadequately staffed for the 2001 and 2005 QJWs.

Scrushy has not shown that not supplementing the VRLs led to any systematic exclusion of African-Americans. *Carmichael*, 467 F. Supp. 2d at 1314. Scrushy's failure of proof is especially apparent here given the minuscule effect of the errors he identifies, namely, reducing by 0.6% the African-American composition on the last 44 jury pools drawn from the 2001 QJW. R27-740. *Contra Duren*, 439 U.S. at 367, 99 S. Ct. 670; *Gibson*, 705 F.2d at 1547. *See also Orange*, 447 F.3d at 800; *United States v. Cecil*, 836 F.2d 1431, 1445 (4th Cir. 1988).

Scrushy's reliance on *United States v. Jackman*, 46 F.3d 1240 (2d Cir. 1995) is unavailing. In *Jackman*, the jury system systematically excluded minorities because the clerk had continued to select most jurors from the wheel that omitted the two towns containing two-thirds of the minority population – the practice disapproved in *Osorio*. *Id*. at 1248. Scrushy claims that the clerk

similarly failed to remedy the errors identified in *Clay*. Scrushy-Br. 115. Scrushy is wrong. As the district court noted, the clerk never preferentially placed deferred jurors on the jury pool. R8-576-49; *Carmichael*, 467 F. Supp. 2d at 1304-05. Second, *Clay* did not find a violation of the fair cross-section requirement, but rather the randomness principle of the JSSA. 159 F. Supp. 2d at 1370. As discussed *supra*, the jury selection system under the 2001 QJW did not frustrate the JSSA's underlying principle of randomness, and the alleged errors did not occur during the 2005 QJW.

Finally, the liberal deferral practice did not lead to systematic exclusion of African-Americans for the "rate of granting deferrals [was] essentially the same for all persons, regardless of race." R8-576-39 nn.50 & 57. The deferral policy did not target African-Americans like the practice in *Duren* targeted women. 439 U.S. at 366. The rate at which white and African-American jurors request deferrals is external to, and not inherent in, the selection process. *Rioux*, 97 F.3d at 658.

Scrushy's failure on *Duren*'*s* third element should lead this Court to reject his fair cross-section claims.

2. Scrushy Has Not Shown A 10% Absolute Disparity Of African-Americans For The 2001 And 2005 QJWs.

Scrushy must show an absolute disparity of greater than ten percent "between the percentage of the 'distinctive group' on the qualified jury wheel and the percentage of the group among the population eligible for jury service. . . ." *Rodriguez*, 776 F.2d at 1511. Since he did not, *Duren's* second element is unsatisfied. *Grisham*, 63 F.3d at 1078.[51]

As to the 2001 QJW, Scrushy failed to meet the absolute disparity test for several reasons.[52] First, the magistrate adopted the *Carmichael* court's findings that Scrushy's proof was insufficient because he assumed that all 546 jurors who did not identify their race on the qualification questionnaires were not African-

[51] Contrary to Scrushy's representation, Scrushy-Br. 109 n.20, the government's expert has consistently upheld the absolute disparity test as the proper analysis. *See* R4-405-1.

[52] Over the government's objection, R1-114-6-8; R27-899-900, the magistrate used census data to measure the distinctive group eligible for jury service. R8-576-59. Census data is an over-inclusive measure of this population. *United States v. LeCroy*, 441 F.3d 914, 918 n.1 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 2096 (2007). Voter registration data better measure "jury eligibility" because the data exclude certain persons ineligible to serve. *See Williams v. Florida*, 109 F. Supp. 2d 1372, 1374 (S.D. Fla. 2000). More importantly, the Middle District's Plan makes voter registration an absolute eligibility requirement because only those registered can be selected. R25-403-05. Using census data produced a finding of greater underrepresentation by including the loss in representation of African-Americans from the census to the voter registration population – a loss irrelevant to a challenge to the *jury selection system*.

American. R8-576-61-63. Scrushy seeks to avoid this fatal flaw by claiming it "was *never* raised in this jury challenge, by either the Government or the court." Scrushy-Br. 111.

Scrushy overlooks the record in making this assertion. The government raised this issue over two months before the magistrate's ruling on May 1, 2007, when it relied upon this finding in *Carmichael* in responding to the magistrate's order for additional submissions. R7-531-2. Despite being made aware of the "missing juror" issue at least as early as August 28, 2006, during the *Carmichael* litigation, receiving the adverse ruling in *Carmichael* on December 18, 2006, and learning on February 14, 2007, that the government intended to rely upon *Carmichael* in this litigation, Scrushy took *no* action to address this fundamental defect prior to the magistrate's ruling on May 1, 2007. Moreover, during cross-examination of the government's expert on April 13, 2006, Scrushy's counsel criticized him for assuming that all registered voters who had not identified their race were not African-Americans – the same assumption he presently champions. R27-761-63. Scrushy's claim (Br. 111) that he should be excused from his burden of proof because he was denied "any opportunity to litigate this issue" is, to say the least, hard to swallow. *See Esle*, 743 F.2d at 1474-75.

The district court also properly found that Scrushy had not satisfied the absolute disparity test because he had aggregated the racial composition of the 92

criminal petit jury pools selected from the 2001 QJW. R8-576-63-70. The percentage of the distinctive group on the QJW, not a summation of the group on aggregated jury pools, is the correct figure to measure absolute disparity.[53] *See Rodriguez*, 776 F.2d at 1511. Scrushy's methodology was defective because each jury pool was selected from the QJW at a different point in time, and the percentage of different groups on the QJW constantly changes. R4-405-1-11-13. The percentage of African-Americans in aggregated jury pools, therefore, is not an accurate sample of the overall African-American population on the QJW. *Id*.

In short, Scrushy can satisfy the absolute disparity test for the 2001 QJW only by making three errors: (1) using census data to measure the juror eligible population, (2) aggregating the jury pools to determine the percentage of African-Americans on the QJW, and (3) assuming that every juror who did not identify his race was not African-American. This Court should not accept such an erroneous calculation.

As to the 2005 QJW, even with flawed methodologies, Scrushy cannot meet the absolute disparity test; therefore, his fair cross-section claims fail. R8-576-60-61.

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[53]The government offered the JS-12 and Race/Gender Report, R26-684-97; R4-405-1, to measure the percentage of African-Americans on the QJW because they are free from the defects associated with Scrushy's method. R4-405-1-11-13.

C. Conclusion.

Scrushy's challenges to the jury selection system are meritless. Although the clerk made errors, "[t]here is a difference between what violates the law and what, while not in violation, is still a situation leaving much to be desired." *Royal*, 174 F.3d at 12. At most, this case represents the latter.

IX. THE DISTRICT COURT'S DECISION TO GRANT AN UPWARD DEPARTURE AS TO SIEGELMAN WAS NOT AN ABUSE OF DISCRETION.

Siegelman does not contend that his 88-month sentence is substantively unreasonable, or that the district court's calculation of his initial advisory Guidelines range of 121-151 months was incorrect. *See United States v. Pugh*, 515 F.3d 1179, 1189-91 (11th Cir. 2008) (discussing requirements that sentence be procedurally and substantively reasonable). Rather, Siegelman (Br. 77-83), with the support of amici (Br. 13-16), narrowly contends that the court's decision to grant an upward departure under U.S.S.G. §§ 2C1.1 cmt. n. 5, 5K2.0 (2002) violated the First Amendment and 18 U.S.C. § 3553(a) because it was allegedly based on Siegelman's statements criticizing the prosecutors in this case. Siegelman misconstrues the actual basis for the departure – that his conduct was part of a systematic and pervasive corruption of state government. That ground

was an appropriate ground for the departure. Regardless, any error was harmless because the departure did not affect Siegelman's ultimate sentence.[54]

After calculating an initial Guidelines range for Siegelman of 121-151 months, R33-151-52, the court considered the parties' departure motions, including the government's motion for a four-level upward departure for Siegelman, R34-3-126. The government's motion maintained that "Siegelman's criminal conduct was part of a systematic and pervasive corruption of the office of Governor and Lieutenant Governor, as well as various state agencies, such as the CON Board, of *the State of Alabama* that may cause loss of public confidence in government." R8-591-1 (emphasis added). The district court addressed the request for an upward departure "as set forth in the Government's motion," and granted it:

> Based upon all of [the] information that is before the Court, I am convinced that the conduct in which Governor Siegelman engaged in has damaged the function of the Executive Branch of Government in this case, and the public's confidence in the Executive Branch of Government.

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[54] Siegelman uses his sentencing claim as a vehicle for discussing extra-record material concerning the government's alleged motivation in prosecuting him. *See* Siegelman-Br. 78-79. Because that material is not part of the record on appeal, the government does not address it. We simply note, as did Siegelman's own counsel, that Siegelman has never filed a motion alleging selective prosecution in this case. R34-125.

R34-127. Siegelman's post-departure, advisory range was 188-235 months. *Id.* at 127. The court sentenced Siegelman to 88 months. *Id.* at 287-92.

The court's decision to grant an upward departure was not an abuse of discretion. The premise of Siegelman's instant claim – that the court granted the motion because he made out-of-court statements criticizing the prosecution (Siegelman-Br. 77) – is flawed. The court found that Siegelman's conduct resulted in a loss of public confidence in the executive branch of *state* government, not federal government. In its written motion (R8-591-1-3, 6), and its arguments at sentencing (R34-98-105, 121-22), the government focused on the fact that Siegelman's conduct was part of a systematic and pervasive corruption of state government. The government contended that Siegelman "for over six years abused the Executive Branch of the state of Alabama." R34-122. Moreover, the cases relied on by the government (R8-591-3-4) upheld departures for corruption or fraud causing a loss of public confidence in state or local government. *See United States v. Shenberg*, 89 F.3d 1461, 1476-77 (11th Cir. 1996) (state circuit court); *United States v. Reyes*, 239 F.3d 722, 744-45 (5th Cir. 2001) (city government); *United States v. Gutman*, 95 F. Supp.2d 1337, 1350-51 (S.D. Fla. 2000) (state legislature). Given the government's arguments, the court's finding that Siegelman's conduct caused a loss of public confidence in government necessarily referred to the executive branch of state government. That conclusion

is also apparent from the court's statement, when announcing Siegelman's sentence, that "a fair punishment" was necessary "to preserve . . . the confidence of the people of the state of Alabama in its elected officials." R34-289.[55]

Siegelman does not contend that an upward departure for his systematic and pervasive corruption of state government was inappropriate, and even his attorney at sentencing conceded that "certainly the argument could be made, in all candor, that there could be some question as to public confidence in this case." R34-114. The district court's finding that Siegelman's conduct damaged public confidence in the executive branch of Alabama government was based on the evidence at trial as well as "the plethora of media attention" generated by the news, of which the

[55] At sentencing, the government referred to Siegelman's attacks on the criminal justice system, including his participation in a propaganda video attacking his convictions, *see* Gov't Sent. Ex. 6, and his repeated claims that his prosecution was based on political considerations rather than the clear evidence of his guilt. R34-120-24. There is no indication that the court based its departure decision on Siegelman's attacks; in fact, the court affirmatively suggested that it did not. *See* R34-126 (responding "[t]hen let's do that" to Siegelman's counsel statement about saving the issue of alleged selective prosecution for another day). In any event, at least one court has taken into account a defendant's public statements that his prosecution was politically motivated when granting a conditional upward departure. *Gutman*, 95 F. Supp. 2d at 1351 n.17. And, this Court has noted a defendant's failure to seriously acknowledge wrongdoing in the course of affirming his sentence. *United States v. Campbell*, 491 F.3d 1306, 1317 (11th Cir. 2007).

court took judicial notice. *Id.* at 126-28.[56] The court's reliance on the widespread media coverage of this case in determining the harm to public confidence was appropriate. *See Shenberg*, 89 F.3d at 1476-77; *Reyes*, 239 F.3d at 744-45. The court's upward departure was supported by evidence and precedent; it was not an abuse of discretion.

Regardless, any error was harmless because the departure did not "substantially affect" Siegelman's sentence. *United States v. Foley*, 508 F.3d 627, 634 (11th Cir. 2007). Indeed, it had *no* effect whatsoever. After granting the upward departure, the court sentenced Siegelman 100 months below his post-departure range and 33 months below his pre-departure range. The court found that Siegelman had done many good things for the state of Alabama and commended him for his public service, but balanced those factors with its duty to punish Siegelman for his "criminal conduct as determined by the jury" and "to impose a fair punishment to preserve the integrity of the judiciary and the confidence of the people of the state of Alabama in its elected officials." R34-

[56] The evidence was sufficient to establish Siegelman's systematic and pervasive corruption by a preponderance of the evidence. *See Shenberg*, 89 F.3d at 1476. It established the corrupt CON Board scheme underlying Siegelman's bribery, conspiracy, and fraud convictions, and the pay-for-play agreement underlying his obstruction of justice conviction; as part of that agreement, Siegelman, Bailey, and Hamrick exerted corrupt influence over multiple state and local entities on Young's behalf. R8-591-2-3 (government motion).

287-89. The court took into account all of the § 3553(a) factors in concluding that an 88-month sentence was warranted. *Id.* at 292. Critically, Chief Judge Fuller stated: "even if I had not granted the Government's motion for an upward departure . . . based upon the systematic and pervasive Government corruption on behalf of Governor Siegelman, I would still make the same finding as to a reasonable sentence under [§ 3553(a)]." *Id.* at 297. Notwithstanding Siegelman's cursory arguments to the contrary (Br. 83 n.26), that statement proves that the court's decision to depart upward had no effect on Siegelman's sentence. The Court should reject his claim.[57]

[57] Chief Judge Fuller's fairness is manifest in the record of the three-day sentencing hearing. Reassignment is not warranted in the event of a remand.

CONCLUSION

For the foregoing reasons, the judgments of conviction should be affirmed.

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August 4, 2008

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with this Court's order dated June 30, 2008, which authorized the government to file an answering brief of up to 40,000 words, because the brief contains 39,965 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R. 32-4.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced font using WordPerfect 12 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I, John-Alex Romano, do hereby certify that on August 4, 2008, I caused to be served via Federal Express, for delivery on the next business day, a copy of the of the foregoing Corrected Brief for the United States on each of the counsel listed below.

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