No. 07-13163-B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA, Appellee

vs.

DON EUGENE SIEGELMAN, et al., Appellants

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

BRIEF OF GOVERNOR DON SIEGELMAN, APPELLANT

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Certificate of Interested Persons

The following persons may have an interest in the outcome of this case.

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Blakey, George Robert, Counsel for Governor Siegelman

Coody, Honorable Charles S., U.S. Magistrate Judge

Eastland, Hiram C., Jr., Counsel for Governor Siegelman

Feaga, Stephen P., Counsel for Appellee

Franklin, Louis V., Sr., Counsel for Appellee

Fitzpatrick, Joseph L., Jr., Counsel for Appellee

Fuller, Honorable Mark E., U.S. District Judge

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Statement Regarding Oral Argument

Oral argument is warranted because of the importance of the issues involved. This Court, in ordering Governor Siegelman released pending appeal, has already decided that this appeal presents substantial issues.

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Statement Regarding Adoption of Other Party's Brief

Pursuant to Fed. R. App. P. 28(i) and 11th Cir. R. 28-1(f), Governor Siegelman adopts all portions of the brief of appellant Richard Scrushy. Because Scrushy's brief has not been filed as of this writing, Governor Siegelman reserves the right to modify the extent of this adoption if appropriate.

Statement Regarding Jurisdiction

This is an appeal from a final judgment in a criminal case. The Court has jurisdiction under 28 U.S.C. § 1291. The judgment was entered on July 3, 2007. [R10-626]. Notice of appeal was timely filed on July 9, 2007. [Doc. 632]. An amended judgment was entered on July 10, 2007. [R10-634]. A second notice of appeal was filed on July 23, 2007. [R10-637]. While the original notice of appeal would have been sufficient, the second notice of appeal was timely as well. *See* Fed. R. App. P. 4(b)(1)(A) (10 days to appeal); Fed. R. App. P. 26(a)(2) (10-day period excludes weekends).

Statement of the Issues

1. When a charge of "honest services" mail fraud, of conspiracy to commit that offense, or of bribery is based on an alleged connection between official action and a campaign contribution, is the prosecution required to prove an explicit *quid pro quo* linkage between the contribution and the action, just as it must in the extortion context under *McCormick v. U.S.*, 500 U.S. 257, 111 S.Ct. 1807 (1991)?

   a. Was the jury correctly instructed on those charges?

   b. Was the evidence sufficient on those charges?

2. Was the bribery charge barred by the statute of limitations; and was this argument preserved when raised through post-trial Rule 29 motion?

3. Was Governor Siegelman entitled to judgment of acquittal on the "witness tampering" obstruction charge, where he neither persuaded nor misled anyone within the meaning of the statute?

4. Did the District Court err in admitting evidence under Fed. R. Evid. 801(d)(2)(E) (the "coconspirator hearsay rule"), where the prosecution failed to prove that the Rule's requirements were met?

5. Was it permissible to increase Governor Siegelman's sentence because of out-of-court public statements on matters of public concern, i.e., statements criticizing and questioning the actions and motives of prosecutors – particularly without any evidence or factual specificity as to the content of such statements?

6. Is Governor Siegelman entitled to a new trial based on juror misconduct, where the District Court refused to undertake or to allow adequate inquiry into the matter?[1]

Statement of the Case

A. Course of Proceedings and Disposition Below.

Don Siegelman, former Governor of Alabama, was charged along with other defendants in a multi-count indictment. [R1-3 (original indictment); R1-61 (second superseding indictment)]. He was acquitted on the great majority of the charges, and was convicted on only a relatively narrow slice of the case.

The counts of conviction were: (a) Counts 3, 5, 6, 7, 8, and 9, consisting of "honest services" mail fraud, conspiracy to commit that offense, and bribery, all relating to the reappointment of co-defendant Richard Scrushy to the Certificate of Need (or C.O.N.) Board, allegedly in return for a contribution to an issue-election or referendum campaign; and (b) Count 17, an "obstruction of justice" witness-tampering charge. [R10-634, Amended Judgment].

The District Court sentenced Governor Siegelman to 88 months of incarceration, 3 years of supervised release, and a fine. [*Id.*].

The District Court ordered Governor Siegelman incarcerated immediately at

[1] Because of space limitations and in order to avoid duplication, Governor Siegelman adopts all relevant portions of the brief of appellant Scrushy on this issue, and will not address it further in this brief.

the close of the sentencing hearing, and denied him release pending appeal. He remained incarcerated for nine months. But in March 2008, this Court overruled the District Court and ordered Governor Siegelman released pending appeal, finding that he had raised substantial issues likely to result in reversal or new trial. Thus it is already established that the District Court has committed one substantial error in this case: the error of denying release pending appeal, based on an erroneous understanding or application of the legal standard..

Proceedings relevant to the issues on appeal include the following:

Issue 1 (explicit *quid pro quo*)

Governor Siegelman requested jury instructions requiring proof by the prosecution of an "explicit *quid pro quo*." [R3-275, pp. 10, 37, 41, 50, 52]. But the District Court disagreed, and its instructions did not include that requirement. [R66-839 pp. 36-41 (Tr. 7292-97) ("honest services" instructions); *id.* pp. 47-48 (Tr. 7303-04) (bribery instructions)]. Governor Siegelman made timely objection to the District Court's failure to instruct the jury on that point. [*Id.*, pp. 65, 67-68 (Tr. 7321, 7323-24)].[2]

Governor Siegelman also sought judgment of acquittal on this basis. [*See*, *e.g.*, R62-823 pp. 87, 136-38, 143-44, 146 (Tr. 6508, 6557-59, 6564-65, 6567);

[2] In citations to transcripts, we include the page number of the relevant pdf file in the form "p. __" or pp. ___," for the convenience of those readers who are viewing the record on a computer. We also include the parallel citation to the page number of the transcript as a whole, in the form "Tr. ____."

R65-838 p. 61 (Tr. 7232)]. He renewed the argument by his post-trial written motion for judgment of acquittal as well. [R5-455]. The District Court reserved ruling on the oral motions for judgment of acquittal. [R63-825 p. 102 (Tr. 6735); R65-838 pp. 81-82 (Tr. 7252-53)]. The District Court ultimately denied the motions. [R6-468].

Issue 2 (statute of limitations)

Governor Siegelman raised the statute of limitations issue, as to the bribery charge, in his post-trial motion for judgment of acquittal. [R5-455, pp. 5, 31-36]. The prosecutors did not contest the merits of the limitations issue, but instead argued that Governor Siegelman had waived the issue by failing to raise it earlier. [R6-459, pp. 18-20]. The District Court denied the motion. [R6-468].

Also relevant to this issue is the fact that, early in the case, Governor Siegelman moved for a bill of particulars. [R2-142]. Among the information that he sought, in that motion, was a more particular statement as to when the prosecution alleged that the bribery actions had taken place. [*Id.*, pp. 16-17]. The prosecutors opposed the motion for bill of particulars. [R2-162]. The District Court denied the motion. [R2-235].

Issue 3 (obstruction of justice)

Governor Siegelman moved for judgment of acquittal on the obstruction of justice charge both orally and in writing. [R62-823 pp. 178-79 (Tr. 6599-6600);

R65-838 pp. 62-63, 67-68 (Tr. 7233-34, 7238-39); R5-453]. As noted above, the District Court denied the motions.

Issue 4 (hearsay)

Governor Siegelman made continuing and repeated objection at trial to the admission of evidence under the "coconspirator hearsay" rule of Fed. R. Evid. 801(d)(2)(E), including the erroneously-admitted evidence that we address in this brief. [*See*, *e.g.*, Doc. 678 (folder) pp. 5-10 (Tr. 524-29); R37-679 pp. 15-16 (Tr. 546-47); R41-700 pp. 81-96, 114-28, 262-63 (Tr. 1599-1614, 1632-46, 1780-81)].[3]

Issue 5 (sentencing)

At the prosecution's urging, the District Court increased Governor Siegelman's sentence and granted an upward departure on the basis of out-of-court statements by Governor Siegelman criticizing the prosecutors. [R34-654 pp. 126-28] There was no evidence as to what statements he made. The District Court said that it took judicial notice of such statements, but did not identify their contents or substance. Nor did the Court indicate where in the public record one could find any such statements, much less any particular ones that the Court deemed to justify an increased sentence. [*Id.*, p. 128]. Governor Siegelman objected to the District Court's increase of his sentence on this basis. [*Id.*, pp. 293, 295, 297].

[3] As the District Court often said, including specifically in the context of Rule 801(d)(2)(E) issues, it had a standing rule that an objection by one defendant would be considered to preserve the issue for all defendants. [E.g., R36-673 pp. 135-36 (Tr. 374-75)].

B. Statement of Facts

1. With regard to the charges involving the C.O.N. Board appointment and the campaign contributions, the pertinent facts were as follows, taking the prosecution's evidence as true.

a) Don Siegelman was the Governor of the State of Alabama. Richard Scrushy was the founder and CEO of Healthsouth Corporation, one of the State's most prominent corporations and employers, and one of the world's leading healthcare corporations. [R37-679 pp. 184-85 (Tr. 715-16); R39-689 p. 134 (Tr. 1161)].[4]

The Certificate of Need (or C.O.N.) Board is an instrumentality of Alabama's government with certain responsibilities relating to healthcare delivery in the state. [R35-670 pp. 203-04 (Tr. 203-04)]. The members of that Board are appointed by the Governor, and serve without pay. [*Id.*, p. 205 (Tr. 205); R36-673 p. 59 (Tr. 298)].

Scrushy had served on that Board through appointment by three Governors, prior to Governor Siegelman's administration. [R35-670 p. 227 (Tr. 227); R36-673 p. 59 (Tr. 298)]. Three of the Board's nine seats are reserved by law for health-care providers. [R35-670 p. 205 (Tr. 205)]. So there is nothing at all

[4] Although it was later revealed that Healthsouth was the site of a major accounting fraud scandal, that has nothing to do with this case; and there is no evidence that Governor Siegelman knew anything about it.

improper about appointing a healthcare company executive such as Scrushy to the Board. It is also not unusual for Governors to appoint political contributors to the Board; it is the norm. [R36-673 p. 62 (Tr. 301)].

Scrushy, having been reappointed to the C.O.N. Board by Governor Siegelman's immediate predecessor, had resigned from the Board before Siegelman was elected as Governor. [R36-673 p. 83 (Tr. 322)]. However, even during the "transition" period between his election and inauguration (i.e., November 1998 to January 1999), Governor Siegelman was considering Scrushy for reappointment to the Board. Scrushy was on a list of potential "C.O.N. Candidates," where his name was accompanied by two typewritten stars, circled in handwriting and emphasized with another handwritten star. This document was created during the transition period between election and inauguration; the handwritten notations were Siegelman's. [Siegelman Ex. 220; R40-694 pp. 244-47 (Tr. 1453-56)].

Governor Siegelman's former aide, prosecution witness Nicholas Bailey, testified that he heard a conversation between Governor Siegelman and Eric Hanson at some point after Governor Siegelman's inauguration [R36-673 p. 258 (Tr. 497)]. Hanson was a friend of Governor Siegelman, and a Healthsouth employee or consultant. [*Id.*, pp. 257-58 (Tr. 496-97)]. According to Bailey, Governor Siegelman said "Mr. Scrushy had contributed at least … $350,000 to the

Fob James campaign. And in order to make it right for the Siegelman campaign, he needed to do at least 500,000." [*Id.*, p. 261 (Tr. 500)].

The "Siegelman campaign" in question was Governor Siegelman's campaign for voter approval of his ballot initiative to establish a state lottery to fund educational programs. [*Id.*] In short, it was "a referendum campaign." [R40-694 p. 16 (Tr. 1225)].

Former Healthsouth CFO Michael Martin testified that Scrushy told him that "in order to get in the good graces of Governor Siegelman that we needed to assist him with raising money for the lottery campaign." [R41-700 pp. 248-49 (Tr. 1766-67)]. According to Martin, "There were a number of occasions when Mr. Scrushy told me that it was important for us to be in the good graces of that governor or any other governor so that we could have some influence or a spot on the CON Board." [*Id.*, p. 249 (Tr. 1767)]. Martin testified that Scrushy's view was that "if we raised that money, then we would have a spot on the CON Board." [R42-710 p. 73 (Tr. 1865)]. There is, however, no evidence that this view was based on anything that Governor Siegelman had done or said to Scrushy or to anyone else. Nor was there evidence that Governor Siegelman knew of conversations between Martin and Scrushy.

Bailey testified that at some point, Governor Siegelman showed him a check for $250,000 and said that Scrushy "was halfway there." [R36-673 pp. 265-68,

271 (Tr. 504-07, 510)]. (There was much confusion in Bailey's testimony as to when this happened; we are not sure what the prosecution will claim, if anything, as to the date of this alleged conversation). According to Bailey, "I responded by saying, what in the world is he going to want for that? And his response was, the CON Board, the C-O-N Board." [*Id.*, p. 268 (Tr. 507)]. "I said, I wouldn't think that would be a problem, would it? And he said, I wouldn't think so." [*Id.*]

As we will discuss in the Argument, a crucial point is that there was no evidence of any agreement – much less an *explicit* agreement – connecting the C.O.N. Board appointment to the Education Lottery campaign contributions. At most, as we will show, with the prosecution's evidence taken as true there was some *expectation*, as shown by Bailey's testimony that we have just quoted. Bailey confirmed that he did not have first-hand knowledge of anything that Governor Siegelman and Scrushy said to each other. [R38-687 pp. 196-97 (Tr. 1003-04)]. And the existence of an explicit agreement cannot be inferred from the fact that Governor Siegelman and Scrushy met. As Bailey confirmed, it was routine for Governor Siegelman to have meetings in private – so routine that nothing improper can be inferred from the fact of a private meeting with Scrushy. [R39-689 pp. 33-34 (Tr. 1060-61)].

The check was payable to the Alabama Education Lottery Foundation, a § 501(c)(3) entity that was "a campaign fund for the lottery that Governor Siegelman

was promoting." [R36-673 p. 272 (Tr. 511); R37-679 p. 212 (Tr. 743)]. The check was written from Integrated Health Services, a Maryland corporation. [R36-673 p. 272 (Tr. 511)].

On July 26, 1999, Governor Siegelman appointed a slate of members, including Scrushy, to the C.O.N. Board. [*Id.* pp. 89, 278 (Tr. 328, 517)]. Later, according to Bailey, Governor Siegelman instructed Bailey to try to have Scrushy made the vice-chair of the Board. [*Id.*, pp. 279-80 (Tr. 518-19)]. The Board members themselves unanimously elected Scrushy as vice-chair. [R41-700 pp. 22-23 (Tr. 1540-41)]. Being vice-chair means only that the person chairs meetings when the chairperson is absent, which was rare; beyond that, the position carries no additional power. [*Id.* pp. 51-52 (Tr. 1569-70)].

In the fall of 1999, according to former Healthsouth CFO Martin, Eric Hanson bragged "that he was able to get us a spot on the CON Board with the help of the Integrated check." [R41-700 pp. 263-64 (Tr. 1781-82)]. "He was bragging about the fact that he was able to get the CON slot for HealthSouth and the fact that Integrated had made the payment and that [investment banker] McGahan had worked with him on getting that done." [*Id.* p. 269 (Tr. 1787)].[5]

Subsequently, Bailey deposited another $250,000 check, this one from Healthsouth, into an account belonging to the Alabama Education Foundation.

[5] As discussed in the Argument, this testimony was inadmissible hearsay.

[R36-673 pp. 283-84 (Tr. 522-23)]. Governor Siegelman received that check at a meeting with Scrushy, at Healthsouth, approximately ten months after Scrushy's appointment to the C.O.N. Board. [R37-679 pp. 6-8, 17-22 (Tr. 537-39, 548-53)]. The Alabama Education Foundation was a successor to the Alabama Education Lottery Foundation. [*Id.*, p. 211 (Tr. 742)].

In 2001, Scrushy told the Governor that he no longer wished to serve on the Board. Governor Siegelman appointed a Healthsouth employee, Tom Carman, to finish the unexpired term, and later reappointed Carman to another term. Carman, like Scrushy, had served on the C.O.N. Board in the past, through appointment by former Governor Fob James. [R35-670 pp 221, 224, 226 (Tr. 221, 224, 226); R43-720 p. 17 (Tr. 2058)].

b) The evidence also includes the following somewhat related matters, which are immaterial to the questions on appeal; but, since the prosecution may rely on its view of these facts, we will discuss them for the sake of completeness.

The prosecution attempted to prove that Scrushy, and/or Carman, engaged in some inappropriate actions in their service on the C.O.N. Board. But there was no evidence that Governor Siegelman knew of, much less that he took part in, any such thing. Likewise there is no evidence that Governor Siegelman intended or even expected that any such thing would occur.

The prosecution introduced testimony about the way Healthsouth went about

getting Integrated Health Services to make the first contribution. But here again there is no evidence that Governor Siegelman knew anything about it, or that he had any involvement in the decision to have the contribution come from an entity other than Healthsouth. Martin testified that Scrushy told him that Healthsouth could not make the contribution itself because "we had not supported [the lottery] and that his wife, Leslie, was against the lottery, and it would just look bad …" [R41-700 p. 250 (Tr. 1768)]. But Siegelman had nothing to do with how Scrushy or Healthsouth raised the money for the contribution.

According to Bailey, Governor Siegelman instructed the campaign finance office to hold the Integrated Health Services check until it was determined how to disclose it. [R36-673 p. 273 (Tr. 512)]. The issue, according to Bailey, was that Scrushy preferred a delay in the disclosure since "he didn't want his wife to know he was supporting the Alabama Education Lottery." [R37-679 p. 10 (Tr. 541)]. Another prosecution witness, Darren Cline, who did fundraising for the Alabama Education Lottery Foundation, testified that the reason for holding the check was that his boss Jim Cunningham told him to hold the check until it was decided what to do with it. The issue, according to Cline, was the fear of negative press coverage of a large contribution from an out-of-state corporation. [R40-694 pp. 24-25 (Tr. 1233-34)].

In March 2000, the Alabama Education Foundation took out a loan, the

proceeds of which went to satisfy a debt of the Alabama Democratic Party from the Education Lottery campaign. Governor Siegelman signed as one of the guarantors on the Foundation's loan. [R44-725 pp. 64, 105-06 (Tr. 2361, 2402-0)3]. The Foundation paid off the loan, using (among other things) the proceeds of the checks from Integrated Health Services and Healthsouth. [*Id.* p. 86 (Tr. 2383)]. However, Governor Siegelman's signature as a guarantor of the Foundation loan occurred nearly a *year* after Governor Siegelman had appointed Scrushy to the C.O.N. Board. There is no evidence that, at or before the time of that appointment, Governor Siegelman contemplated that there would be such a loan, that he would be a guarantor of such a loan, or that these contributions would be used to satisfy such a loan. Nor is there evidence that there was any reasonable prospect that Governor Siegelman ever would have been called upon to cover the debt. In other words, there is no evidence that Governor Siegelman sought contributions from Scrushy *in order to* avoid personal liability on the loan guarantee. There is no evidence that Governor Siegelman ever contemplated *any* sort of personal financial benefit to himself as a result of the contributions at the time they were made, or at the time of Scrushy's appointment to the C.O.N. Board, or at any other time. It is common in this country for campaign debt to be paid off after elections. The Internal Revenue Service did not impute any income or financial benefit to Governor Siegelman as a result of this debt being paid off.

The prosecutors asserted that the contributions were not timely disclosed in filings with the Alabama Secretary of State. Whether or not the disclosure was timely under state law, the fact is that the Integrated Health Services and Healthsouth contributions were treated, by the Alabama Education Foundation, in exactly the same way as other contributions that the Foundation deposited during the same time frame, including substantial contributions from such prominent companies as Oracle, Hitachi, and ALFA. [*E.g.*, R44-725 pp. 202, 223-24, 226-27, 242 (Tr. 2499, 2520-21, 2523-24, 2539)]. Thus there is no basis for an inference, from the timing of the disclosure filings with the Secretary of State, that Governor Siegelman sought to hide the Healthsouth and Integrated Health Services contributions in particular by delaying disclosure of them.

2. With regard to the "witness tampering" obstruction of justice charge, the pertinent facts were as follows, taking the prosecution's evidence as true. As will become clear in the Argument below, the most important factual point is that Governor Siegelman did not persuade Bailey to write the check in question; nor did Governor Siegelman mislead anyone with the intent of impacting such person's communications to law enforcement.[6]

In 1999, Governor Siegelman had been working with The Honda

[6] There is, indeed, no evidence that Governor Siegelman sought to mislead *anyone*, whether in law enforcement or otherwise. But for reasons that will become clear in the Argument, the Court can primarily focus on the narrower point made in the text above.

Corporation to bring a new automobile manufacturing plant to Alabama. [R62-823 p. 44 (Tr. 6465)]. Honda wanted to give a motorcycle to Governor Siegelman, but he declined that offer. Instead he insisted on purchasing the motorcycle himself. [R36-673 pp. 199-201 (Tr. 438-40); R62-823 p. 35 (Tr. 6456)].

In January 2000, Lanny Young wrote Bailey a check for $9200; and Bailey wrote a check to Governor Siegelman's wife in the same amount. [R36-673 pp. 217-19 (Tr. 456-58)]. Bailey's testimony was that Young told him that he was buying a portion of the motorcycle from the Governor. [*Id.* p. 220 (Tr. 459)]. Bailey – not Governor Siegelman – suggested that the payment go through himself, rather than directly from Young to the Governor. [*Id.*] Bailey purchased an interest in the motorcycle, and a formal bill of sale was executed. [R37-679 pp. 253-54 (Tr. 784-85)]. Bailey and the prosecutors contended that this was not a *bona fide* purchase of part of a motorcycle, but was instead a payoff by Young to Governor Siegelman as part of an ongoing "pay-to-play" scheme. However, the jury rejected those charges.

A federal investigation began into the relationships of various people including Governor Siegelman, Bailey, and Young. Governor Siegelman and Bailey knew of that investigation. [R36-673 pp. 196-97, 236 (Tr. 435-36, 475)]

Bailey wrote a check to Young in June 2001, noting on the check that it was repayment plus interest of the $9200 check that Young had written to Bailey

earlier. [*Id.* p. 235 (Tr. 474)]. Bailey's testimony is that this description of the check was a "disguise." [*Id.*] This was Bailey's idea and his intent, he says. There was no evidence that it was Governor Siegelman's idea to have Bailey write this check, or that Governor Siegelman persuaded him to write it, or even requested that he do so. As Bailey said, "I found out about the investigation that was going on with Lanny. … I wanted to repay Lanny's $9200. I did it in the form of a check." [*Id.* p. 236 (Tr. 475)]. Bailey testified that Governor Siegelman knew of, and agreed to, his (Bailey's) plan to write the check. [*Id.* p. 237 (Tr. 476)]. Count 16 [R1-61, pp. 39-40] charged Governor Siegelman with obstruction of justice in regard to Bailey's check to Young; the prosecution alleged that Governor Siegelman "caused" Bailey to write that check. The jury correctly rejected that charge.

Bailey testified that the "plan" was that he had borrowed money from Young to purchase the motorcycle, that he would repay Young, and that he would then pay Governor Siegelman the remaining value of the motorcycle and take possession of it. [R36-673 p. 237 (Tr. 476)]. There is no evidence that Governor Siegelman came up with this plan; there is no evidence that he urged or cajoled or even requested Bailey to come up with it or to carry it out.

In October 2001, Bailey wrote a check to Governor Siegelman for $2,973.35, noting on the check that it represented the balance due on the

motorcycle. [*Id.*, p. 240 (Tr. 479)]. This check was the subject of Count 17, which is at issue in this appeal. [R1-61-40].

There was a further formal bill of sale of the remaining interest in the motorcycle. [R37-679 pp. 270-71 (Tr. 801-02)]. When asked by the prosecutor why he wrote that check, Bailey's answer was "I had had a discussion with the Governor and expressed interest in either the Governor buying the motorcycle from me or me buying the motorcycle from the Governor in full. So if I bought it, I could sell it and be done with the motorcycle. That's what ultimately happened on October 16, 2001." [*Id.* p. 242 (Tr. 481)]. Bailey also testified, "We made a decision to finalize the agreement we made regarding the motorcycle early on, and this was to finish that." [*Id.* p. 243 (Tr. 482)]. According to Bailey, "We met at the Governor's attorney's office and with my attorney, and that's when I finished paying the Governor in full for the motorcycle to carry out the plan that we had entered into probably 12 to 18 months earlier." [*Id.* p. 244 (Tr. 483)]. Bailey testified that he did not tell either attorney about the "plan" as he had described it, because "I didn't see it was necessary." [*Id.*]. As far as he knows, Governor Siegelman did not tell them either. [*Id.*]. Bailey's attorney at the meeting was the same attorney who still represented him at this trial. [E.g., R37-679 p. 270 (Tr. 801)]

3. With regard to the sentencing issue, the facts are as follows.

The prosecution asked the District Court not only to deny a downward departure, but also affirmatively to depart *upward*, based on out-of-court statements by Governor Siegelman.

The prosecutors began by describing those alleged statements as follows, when arguing against a Guidelines adjustment for acceptance of responsibility:

> And, Judge, I want to clear something up. We don't say to the Court that this defendant doesn't have the right to stand out in the public and say that he's innocent. That is not the problem we have with the comments of this defendant. It is the all out assault on the system that we have a problem with. That is a problem that we have in the system. And then to assault the system at each and every phase that has worked, and worked appropriately, worked as it should work, to then turn around and come into this Court and ask this Court for acceptance of responsibility, again, hypocrisy, Judge. That's all it is.

[R34-654 pp. 71-72]. The prosecutor later added that such out-of-court public statements should actually be the basis for an *increased* sentence. [*Id.*, pp. 79-80].

Then, when it came time [*id.*, p. 98] to argue specifically about the prosecution's motion for upward departure [R8-Doc. 591], the prosecution explicitly relied on such alleged out-of-court statements as one of the grounds for such a departure. It argued that Governor Siegelman had made statements "publicly argu[ing] that his indictment was politically motivated," and offered that as part of the reason for an upward departure. [R34-654 p. 106]. The prosecution argued that an upward departure was justified because "every time they utter the words that there was no evidence of their guilt causes a huge loss of public

confidence." [*Id.*, p. 107]. The prosecution continued in this vein at some length, making clear that the public statements allegedly made by Governor Siegelman were at the very core of the prosecution's request for an upward departure:

> I feel compelled to respond, Your Honor, because I believe [counsel for Governor Siegelman] mischaracterized entirely the Government's basis for asking for this upward departure. … [T]he heart of this departure comes from what this defendant has been doing to the criminal justice system. This is not about a defendant exercising First Amendment speech rights; no, this is what the law recognizes as an attack on the criminal justice system that causes the public to lose confidence in the system. And that is what the heart of this upward departure is for.
>
> It's for starring in a propaganda video to attack the system. …
>
> That is what the upward departure is for. His continued blatant willingness to engage in propaganda, that he casts disrespect on this system. He should be held accountable for that.
>
> …He has knowingly accused the Government of being politically motivated.

[*Id.* pp. 120-24].

The prosecutor falsely accused Governor Siegelman of attacking the Court and the jury. [*Id.*] Governor Siegelman did not do that, and there is not a bit of evidence that he did. Notably, the prosecutors chose not to introduce any evidence of any statement by Governor Siegelman, of the sort that they were complaining about. And Governor Siegelman's counsel made clear that the prosecution's unsupported accusation was false: Governor Siegelman had in fact *not* said that the District Court or the criminal justice system was corrupt. [*Id.* p. 125]. Counsel

argued that the prosecutor

> mischaracterizes the evidence and what has gone on. Don Siegelman, I don't believe that they can offer one shred of proof that he has ever said that this Court is corrupt, or this system was corrupt. In fact, he's repeatedly said this week that he has faith and confidence in the system, and that's the record before us today.

[*Id.*]

The District Court granted the prosecution's motion for upward departure, specifically relying on the unspecified out-of-court statements that the prosecutors claimed Governor Siegelman had made. And the District Court purported to take "judicial notice" of such statements, even while not making any specific finding about the content of any such statement or even identifying where such statement could be found in the public record.

> Based upon the evidence that this Court has heard through the ten weeks of trial, based upon the pleadings this Court has seen, the plethora of media attention, some reporting the news, some of which has been generated with the assistance of Governor Siegelman, this Court would be avoiding its obligation if it did not address the Government's motion for upward departure based upon the systematic and pervasive Government corruption as set forth in the Government's motion, which is document five ninety-one in this case.
>
> Based upon all of that 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. I will grant the United States' motion for upward departure of four offense levels.
> …
> MR. FEAGA [for the Government]: Your Honor, for the record, would the Court state that it's taking judicial notice of those matters

> that occurred outside of the courtroom that it mentioned in its findings?
>
> THE COURT: I certainly thought that I made that clear.

[*Id.*, pp. 126-28].

The District Court's factual assertion – 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" [*id.*] – shows at least that the District Court was not purporting to find that Governor Siegelman had unduly criticized the Court or the jurors. There is, again, no evidence that he did. The criticism that led the District Court to impose the sentence enhancement – though its content was never made specific – was of *the prosecution*, an arm of the "Executive branch."

Governor Siegelman's counsel, opposing the prosecution's request for upward departure, noted that there *was* in fact evidence that the prosecution was improperly politically motivated. [*Id.*, pp. 125-26]. The District Court did not find otherwise. And the question of whether the prosecution in this case was so motivated – and other questions concerning the tactics and actions of the prosecution in this case – are matters of substantial public concern. They are the subject of ongoing official Congressional inquiry, and the subject of intensive investigatory journalism and editorial discussion in the nationwide news media. This Court can take judicial notice of this fact, without having to take a position in

this appeal on the merits of the underlying questions of prosecutorial motivation and tactics.[7]

For instance, on April 17, 2008, the Committee on the Judiciary of the United States House of Representatives released a report prepared by its Majority Staff, titled "Allegations of Selective Prosecution in Our Federal Criminal Justice System."[8] This very case is the one most prominently and extensively discussed in the report. As the report states,

> There is extensive evidence that the prosecution of former Governor Don Siegelman was directed or promoted by Washington officials, likely including former White House Deputy Chief of Staff and Advisor to the President Karl Rove, and that political considerations influenced the decision to bring charges.

Id., p. ii. The report continues, "There is also significant evidence of selective prosecution in the Siegelman case." *Id.* The report recognizes that this is a matter of wide public concern:

> Concerns that politics may have played a role in the investigation and prosecution of Don Siegelman have been widely aired in the local and national press, culminating in a petition urging the Committee to open this inquiry that was signed by 44 former state Attorneys General, both Democrats and Republicans, and received by the Committee in July 2007.

Id., pp. 8-9.

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[7] Under Fed. R. Evid. 201(f), judicial notice can be taken on appeal.

[8] Available at http://judiciary.house.gov/Media/PDFS/SelProsReport080417.pdf

C. Standard and Scope of Review

This Court reviews the denial of a motion for judgment of acquittal *de novo*, taking the prosecution's evidence as true. *U.S. v. Charles*, 313 F.3d 1278, 1284 (11th Cir. 2002). "[T]he evidence must be sufficient that a reasonable jury could find that the government has proven guilt beyond a reasonable doubt." *U.S. v. Medina*, 485 F.3d 1291, 1296-97 (11th Cir. 2007). The standard requires "reasonable inferences, not mere speculation." *U.S. v. Perez-Tosta*, 36 F.3d 1552, 1557 (11th Cir 1994). "[I]ntuition cannot substitute for admissible evidence when a defendant is on trial." *U.S. v. Hamblin*, 911 F.2d 551, 558 (11th Cir. 1990). As discussed in the Argument, this standard of review is altered in this case, and this Court's review should be more stringent, because of First Amendment concerns.

This Court decides questions of law *de novo*. Many of the issues involved herein are issues of law. Included among these are the legal question regarding whether the District Court was allowed to enhance the sentence based on out-of-court statements regarding matters of public concern about the motives and practices of prosecutors.

The standard of review for jury instructions depends on the nature of the asserted error. Here, the error was the failure of the District Court to accurately state the law; and so review is *de novo*. *See*, *e.g.*, *U.S. v. Williams*, ___ F.3d ___, 2008 U.S. App. LEXIS 6073, *15 (11th Cir. 2008); *U.S. v. Browne*, 505 F.3d 1229,

1267 (11th Cir. 2007) ("We review jury instructions de novo to determine whether they misstate the law or mislead the jury to the objecting party's prejudice."); *see also id.* at 1267, n.29.

The Court reviews evidentiary rulings for abuse of discretion, with pertinent factual findings reviewed under the "clearly erroneous" standard. *U.S. v. Magluta*, 418 F.3d 1166, 1177 (11th Cir. 2005).

Summary of the Argument

All but one of the counts at issue in this appeal are based on an alleged connection between Governor Siegelman's appointment of Richard Scrushy to the Certificate of Need Board, and contributions to an issue-advocacy or referendum campaign fund supporting a state lottery for education. Those are the "honest services" counts, the conspiracy count, and the bribery count. The trial court fundamentally erred as to all of those counts, by failing to recognize that proof of a criminal violation requires an "explicit *quid pro quo*" linkage between a campaign contribution and official action. The Supreme Court held precisely that, as to the Hobbs Act, in *McCormick v. U.S.*, 500 U.S. 257, 111 S.Ct. 1807 (1991). As we show, the same principle applies to the similar statutes at issue in this case. Under this governing standard, Governor Siegelman was entitled to a judgment of acquittal since the evidence did not prove an "explicit *quid pro quo*." At the very least, Governor Siegelman is entitled to a reversal of the convictions since the jury

instructions did not require an "explicit *quid pro quo*" but instead allowed conviction upon lesser proof.

The bribery count under 18 U.S.C. § 666 was also brought outside the relevant limitations period, and so Governor Siegelman was entitled to a judgment of acquittal on that count for this reason as well. The § 666 offense is not a "continuing violation." Instead, the limitations period begins to run when the prosecution could first be commenced, *not* when the entire relevant "course of conduct" has finished. *See*, *e.g.*, *U.S. v. Yashar*, 166 F.3d 873 (7th Cir. 1999). Under this standard, the charge was brought too late. The District Court did not dispute this, but instead held that the limitations issue was raised too late by post-verdict motion for judgment of acquittal. As we show, though, the District Court misinterpreted the Federal Rules of Criminal Procedure and relevant caselaw.

The only other count at issue in this appeal is an obstruction of justice charge. The charge, in a nutshell, is that Governor Siegelman obstructed justice in connection with Bailey's writing a check to him to complete Bailey's purchase of a motorcycle from Governor Siegelman. But there is no evidence that Governor Siegelman obstructed justice. The statute at issue, 18 U.S.C. § 1512(b)(3), has a precise and limited scope. Insofar as relevant here, it prohibits certain types of "persuasion" and certain types of "misleading conduct." There is no proof of "persuasion" in this case; the person allegedly persuaded was star prosecution

witness Bailey, but neither Bailey's own testimony nor any other evidence contains any proof that Governor Siegelman "persuaded" Bailey to write the check. Nor does the proof show misleading conduct by Governor Siegelman, and certainly none within the meaning of the statute. As recognized in cases such as *U.S. v. King*, 762 F.2d 232 (2nd Cir. 1985), a charge under this prong of the statute requires proof that the defendant misled someone in order to affect that person's communications to law enforcement; misleading federal law enforcement *directly* is not covered by this statute. So even if the prosecution's evidence is taken as true, still there was no crime here, because there is not an iota of proof that Governor Siegelman misled Bailey.

Furthermore, the District Court erred in admitting testimony about out-of-court statements by Eric Hanson, under the "coconspirator hearsay" rule of Fed. R. Evid. 801(d)(2)(E). Even assuming for purposes of argument that there was a conspiracy and that Hanson was part of it, the prosecution did not prove that the statements attributed to Hanson were made "during the course and in furtherance of the conspiracy." The statements attributed to Hanson were simple after-the-fact "bragging" that served no conspiratorial purpose whatsoever. And the erroneously admitted Hanson hearsay was so important to the case that the prosecutors strongly relied on it, in the final rebuttal portion of their closing argument.

Finally, even if this Court upheld the convictions, the Court should reverse

the sentence because the District Court increased the sentence in punishment for out-of-court statements by Governor Siegelman criticizing and questioning the motivations and actions of the prosecutors. Neither the First Amendment, nor 18 U.S.C. § 3553, permits a sentence to be increased for that reason. In this country, public officials are not beyond criticism; and there is no "federal prosecutors are beyond reproach" exception to the First Amendment. In fact, the actions and motivations underlying this prosecution are a matter of grave and widespread public concern.

Argument

1. The prosecution was required to prove an "explicit *quid pro quo*" agreement on the conspiracy, mail fraud, and bribery charges. The District Court failed to instruct the jury on this point. Furthermore, the evidence was insufficient on this point.

The conviction must be reversed as to all counts relating to an alleged connection between the Education Lottery campaign contribution and the C.O.N. Board appointment, based on the legal principle that an "explicit *quid pro quo*" connection is required for conviction. Such proof is required as a matter of statutory interpretation, just as the Supreme Court reached precisely the same result under a related statute in *McCormick v. U.S.*, 500 U.S. 257, 111 S.Ct. 1807 (1991). Furthermore, the First Amendment demands such an interpretation of the statutes at issue, in the context of issue-advocacy campaign contributions.

Under the governing law, the evidence was not sufficient to support the conviction; and so a judgment of acquittal should be entered. But at the very least there should be a reversal of the conviction and a new trial, since the jury was not correctly instructed on this point. This argument covers all of the "honest services" mail fraud counts (numbers 6 through 9), the charge of conspiracy to commit mail fraud (number 5), and the bribery count (number 3).

A. As to all of these counts, the alleged connection between the contributions and Governor Siegelman's actions is the key; and Governor Siegelman was entitled to judgment of acquittal on Counts 8 and 9, concerning things with which he had no involvement at all.

As to all of these charges, the alleged connection between the contributions and Governor Siegelman's actions is the key. If the prosecution did not prove the legally-required degree of connection between the contributions and the Governor's action, then there certainly was no federal crime here. We do not understand there to be any dispute about this. There will be a dispute as to what particular degree of connection the law requires in order to establish a crime, but there is no dispute that a connection is the key. For instance, there is no claim that the Governor's conduct with regard to the contribution was itself criminal under federal law, absent an alleged connection to Scrushy's appointment to the C.O.N. Board. Nor is there a claim that the appointment of Scrushy itself was unlawful, absent the legally-required degree of connection to the contributions. It is the alleged connection between the appointment and the contributions, and the precise

nature of that connection, that makes or breaks this case.

As noted in the Statement of Facts, there is no evidence that Governor Siegelman had any part in any alleged misconduct by Scrushy or Carman on the C.O.N. Board, in connection with their service on the Board. There is not even any evidence that Governor Siegelman knew of any such thing, or that he understood or planned that anything remotely like that would occur. This in itself is sufficient grounds for a judgment of acquittal on Counts 8 and 9.

That is, Counts 8 and 9 were mail fraud counts, premised on mailings that occurred in 2002 and 2003 respectively. They related to actions taken by the Certificate of Need Board. The indictment charged that Governor Siegelman "caused" those mailings. [R1-61 p. 35, ¶ 60]. But there is, as we have said, absolutely no evidence that Governor Siegelman "caused" those mailings in any sense whatsoever. Nor is there any evidence that he had any part whatsoever in any "scheme" by Scrushy to fraudulently misuse authority on the C.O.N. Board. There is no evidence that Governor Siegelman even knew of any such alleged scheme, much less that he supported any such scheme. Whether or not Scrushy breached a legal duty of "honest services" on the C.O.N. Board, there is no proof that Governor Siegelman is legally responsible for any such thing.

The indictment alleged, as part of the fraud scheme, that "SCRUSHY and others would and did offer things of value to another CON Board member to

attempt to affect the interests of HealthSouth and its competitors." [R1-61 p. 35]. The other Board member in question was Tim Adams. This is the crucial aspect of the alleged fraud scheme that underlies Counts 8 and 9. But there is, again, not the slightest bit of evidence, nor any way to infer from the evidence, that Governor Siegelman had any knowledge or expectation that this would occur. Despite this complete lack of evidence, the prosecution pursued Counts 8 and 9 against Governor Siegelman; and the jury, despite the lack of evidence against him these counts, followed along.

The prosecution's response to this point, if it has one, will certainly be based solely on the evidence surrounding the alleged connection between the appointments and the contributions; so we will not belabor this point further, and will instead focus the following discussion on the lack of a criminally culpable connection between the appointments and the contributions.

B. Both the "honest services" mail fraud statute, and the "bribery" statute, require proof of an explicit *quid pro quo* in cases involving campaign or issue-advocacy contributions.

The core legal issue is an important one that crosses all partisan boundaries and that affects officials, candidates, and citizens at every level of government. The issue, in a nutshell, is how close a connection there must be, between a campaign contribution (in this case, specifically, a contribution to an issue-advocacy or referendum campaign) and an official act, in order to take the case out

of the realm of politics into the realm of crime. The answer is that there must be an "explicit *quid pro quo*," within the meaning of that phrase as used in *McCormick v. U.S.*, 500 U.S. 257, 111 S.Ct. 1807 (1991).

We are not talking, here, of cases in which an elected official takes money (or things of value) himself, for his personal use. It is understandable that, in the context of personal gifts of "things of value" to public servants, Congress might enact a broad prophylactic ban. Government officials don't *need* to take gifts from their constituents or from those who are affected by government action. And so it might make sense to have a ban on accepting them, and even to impose criminal penalties without requiring proof of a *quid pro quo*. But this is not that sort of case. Here, Governor Siegelman personally received nothing.

We are talking instead about cases in which the alleged crime is premised on First Amendment-protected activity, of campaign or issue-advocacy contributions. The contributions context is different from the personal-benefit context. It is different, first, because *all* politicians (leaving aside perhaps a few billionaires) *must* raise contributions. They have to raise money for their own campaigns. And when crucial issues must be put before the public in a referendum vote, politicians must raise money for those issue-oriented elections as well. Like it or not, contributions of money are the mother's milk of politics in modern campaigns (for election or for issue-oriented referenda). "Campaigning for elected office

necessarily entails raising campaign funds." *Weaver v. Bonner*, 309 F.3d 1312, 1322 (11th Cir. 2002). And the contributions context is different, too, because the giving of contributions is a constitutionally-protected activity under the First Amendment. The constitutional protection is not absolute, to be sure, in the sense that some campaign finance laws are permissible; but it is real, and it is especially powerful in referendum or issue campaigns as contrasted with candidate election campaigns. *See*, *e.g.*, *First. Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407 (1978) (holding unconstitutional a state law banning corporate contributions or expenditures in referendum campaign). In short, unlike personal gifts to politicians, contributions to elections and referenda are actually necessary and even in many ways *good*; they are a major type of political expression, participation and involvement.

So when it comes to criminal prosecutions based on campaign or referendum contributions, it is important that there be clear rules as to what an elected official can lawfully do, and what by contrast is a crime. An official must be able to know, in advance, the rules as to when action benefiting a contributor will be legally acceptable (subject perhaps only to correction at the ballot-box), and when by contrast it will result in a prison term.

The existence of such rules is important not only so that officials can conform their conduct to the law. The existence of clear rules is important, beyond

that, so that we can all be sure that prosecutors are applying the same rules to everyone regardless of political preference. Every President who has ever appointed a contributor as Ambassador to France, every Senator who has ever exercised the Senatorial prerogative of putting forward a nominee for the United States District Court after such person supported the Senator's campaign, every Governor and state Legislator, every Mayor and City Council member throughout the nation, and indeed every constituent of every such person, needs to know where the line is drawn between politics and crime. And the line must not be subject to the whim of prosecutors.

For cases involving contributions rather than personal kickbacks or the like, the line should be drawn between cases where the proof establishes the existence of an explicit *quid pro quo*, and cases where it does not. Proof of an "explicit *quid pro quo*" in this sense requires much more than the mere existence of a contribution and an official action. It requires more, even, than inferences as to what the thoughts, wishes or expectations of the contributor and of the official were. It requires just what the phrase "explicit *quid pro quo*" implies: an explicit, which is to say an expressly communicated, statement or agreement that the contribution and the action were linked.

The caselaw we will discuss below, in support of this argument, has arisen in the context of candidate-election campaign contributions. But of course, issue-

advocacy contributions are just as important to the legitimate political process as are election campaign contributions. *See FEC v. Wis. Right to Life*, ___ U.S. ___, 127 S.Ct. 2652, 2677 (2007) (Scalia, J., concurring) (describing issue-advocacy expenditures as "at the heart of the First Amendment's protection" and "indispensable to decisionmaking in a democracy"); *First. Nat. Bank v. Bellotti, supra*. From what we can tell, this is the first case *ever* in which charges like these have been premised on issue-advocacy campaign contributions.

If anything, it is *more* important for the criminal law to leave breathing-room for issue-advocacy contributions, than it is for candidate-election contributions. Just as the Supreme Court's First Amendment jurisprudence has been somewhat *more* protective of issue-advocacy expenditures and contributions than of candidate-campaign contributions (*see generally FEC v. Wis. Right to Life*, *supra*), so the criminal law ought to be more protective as well. Issue-advocacy contributions do not financially benefit the individual politician in the same way that a candidate-election campaign contribution does. So, the law should permit no federal criminal prosecution based on an issue-advocacy or referendum campaign contribution, unless such a prosecution is brought under a statute that actually speaks clearly and specifically to that particular context. Such a holding would be reasonable, as an application of a "clear statement" rule of statutory interpretation.

But in any event, this Court can and should decide this case on the narrower

basis that we propose: a conviction, for a case arising under the statutes at issue here and involving a referendum campaign contribution, requires proof beyond a reasonable doubt of an "explicit *quid pro quo*" connection between the contribution and the official action.

To recognize the correctness of our argument on this point, it is useful to begin with *McCormick v. U.S.*, 500 U.S. 257, 111 S.Ct. 1807 (1991). There, the Supreme Court read the extortion statute, 18 U.S.C. § 1951, in precisely the way that we are suggesting that the present statutes ought to be read as well. Recognizing that campaign contributions are a constant in the real life of politicians, the Court held that a link between such a contribution and an official act would constitute the crime of extortion only if there was an "explicit *quid pro quo*." *Id.*, 500 U.S. at 271 & n.9, 111 S.Ct. at 1815 & n.9 (formulating the question in that way); 500 U.S. at 273, 111 S.Ct. at 1816 ("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."). The Court held that if the Congress wanted to criminalize conduct short of that, conduct that "in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures," Congress would have to be explicit about it. 500 U.S. at 272-73, 111 S.Ct. at 1816.

The Court was adamant that the line being drawn was between an *explicit*

agreement or *promise* that favorable action would be given in return for the contribution (the illegal side of the line) and an *expectation* of such a result (the side of the line that, under *McCormick*, was not a crime). The Supreme Court declared that the illegal side of the line was as follows:

> Political contributions are of course vulnerable if induced by the use of force, violence, or fear. The receipt of such contributions is also vulnerable under the Act as having been taken under color of official right, but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking.

500 U.S. at 273, 111 S.Ct. at 1816 (emphasis supplied). "This formulation defines the forbidden zone of conduct with sufficient clarity." *Id.*

The Court was thus speaking overtly in terms of *explicit*, *express*, promises and agreements. The criminally-prohibited situations, said the Court, are those in which there is an "explicit promise or undertaking" by the official to act in exchange for the contribution, in which "the official asserts that his official conduct will be controlled by the terms of the promise or undertaking." *Id*., 500 S.Ct. at 273, 111 S.Ct. at 1816. To rise to the level of a crime, there must be a *communication* by the official, amounting to an overt promise or undertaking.

The Court made clear, by contrast, that a contributor's *expectation* that favorable official action would follow from the contribution – and the official's *knowledge* of that expectation – did not place the conduct on the illegal side of the

line. Indeed, the Supreme Court noted that this was one of the central flaws in the jury instructions:

> [T]he jury was told that it could find McCormick guilty of extortion if any of the payments, even though a campaign contribution, was made by the doctors with the expectation that McCormick's official action would be influenced for their benefit and if McCormick knew that the payment was made with that expectation.

500 U.S. at 274, 111 S.Ct. at 1817. A contributor's expectation of a linkage between the contribution and the action, even combined with the official's knowledge of that expectation, does not rise to the level of "explicit" under *McCormick*.

In pointedly including the requirement that the *quid pro quo* be "explicit," the Supreme Court helped not only to ensure that the rules for conduct are clear, but also to increase the chances that they are applied by prosecutors in an even-handed way. Without that requirement of explicitness, there would be too much room for prosecutorial selectiveness in choosing which politicians to target, even if that selectiveness might be subconscious. If a criminal prosecution can be undertaken without proof of an explicit *quid pro quo*, and if instead an implicit connection between contribution and official action is enough to make out a crime, prosecutorial discretion will be markedly expanded. Prosecutors will then, in deciding whom to seek to indict, be in the position of inferring the unspoken mental states of elected officials – inferring which of them took action for "good"

reasons (such as a belief that an appointee will be a valuable member of the board in question) and which of them was motivated by "bad" reasons (contributions). Prosecutorial mindreading will be the order of the day. That is an important reason why the *McCormick* standard makes good sense: it reduces the likelihood of, and the public perception of, selective prosecutions.

The reasoning of *McCormick* is equally applicable to the statutes at issue here (18 U.S.C. § 666, and 18 U.S.C. §§ 1341, 1346). The basis for *McCormick*, as we have shown, was at its root a "clear statement" rule: that in the realm of campaign contributions (a realm that is at the core of the First Amendment), a criminal statute requires an "explicit *quid pro quo*" unless the Congress clearly states that it means to eliminate such a requirement. *McCormick*, 500 U.S. at 272-73, 111 S.Ct. at 1816. (The fact that this was an application of a "clear statement" doctrine is further demonstrated by the Court's citation to *U.S. v. Enmons*, 410 U.S. 396, 411, 93 S. Ct. 1007 (1973); the cited passage of *Enmons* was about "clear statement" rules in the construction of criminal statutes.) *McCormick*'s interpretive principle is dispositive as to the statutes at issue in this case, as well: like the extortion statute interpreted in *McCormick*, the "honest services" and federal bribery statutes do not include any clear statement by Congress drawing the line of forbidden conduct to criminalize situations lacking an explicit *quid pro quo*, in cases involving campaign contributions.

The prosecution might retort that these statutes do "clearly" set a governing legal standard that does not differentiate between cases involving campaign contributions and cases involving personal payments to government officials. But this is not the sort of clear statement that the Supreme Court demanded in *McCormick*. One might as well have said in *McCormick* that the law "clearly" made no distinction between campaign contributions and personal graft. The Supreme Court recognized, however, that there is a vast and legally significant distinction there. What the Congress must intentionally and plainly do, under *McCormick*'s rule of statutory interpretation, is to speak clearly to the context of contributions in particular, if it means to impose a rule other than "explicit *quid pro quo*" in that specific context.

The various courts that have addressed the issue have recognized that the reasoning of *McCormick* applies to campaign-contribution cases brought under the federal bribery and "honest services" statutes. For instance, this was the holding of *U.S. v. Zucchet*, No. 03cr2434 JM (S.D. Cal. Nov. 10, 2005) (attached as Appendix A) (granting judgment of acquittal in part, and new trial in part): "A prerequisite to criminal liability involving campaign contributions under the Hobbs Act and honest services wire fraud is the indispensable requirement of a quid pro quo. See McCormick v. United States, 500 U.S. 257 (1991)." (Slip Op., p. 2). Notably, while the Government has appealed the judgment in *Zucchet*, the Government has

not argued that the District Court was wrong in applying the *McCormick* standard to the "honest services" charges. *See* Brief of United States in *U.S. v. Zucchet* (9th Cir. No. 05-50960). It is striking that the Government is taking a position in this case that it has declined to take in the *Zucchet* appeal. There is no reason why Governor Siegelman should be subjected to prosecution on a legal theory that other federal prosecutors are not even willing to advance in an appellate court.

Equally compelling, on the applicability of *McCormick*'s reasoning not only to the Hobbs Act but to "bribery statutes," is the Seventh Circuit's discussion in *U.S. v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993).

> Allen maintains that whether the charge against a defendant be extortion or bribery, the concerns that led the Supreme Court to adopt the quid pro quo requirement in *McCormick* exist. This argument is not without force. *McCormick* recognized several realities of the American political system. Money fuels the American political machine. Campaigns are expensive, and candidates must constantly solicit funds. People vote for candidates and contribute to the candidates' campaigns because of those candidates' views, performance, and promises. It would be naive to suppose that contributors do not expect some benefit – support for favorable legislation, for example – for their contributions. To hold that a politician committed extortion merely by acting for some constituents' benefit shortly before or after receiving campaign contributions from those constituents "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." 111 S. Ct. at 1816. Only statutory language much more explicit than that in the Hobbs Act would justify a contrary conclusion. Id.
>
> As the law has evolved, extortion "under color of official right" and

> bribery are really different sides of the same coin. … Because of the realities of the American political system, and the fact that the Hobbs Act's language did not justify making commonly accepted political behavior criminal, the Supreme Court in *McCormick* added to this definition of extortion the requirement that the connection between the payment and the exercise of office – the quid pro quo – be explicit. Given the minimal difference between extortion under color of official right and bribery, it would seem that courts should exercise the same restraint in interpreting bribery statutes as the *McCormick* Court did in interpreting the Hobbs Act: absent some fairly explicit language otherwise, accepting a campaign contribution does not equal taking a bribe unless the payment is made in exchange for an explicit promise to perform or not perform an official act. Vague expectations of some future benefit should not be sufficient to make a payment a bribe.

Allen, 10 F.3d at 410-11.[9]

Other caselaw is in accord, not only as to bribery statutes but also as to "honest services" fraud. *See*, *e.g.*, *U.S. v. Malone*, 2006 U.S. Dist. LEXIS 63814, *3-4 (D. Nev. 2006):[10]

> In *United States v. McCormick*, the Supreme Court held that a showing of *quid pro quo* is necessary for a conviction under the Hobbs Act when a public official receives a campaign contribution. … This court has previously found the Supreme Court's reasoning in *McCormick* equally applicable to charges of honest services wire fraud where the "scheme or artifice to defraud" involved the payment of campaign contributions. … Therefore, to the extent the Government alleges that campaign contributions amount to violations of 18 U.S.C. §§ 1343, 1346, and 1951, the Government must show the

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[9] This Court has cited and followed the relevant portion of *Allen*. *U.S. v. Davis*, 30 F.3d 108, 109 (11th Cir. 1994).

[10] Although the quoted passage in *Malone* did not use the word "explicit" along with "*quid pro quo*," the Court was expressly following the *McCormick* standard; as seen above the requirement that the *quid pro quo* be "explicit" is the core of the *McCormick* rule.

requisite *quid pro quo*.

Luzerne County Retirement Bd. v. Makowski, 2007 U.S. Dist. LEXIS 87246, *155-59 (M.D. Pa. 2007), arising in the context of a RICO claim, also agreed that the *McCormick* standard applies to "honest services" and to bribery; the Court cited *Malone* as well as *United States v. Warner*, 2005 WL 2367769, at *5 (N.D. Ill. Sept. 23, 2005), in support.

Notably, in its submissions on this issue, the prosecution has never cited any opinion that has *disagreed* with the application of the *McCormick* standard to these statutes, in a case involving campaign or issue-advocacy contributions. Instead it has relied on cases that do *not* involve campaign or issue-advocacy contributions. In such cases, it may be true that there is no explicit *quid pro quo* requirement under "honest services" or § 666. But this, even if correct, is beside the point. The Supreme Court's discussion in *McCormick* was specifically about cases that involve campaign contributions, rather than personal kickbacks or the like. Such cases raise concerns that are not present in cases involving personal kickbacks and other personal payments: concerns about the First Amendment, concerns about the realities of fundraising as a practical necessity, and concerns about criminalizing too much conduct without a clear Congressional mandate. Those concerns drove the decision in *McCormick*, and should drive a parallel decision in this case. Cases not involving campaign or issue-advocacy contributions are different. *See Malone*,

2006 U.S. Dist. LEXIS 63814, *7 ("The issue of *quid pro quo* only arises when the alleged scheme or artifice to defraud involves campaign contributions.").

C. The First and Fifth Amendments, and the rule of lenity, require the application of the "explicit *quid pro quo*" standard here.

If there is any doubt about the applicability of the *McCormick* "explicit *quid pro quo*" standard to the statutes at issue here, such doubt must be resolved in favor of Governor Siegelman. The reason is two-fold: the related doctrines of fair notice and the rule of lenity, and the First Amendment.

Criminal statutes must give fair notice of what is covered; and where there is ambiguity, the rule of lenity requires a narrow construction of the statute. This Court recognized this in *U.S. v. Brown*, 79 F.3d 1550, 1562 (11th Cir. 1996), with specific reference to the federal mail fraud statute.

> "The law is a causeway upon which, so long as he keeps to it, a citizen may walk safely." Robert Bolt, "A Man For All Seasons" Act II, 89 (Vintage 1960) (speech of Sir Thomas More). To be free of tyranny in a free country, the causeway's edges must be clearly marked. The exercise of federal government power to criminalize conduct and thereby to coerce and to deprive persons, by government action, of their liberty, reputation and property must be watched carefully in a country that values the liberties of its private citizens. Never can we allow federal prosecutors to make up the law as they go along.

The prosecutors in this case should not be allowed to take advantage of the vagueness of the "honest services" statute.. That vagueness is not a virtue, but a danger to liberty that requires a narrow interpretation of the statute: the same

interpretation that the Supreme Court gave in *McCormick*. *See U.S. v. Sorich*, __ F.3d ___, 2008 U.S. App. LEXIS 7996 *10 (7th Cir. 2008) ("[G]iven the amorphous and open-ended nature of § 1346, … courts have felt the need to find limiting principles …")

Such a narrow interpretation is particularly important here, again, since the First Amendment is implicated in both sides of the alleged connection between the contributions and the appointment. By accepting appointment to the C.O.N. Board, Scrushy was seeking to take part in the formulation and execution of public policy, through public service. By arranging for contributions to the lottery campaign, Scrushy was engaging in conduct squarely within the core of the First Amendment. Governor Siegelman, too, was engaged in conduct protected by the First Amendment, by raising funds to support the Education Lottery issue-advocacy campaign. This case, then, is a far cry from an "honest services" case where a person or entity seeks only private benefit, by bestowing a financial benefit directly on a public official. In such a case, neither side of the coin so directly implicates the First Amendment, as in this case. Thus, again, this case is different from other "honest services" cases in which no "explicit *quid pro quo*" is required.

The "honest services" law would violate the First and Fifth Amendments, as applied to cases like this one involving issue-advocacy campaign contributions, if

the law were not saved by the narrowing interpretation that we have discussed. The statute, if not so limited, is too vague to pass constitutional muster in cases of this sort. While we recognize that the courts have upheld the statute against general vagueness challenges, the issue is different here because conduct protected by the First Amendment is implicated.

Unless this Court applies the limiting principle of *McCormick*, the "honest services" statute offers no guidance as to what connection the prosecution must prove between contribution and action in order to make out a crime. The statute would then fail the vagueness test as the Supreme Court explained it just days ago. A statute is unconstitutional if it is contains an "indeterminacy of precisely what" the "incriminating fact" is. *U.S. v. Williams*, ___ U.S. ___, ___ S.Ct. ___, 2008 U.S. LEXIS 4314 *35 (2008). A statute is unconstitutional if it defines culpability in terms of "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *Id.*, *36. The Court gave examples, *id.* of unconstitutional laws against being "annoying" or "indecent."

The term "honest services" falls into that same category of vague laws that the Supreme Court addressed in *Williams*. The term has no statutory definition. It has no narrowing context. Among the questions to which the statute gives no clear answer is the one at the core of this case. Does it prohibit an official from taking action "because of" or "as a result of" a campaign contribution, such that in other

words the "incriminating fact" (*see Williams*, *supra*) is only what was in the mind of the official? Or instead is the necessary "incriminating fact" an agreement, even an implicit one, between the official and the contributor? Or must the "incriminating fact," as we have argued, be an explicit *quid pro quo*? Without an identifiable answer on this point in the specific realm of prosecutions based on official actions that are allegedly related to campaign or issue-advocacy contributions, the statute is unconstitutionally vague under the *Williams* standard.

In addition to the constitutional vagueness concern that we have just described, the First Amendment also substantively requires the adoption of *McCormick*'s "explicit *quid pro quo*" standard, if the statutes at issue here are to be read to cover cases involving issue-advocacy contributions at all. As we have shown, both the raising and the giving of contributions are at the very core of what the First Amendment protects, especially in issue-advocacy campaigns. If prosecution is allowed on a standard less demanding than "explicit *quid pro quo*," there will be an intolerable impact on that constitutionally protected activity. No elected official will be comfortable asking for support for his or her own campaign or even for his or her policy initiatives, if every action he or she ever takes thereafter might be perceived as criminal in the eye of some prosecutor. And a requirement that prosecutors prove only a certain intent on the part of the official, or that they prove only an implicit linkage between contribution and action, would

be no protection at all. Unless the governing standard requires the linkage to be explicit, the chilling effect on constitutionally protected activity remains just as great in practical terms as if there were no settled standard at all. "'First Amendment freedoms need breathing space to survive.' *NAACP v. Button*, 371 U.S. 415, 433, 83 S. Ct. 328 (1963). An intent test provides none." *Wisconsin Right to Life*, 127 S.Ct. at 2666 (plurality).

For these reasons, in addition to the arguments set forth in subsection (B) above, the *McCormick* standard applies to the statutes at issue here.

D. The jury instructions did not convey the necessity of proof of an explicit *quid pro quo*.

Because the *McCormick* "explicit *quid pro quo*" standard applies to the charges in this case, this Court must reverse these convictions. The first reason is that the District Court's jury instructions did not demand proof of an explicit *quid pro quo* as a prerequisite for conviction.

This Court has binding precedent about the jury instructions that are required, in a case governed by the *McCormick* "explicit *quid pro quo*" standard. The case is *U.S. v. Davis*, 30 F.3d 108 (11th Cir. 1994), an opinion on rehearing after 967 F.2d 516 (11th Cir. 1992). The Court held that under *McCormick* and its progeny, "an explicit promise by a public official to act or not act is an essential element of Hobbs Act extortion, and the defendant is entitled to a reasonably clear jury instruction to that effect." *Davis*, 30 F.3d 108. This Court reversed the

conviction, saying

> Because the district court failed to charge Davis's jury as to the necessity of finding an explicit promise before the jury properly could convict – and indeed informed the jury that 'a specific quid pro quo is not always necessary for a public official to be guilty of extortion' – appellant's conviction is due to be REVERSED and the case REMANDED to the district court for further proceedings consistent with this opinion.

Id.

Because the *McCormick* standard applies to this case, Governor Siegelman was entitled to a "reasonably clear jury instruction" informing the jury that "an explicit promise by a public official to act or not act is an essential element" of the crimes charged here. *Davis*, 30 F.3d 108. But the District Court did not give such an instruction.

On the "honest services" counts (and therefore the conspiracy count as well, because the alleged conspiracy was to commit "honest services" fraud), the District Court's jury instructions plainly did not state that proof of an explicit *quid pro quo* was required for conviction. Governor Siegelman had requested such an instruction [R3-275 pp. 10, 41, 50, 52] but the District Court did not give it. Instead the District Court advised jurors that they could convict Governor Siegelman upon finding "that [he] intended to alter [his] official actions *as a result of* the receipt of *campaign contributions* or other benefits." [R66-839 pp. 37-38 (Tr. 7293-94)]

But a finding that an official has altered his acts "as a result of" campaign contributions is a far cry from finding that there was an "explicit *quid pro quo*" in the *McCormick* sense. The "as a result of" instruction, in fact, is closer to the law governing *gratuity* cases, than it is to the "explicit *quid pro quo*" standard. *See U.S. v. Sun-Diamond Growers*, 526 U.S. 398, 404-05, 119 S.Ct. 1402, 1406 (1999) (involving gratuity statute, prohibiting the giving of things of value "because of" official acts). The instruction given by the District Court allowed conviction based only on attribution of a state of mind to Governor Siegelman, without anything approaching the express "promise," "assert[ion]" or "undertaking" required by *McCormick*. 500 S.Ct. at 273, 111 S.Ct. at 1816. The District Court's instructions did not require even an *agreement* or *promise*, much less an *explicit* agreement or promise as required under the *McCormick* standard. So, the convictions on the honest services and conspiracy counts cannot stand.[11]

The same is true as to the § 666 count. As to this count also, Governor

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[11] Even if this Court does not apply the *McCormick* "explicit *quid pro quo*" standard to honest services cases, still the law must at least require proof of an actual *quid pro quo* – an agreement or promise – for honest services cases involving contributions. Even on that standard, the District Court's instructions here were erroneous as explained above. Without a requirement of proof even of an *implicit* promise or agreement to act in exchange for a contribution, every public official will be completely at the mercy of prosecutors every time such official takes an action that a contributor sought. It will be impossible to raise campaign funds, and impossible to govern, if every official action can be later deemed a crime based on nothing more than the "as a result of" standard that the District Court applied here.

Siegelman requested that the jury be instructed on the requirement of proof of an explicit *quid pro quo*. [R3-275 pp. 10, 37]. But the District Court did not give such an instruction. Instead it told the jury, in pertinent part, "A Defendant does not commit a crime by giving something of value to a government official unless the Defendant and official agree that the official will take specific action in exchange for the thing of value." [R66-839 pp. 47-48 (Tr. 7303-04)]. The flaw here – much like the flaw that this Court identified in *Davis* – is that the trial court did not tell the jury that the *quid pro quo* agreement had to be *explicit*.[12] Instead the instruction allowed the jury to believe that an implied-in-fact "agreement," in the sense of the existence of parallel though unspoken expectations, was enough to make out the crime. But in cases where the *McCormick* standard applies, as we have shown, unspoken and inferred mutual expectations would not be enough. That was precisely why the Supreme Court repeatedly used the word "explicit" and "express" in setting out the governing standard.

The jury instructions that led to the reversal on rehearing in *Davis* are quoted in the initial *Davis* opinion (the one in which the Court initially affirmed, before

[12] Additionally, the quoted instruction did not even actually require proof of an agreement, even an implicit one, as a prerequisite to finding the public official guilty of bribery. Instead the instruction given, by its terms, spoke only to what is necessary in order to impose criminal liability on the *giver*. Taken literally, it would have allowed a conviction of Governor Siegelman even without proof of any sort of agreement, while requiring proof of an agreement (though only an implicit one) in order to convict Scrushy on the parallel charge against him.

realizing that reversal was required). Those instructions told the jury:

> if a public official willfully misuses his or her office by taking or offering to take or agreeing to take or withhold official action for the wrongful purpose of causing or inducing a person to part with money, even money that is denominated and reported as a campaign contribution or denominated as a personal gift or reimbursement for expenses, such action by the public official would constitute extortion or attempted extortion …

Davis I, 967 F.2d at 521-22. This, as this Court recognized in *Davis II*, was not enough to convey the necessity of an "explicit *quid pro quo*" or (in the words of *Davis II*), an "explicit promise" by the official.

So it is here, even though the instructions were not identical. Certainly the instructions on the "honest services" charges here were as flawed as the erroneous charges in *Davis*: they required no agreement or promise whatsoever. But here the § 666 charges were erroneous as well, because they completely failed to convey the requirement that the "*quid pro quo*," the "promise," must be "explicit." "Explicit" means "stated clearly and in detail, leaving no room for confusion or doubt." *See* New Oxford American Dictionary (2d ed.). Similarly, Barron's Law Dictionary (1996 ed.) refers to "explicit" and "express" interchangeably:

> Express: To be known explicitly and in declared terms. To set forth an actual agreement in words, written or spoken, which unambiguously signifies intent. As distinguished from 'implied' the term is not left to implication or inference from conduct or circumstances.

The jury instruction here allowed conviction on an *unstated*, *implied, inferred-from-the-circumstances* agreement.

The law recognizes implied agreements in some contexts, it is true. The law often discusses two types of agreements: explicit (or express) and implicit (or tacit). Sometimes, an implicit or tacit agreement has the same force as an explicit or express one. *See*, *e.g.*, *Clanton v. Inter.net Global, Inc.*, 435 F.3d 1319, 1323 (11th Cir. 2006) (asset sale can give rise to successor liability where there is either an express or an implied agreement to assume debts and obligations). But in some areas of law, the rule is different. *McCormick* drew the line in this particular area – the area of alleged corruption involving campaign contributions – by requiring prosecutors to prove that there was an "explicit" agreement or promise. That was the error in the § 666 instructions here: the instructions failed to tell the jury of the distinction between explicit and implicit, and allowed conviction based on a purported agreement that was not "explicit."

For these reasons, the Court must reverse the convictions on the "honest services" charges, the conspiracy charge,[13] and the bribery charge.

E. The evidence was insufficient to show an explicit *quid pro quo*.

The same principles show that it was error to deny Governor Siegelman's motions for judgment of acquittal: the evidence was insufficient to show an explicit *quid pro quo* connection between the contribution and the appointment.

[13] As there was not an honest services crime, there was no conspiracy to commit such a crime either. In some types of cases there can be a conspiracy without a *completed* crime; but it is still necessary that the thing conspired about must be a crime, in order for the conspiracy to be a crime.

So, while the error in jury instructions would require a new trial *if* the evidence were sufficient, the evidentiary insufficiency requires that a judgment be rendered in Governor Siegelman's favor. The prosecution was required to meet the *McCormick* standard, under which there is a crime "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. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking." *Id.*, 500 U.S. at 273, 111 S.Ct. at 1816. (emphasis added).

The crucial testimony of star prosecution witness Bailey was as follows: that he asked Governor Siegelman what Scrushy was "*going to want* for that [campaign contribution]? And his response was, the CON Board...." Bailey then testified he commented: "I *wouldn't think* that *would be* a problem, would it?" and that Governor Siegelman responded: "I *wouldn't think* so." [R36-673 p. 268 (Tr. 507) (emphasis supplied)].

That testimony is as close as the record evidence ever comes, to proving the nature of the alleged connection between the Education Lottery contributions and the C.O.N. Board appointments. But it is wholly insufficient to prove the existence of an explicit *quid pro quo*. Taken for all that it is worth, Bailey's testimony shows at most that Governor Siegelman knew, or at least thought, that Scrushy <u>*wanted*</u> a C.O.N. Board appointment in recognition of the contribution – and that

Governor Siegelman didn't think that making such an appointment would present a problem. Governor Siegelman knew or thought that Scrushy wanted it, and he ultimately appointed him. But what is missing is precisely what is required by the very concept of "explicit *quid pro quo*": an express discussion between Governor Siegelman and Scrushy to the effect of "I will make this contribution, and in exchange for this contribution you will appoint me. Are we agreed on that?" "Yes we are." That is the sort of conversation that would constitute an explicit *quid pro quo* – not merely one party's thinking something like "I know or I think I know what my contributor wants, and I plan to give it to him." The difference between these scenarios – an express agreement to alter official conduct on the one hand, and merely acting consistent with a contributor's wishes on the other hand – is precisely what drove the Supreme Court's decision in *McCormick*; and Bailey's testimony is on the lawful side of the line the Supreme Court drew in *McCormick*.

Nor can one "infer" from the alleged conversation recounted by Bailey that a true explicit promise or agreement had happened behind closed doors. Any such conclusion would not actually be an inference from the evidence. It would be speculation or intuition at best – speculation and intuition that, we believe, is actually *contrary* to the evidence, but which all reasonable people must at least recognize does not truly *follow from* the evidence. The evidence from Bailey shows that there was at best a tentative expectation about what would happen in

the future. What was Scrushy "going to want" (future tense)? "Would" it be a problem for him to obtain it (again future tense)? I "wouldn't think so" – again future tense and tentative. That is what Bailey's testimony shows: future possibility at best. It does not show that there was a promise made to Scrushy. The prosecution had the burden to show an explicit promise; the proof failed in that respect.

Nor is this gap filled by the evidence other than Bailey's testimony about this conversation between himself and the Governor. Bailey's recounting of Governor Siegelman's alleged comment to Eric Hanson, regarding his desire to see Scrushy contribute $500,000 to the Education Lottery campaign, shows Governor Siegelman trying to raise money for the Education Lottery. It does not show an explicit *quid pro quo* as to C.O.N. Board contributions; Governor Siegelman did not mention any such thing, and made no promise of any such thing. [R36-673 p. 261 (Tr. 500)].

Perhaps Governor Siegelman knew that Scrushy wanted an appointment, and perhaps Scrushy believed that it would be forthcoming; but that is, as we have shown, not what the *McCormick* standard demands. Again the missing piece is the explicit *promise* or *agreement*. Even with all this, we are still squarely in the realm of what *McCormick* declares to be not prohibited: politicians must raise money, people who contribute that money have desires, and sometimes those desires are

met. Sometimes the contributors then believe that the contribution was a cause of the fulfillment of their desires. But still, the missing link is the explicit *quid pro quo* – the explicit *promise* or *agreement* connecting the contribution and the action.

In the discussion thus far, we have addressed the case under the normal standard that the Court takes the prosecution's evidence as true. However, we also contend that this Court should apply a stricter standard in this case, because of the First Amendment implications that we have discussed. In various types of cases involving the First Amendment, an appellate court does not defer to a jury's or lower court's factual findings, but instead reviews the record independently and reaches its own factual conclusions. *See*, *e.g.*, *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 567-68, 115 S.Ct. 2338, 2344 (1995).[14] That doctrine should be applied here as well. This makes it all the more clear that the evidence was not enough to prove a crime, and so this Court should render a judgment of acquittal.

[14] Even if this independent review may allow deference to a lower-court factfinder as to *witness credibility*, still an independent review by this Court would require this Court to decide for itself what inferences it will, and will not, draw from credited testimony. In this case, as we have shown, the evidence does not even *allow* the inferences that the Government needs in order to support the conviction. But even if the evidence would *allow* those inferences (for the sake of argument), this Court should conclude on independent review that they are not the inferences that *should* be drawn.

2. The statute of limitations barred the bribery charge, as a matter of law; and Governor Siegelman raised this issue in a proper manner.

A. The statute of limitations had run; the only question is whether this issue was preserved.

The bribery count (Count 3, 18 U.S.C. § 666) was barred by the statute of limitations. In opposing Governor Siegelman's motion for judgment of acquittal on this point, the prosecutors did not dispute the merits of the argument. Instead, they argued only that the argument was not timely raised. [R6-459, pp. 18-20]. So, we will not unnecessarily belabor the merits, because the point is simple and unrefuted.

The crux of the limitations issue, on the merits, is that the limitations period in a § 666 case begins to run when each element of the offense has occurred. *See*, *e.g.*, *U.S. v. Yashar*, 166 F.3d 873 (7th Cir. 1999). The running of the limitations period does not wait until, and begin to run only when, the entire "course of conduct" relevant to the indictment's count is finished. *Id.* The prosecution must therefore bring charges "within five years from the date the elements of the crime charged are first met." *Id.* at 879. Under § 666, this means the date by which the prohibited conduct has first involved $5,000 or more (and the date by which the entity involved has received the requisite amount of federal funds). *Id.* at 880.

In this case, *if* there were a crime, all elements of it were complete more than five years before the initial indictment. *See* 18 U.S.C. § 3282 (five-year limitations

period). The date of the initial indictment was May 17, 2005. [R1-3]. Five years before that date was May 17, 2000. But the § 666 crime – if there were one, which there was not – was complete well before that: Scrushy's appointment to the CON Board took place on July 26, 1999 [R36-673 p. 278 (Tr. 517)], and according to the prosecution's evidence the first check was received during that same time frame. All of the elements of the putative crime – the appointment, the receipt of a check over $5,000, the entity's receipt of federal funds, and the alleged nexus between the check and the appointment – had all taken place, if at all, by the summer of 1999. (Indeed, the crime would have been complete even before the appointment, since it is the payment rather than the consummation of official action that is the crime under § 666. *Cf. Evans v. U.S.*, 504 U.S. 255, 268, 112 S.Ct. 1881, 1889 (1992) (holding, under extortion statute, that "the offense is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts; fulfillment of the *quid pro quo* is not an element of the offense.")) The indictment was brought nearly six years after that – not within five years, as the law requires.

B. Governor Siegelman raised the issue in a proper way.

The prosecutors' contention, that the limitations issue could not be raised for the first time in a post-trial Rule 29, goes wrong in several ways.

First, the prosecution's argument ignores the Rules of Criminal Procedure.

The Rules of Criminal Procedure are different from the Rules of Civil Procedure. Under the Civil Rules, a statute of limitations defense has to be raised in an Answer. Fed. R. Civ. P. 8(c)(1). The Criminal Rules, by contrast, contain no such requirement. Moreover, under the Civil Rules, a motion for judgment as a matter of law must be made at the close of the opposing party's case in chief, noting the specific grounds; and it cannot then be renewed on broader grounds later. Fed. R. Civ. P. 50 and 1991 Advisory Committee notes. The Criminal Rules, again, are starkly and intentionally different. Criminal Rule 29(c)(3) (in the subsection titled "No prior motion required") states: "A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge." Thus, under the Rules of Criminal Procedure, Governor Siegelman took an appropriate method of raising the issue.

Second, the prosecution (judging by its submissions below and in briefing to this Court on the issue of release pending appeal) relies on loose phraseology in cases involving very different procedural questions. But this Court has repeatedly recognized that a case's holding is defined by the circumstances that the case presents. *See*, *e.g.*, *Williams v. Bd. of Regents*, 477 F.3d 1282, 1298-99 (11th Cir. 2007). So, a case involving the question whether a limitations defense can be waived in a plea agreement, or whether such a defense can be raised for the first time on appeal, cannot make a holding that disposes of the very different question

in this case. The prosecution will cite no case from this Court – and, we expect, no reasoned case from *any* Court, decided after the adoption of the Rules of Criminal Procedure – holding that a post-trial Rule 29 motion raising the limitations issue is untimely. And in fact, in *Phillips v. U.S.*, 843 F.2d 438, 441-43 (11th Cir. 1988), this Court ordered a judgment of acquittal based on the statute of limitations, where the motion was filed after trial; this Court's opinion gives no hint that there had been any earlier invocation of the defense. This case is procedurally the same as *Phillips*.

Third, the prosecution wrongly blames Governor Siegelman for delay in raising the issue, when the prosecution itself doggedly remained studiously vague and misleading on the relevant facts until trial. The prosecutors artfully drafted the indictment to mask its statute of limitations defect by setting the time frame of the alleged offense as "[f]rom on or about July 19, 1999, and continuing through on or about May 23, 2000…" [R1-61, p. 29 ¶ 49]. The original indictment was returned on May 17, 2005. [R1-3]. On its face, the Indictment alleged that a crime occurred within the five-year limitations period. And when Governor Siegelman moved for a Bill of Particulars [R2-142, p. 17], pointedly asking among other things "when, specifically, did the action alleged take place?," the prosecution opposed the motion, arguing that a Bill of Particulars would reveal the prosecutors' "trial strategies." [R2-162, *passim*]. The prosecution even specifically objected to

the request that it disclose the dates on which allegedly criminal actions took place. [*Id.*, pp. 4-5]. The District Court denied Governor Siegelman's motion. [R2-235]. In light of these facts, even if a motion to dismiss were required in *some* cases as the proper way to raise the limitations defense, this case is different by virtue of the prosecution's own chosen litigation tactics.[15]

3. Even taking the prosecution's evidence as true, Governor Siegelman did not obstruct justice.

The prosecution's evidence, even taken as true, does not prove that Governor Siegelman obstructed justice. Therefore the District Court erred in denying Governor Siegelman's motions for judgment of acquittal on Count 17, the obstruction-of-justice charge under 18 U.S.C. § 1512(b)(3).

Section 1512(b)(3) provides, in pertinent part:

> Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to –
> …
> (3) hinder, delay, or prevent the communication to a law enforcement

[15] This Court stated in *U.S. v. Ramirez*, 324 F.3d 1225, 1228 (11th Cir. 2003), 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." This case falls outside that rule, based on the language of the indictment here and the prosecutors' resistance to giving factual clarification. In any event, *Ramirez* was wrongly decided, as the Advisory Committee Notes to Rule 12 say pointedly that a limitations defense is *not* the sort of thing that must be raised by motion to dismiss, and the Rule itself does not unambiguously say the opposite. Therefore the Court should certainly not extend *Ramirez* to cover this case.

> officer or judge of the United States of information relating to the commission or possible commission of a Federal offense …

This case involves no allegation of "intimidation" or "threat[s]". What is at issue here are the phrases "corruptly persuades" and "misleading conduct." [Indictment, R1-61 ¶ 68, p. 40]. The charge is that Governor Siegelman violated those aspects of the statute, by "caus[ing]" Bailey "to provide him with a check in the amount of $2,973.35 with the notation 'balance due on m/c.'" [*Id.*]

A. There is simply no evidence that Governor Siegelman "persuade[d]" Bailey to write the check.

The "corruptly persuades" prong of the statute was added by Congress in 1988. *U.S. v. Khatami*, 280 F.3d 907, 912 (9th Cir. 2001). The word "persuades" has a common and well-understood meaning: to "persuade" someone is to convince, coax, cajole, or influence him. As stated in *Khatami*, 280 F.3d at 911.

> The verb "persuade" has many definitions, but within the context of § 1512(b)(3) can be understood to mean "to coax," Oxford English Dictionary (2d ed. 1989); "to plead with," Merriam Webster's Collegiate Dictionary at 868; or "to induce one by argument, entreaty, or expostulation into a determination, decision, conclusion, belief, or the like; to win over by an appeal to one's reason and feelings, as into doing or believing something." Black's Law Dictionary at 1144-45.

So, the Court continued, "Synthesizing these various definitions of 'corrupt' and 'persuade,' we note the statute strongly suggests that one who attempts to 'corruptly persuade' another is, given the pejorative plain meaning of the root adjective "corrupt," motivated by an inappropriate or improper purpose to convince

another to engage in a course of behavior …" *Id.* (emphasis supplied).

In this case, the prosecution introduced no proof that Governor Siegelman "persuade[d]" Bailey to write the check in question, or to make the notation on it, or indeed to do anything about the check. As recounted in the Statement of Facts, Bailey's own testimony shows that Bailey himself made the plan (if there was one) at his own initiative. Bailey says that Governor Siegelman agreed to it; but even Bailey, the very person who was allegedly "persuade[d]," never remotely suggests that Governor Siegelman persuaded him about anything in connection with the check in question, or even in connection with any related conduct. Because Bailey – the star prosecution witness, testifying under a plea agreement with every incentive to give every bit of damning testimony he could – could not say he was persuaded, there was obviously no persuasion by Governor Siegelman here. If anyone could be said to have been the "persuade[r]," on the prosecution's own evidence, it was Bailey.

B. Governor Siegelman did not engage in any "misleading conduct."

So, let us turn to the "misleading conduct" prong. Again even taking the prosecution's evidence as true, Governor Siegelman did not violate the statute. We submit that there was not proof that he engaged in conduct that was intended to mislead anyone. But the dispositive legal question is slightly more narrow, because the "misleading conduct" aspect of the statute has a precise scope: it

prohibits misleading potential witnesses, not misleading investigators themselves.

The "misleading conduct" prohibition was part of the statute as originally enacted, in 1982. The words that the Congress used were precise and particular. They do *not* cover a scheme to mislead federal investigators directly. Instead, they cover only the misleading of "another person" *in order to* (i.e., "with intent to") "hinder, delay or prevent the communication" of information to federal law enforcement.

The leading case on point is *U.S. v. King*, 762 F.2d 232 (2nd Cir. 1985). There, the Court recognized that "By its terms, § 1512 does not purport to reach all forms of tampering with a witness, but only tampering by specified means, i.e., by use or attempts of 'intimidation' or 'physical force' or 'threat[]' or by engaging in 'misleading conduct toward another person.'" *Id.* at 237. The Court first noted that the indictment's charge, that King had misled his confederate Orgovan, was factually unsupportable; Orgovan (like Bailey in this case) knew what was going on, and King was not trying to mislead him. *Id.* The Court then turned to the Government's alternative theory: "that, notwithstanding the actual language of § 1512, Congress meant for § 1512 to reach conduct that was not misleading to the person at whom it was directed but was intended to mislead the government." *Id.* The Court rejected that theory, as a matter of law, holding that direct misleading of the Government was not covered; the statute requires an attempt to mislead an

intermediary, rather than federal investigators themselves. *Id.* at 237-38. Other cases are in accord. *See*, *e.g.*, *U.S. v. Davis*, 183 F.3d 231, 248 n.4 (3rd Cir. 1999) ("Several courts have held that asking a witness to tell what he knows to be a lie is not misleading conduct because there is nothing misleading about a request to lie," *citing King* and other authority).[16]

King and other authorities are correct on this point. The Congress, when enacting this law, was quite clear as to the fact that its scope was limited; this was intentional on the part of Congress. As originally drafted, § 1512(b)(3) might well have covered a disguise or cover-up that misled investigators directly, rather than misleading an intermediary in order to affect his communications to law enforcement. That is, the original version contained a catch-all provision reaching anyone who "corruptly … intentionally influences, obstructs, or impedes or attempts to influence, obstruct, or impede the … enforcement and prosecution of federal law." S. 2420, 97th Cong., 2d Sess., sec. 201(a), § 1512(a)(3), 128 Cong. Rec. S11, 439 (daily ed. Sept. 14, 1982). The catch-all provision aimed to "protect[] against the rare type of conduct that is the product of the inventive

[16] As noted above, Congress added the "corruptly persuades" prong of the statute after *King*. But this does not mean that, by adding that different prong, the Congress meant to broaden the meaning of the "misleading conduct" prong. If Congress had meant to do so, it would have done so directly. It did not. Instead it chose to expand the statute with an entirely different provision, which (as we have shown above) is also inapplicable here. This Congressional action in response to *King*, we submit, amounts to a legislative acquiescence in and ratification of *King*'s holding with regard to the then-existing prongs of the statute.

criminal mind and which also thwarts justice." S. Rep. No. 532, 97th Cong., 2d Sess. At 18, reprinted in 1982 U.S. Code Cong. & Ad. News 2515, 2524. But Congress did not pass the original version of § 1512(b)(3). Instead, it enacted a law that omitted the catch-all provision.[17]

Therefore, as recognized in *King*, the "misleading conduct" prong of the statute does not cover the conduct of misleading federal investigators directly; instead, there must be an intermediary who is the target of misleading conduct, with the misleading conduct having been undertaken in order to affect that intermediary's communications to federal law enforcement.

This Court's cases are not to the contrary. The cases upon which the prosecution and the District Court have incorrectly relied are *U.S. v. Ronda*, 455 F.3d 1273 (11th Cir. 2006), and *U.S. v. Veal*, 153 F.3d 1233, 1246-47 (11th Cir. 1998). In both *Ronda* and *Veal*, there was evidence of misled intermediaries, exactly the sort of thing that cases such as *King* hold to be required under the "misleading" prong of this statute. In *Ronda* and *Veal*, the misled intermediaries were state investigators, who were potential witnesses in possible federal

[17] Senator Heinz explained the omission: "Subsection (3) of 1512(a) [the catchall provision] of the Senate passed bill, general obstruction of justice residual clause of the intimidation section, was taken out of the bill as beyond the legitimate scope of this witness protection measure. It also is probably duplicative of abstrusion [sic] of justice statutes already in the books. 128 Cong. Rec. S13063 (*daily ed.* October 1, 1982), *quoted in U.S. v. Lester*, 749 F.2d 1288, 1295 (9th Cir. 1984).

investigations and prosecutions of federal offenses. *Ronda*, 455 F.3d at 1288, 1290; *Veal*, 153 F.3d at 1247.

This Court did not hold in *Ronda* that direct misleading of federal investigators, without a misled intermediary, is enough to violate the statute. In prior briefing in this case, the prosecution has wrongly latched onto one partial sentence in *Ronda*, in which this Court said, "The fabrication of evidence to mislead federal investigators violates § 1512(b)(3) …" *Ronda*, 455 F.3d at 1290. But that did not amount to a holding, or even to *dicta*, directed at the question presented here. Instead, as shown by the context and the remainder of the sentence, the Court at that point was addressing an entirely different issue: whether there could be a federal obstruction crime where it turned out that there was not actually an underlying federal crime. The answer was in the affirmative, and that explains the meaning of this Court's sentence as a whole: "The fabrication of evidence to mislead federal investigators violates § 1512(b)(3) whether or not the potential federal investigation would have uncovered sufficient evidence to prove that a federal crime was actually committed." *Id.* There is no suggestion that any party argued in *Ronda* that direct misleading of federal investigators is enough to come within the statute. That was not the question presented in *Ronda*, since there *were* misled intermediaries (state investigators).

The same is true of *Veal*: there were misled intermediaries, i.e., state investigators. The relevant question was whether those state investigators could count, as misled intermediaries; and this Court held that they could. The case did not present the question whether direct misleading of federal investigators, without use of a misled intermediary, was covered by the statute; but it is noteworthy that the Court cited with approval the Second Circuit's decision in *King*, supra, in which the statute's "misleading" prong had been interpreted not to cover such a scenario. *Veal*, 153 F.3d at 1247. So, there is no reason to believe that this Court has created a Circuit split on this issue of law.

With this understanding of the meaning of the "misleading conduct" prong of the statute, it is readily apparent that Governor Siegelman committed no such crime. Governor Siegelman did not engage in misleading conduct towards Bailey; according to the prosecution's own evidence, Bailey knew exactly what was going on. This is why the prosecutors attempted to broaden the statute to cover an alleged effort to mislead federal investigators; but as we have shown, that effort is contrary to law.[18]

Attempting to salvage the conviction, the prosecutors have argued that Governor Siegelman (and Bailey) engaged in misleading conduct *towards Bailey's*

[18] We are not suggesting that there was proof that Governor Siegelman intended to mislead federal investigators. It is not necessary to argue further about that factual question, because the statute would not cover such conduct even if there were any proof of it.

lawyer. This theory would take the statute beyond anything reflected in any authority that the prosecution has cited, and beyond anything we have found. And it would lack support in the evidence. Bailey, the star witness, did not even testify that his *own* intent was to keep his lawyer from giving evidence to the Government; there is certainly no evidentiary basis for imputing that far-fetched intent to Governor Siegelman.

Recall that the statute, in pertinent part, prohibits "misleading conduct toward another person, with intent to … hinder, delay, or prevent the communication to a law enforcement officer … of the United States of information relating to the commission or possible commission of a Federal offense."[19] The prosecution's claim, in regard to Bailey's lawyer, therefore must be that it was Governor Siegelman's intent to "hinder, delay or prevent" communications by Bailey's lawyer to federal investigators. But how could that possibly be? The prosecution offers nothing, factually, to support the counterintuitive suggestion that Governor Siegelman had such intent. Did Governor Siegelman have reason to believe that Bailey's lawyer would tell the Government about crimes that Bailey had allegedly participated in – and that it was only by showing the lawyer this

[19] The *mens rea* element of "intent" is further bolstered by the statute's requirement that the Government must prove that the defendant "knowingly" engaged in the prohibited conduct with the prohibited intent. *See* 18 U.S.C. § 1512(b)(3) ("Whoever knowingly … engages in misleading conduct toward another person, with intent to …")

check that the lawyer would be dissuaded from doing so? To say it is to show how absurd it is. And there was no evidence of it. There was no evidence that Governor Siegelman had the slightest reason to believe that Bailey's attorney would be interviewed by Government investigators, or that he would be a grand jury witness. There is no evidence that it was Governor Siegelman's intent to mislead that lawyer for the purpose of influencing his communications to law enforcement. Bailey did not even say that such was his own intent; he didn't tell his lawyer the whole story only because he did not think it was necessary to do so. [R36-673 p. 244 (Tr. 483)]. There is no evidence that Governor Siegelman had anything different on his mind; to attribute to him an intent to affect the lawyer's communications to law enforcement would be pure speculation, not inference from evidence.[20]

For these reasons, Governor Siegelman was entitled to a judgment of acquittal on Count 17. He did not violate the law, even when the evidence is

[20] Even if there were such evidence, still it would not constitute a crime under this section. Misleading 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. If Governor Siegelman had any reason to believe that Bailey's lawyer would communicate to the Government, it would only be in his capacity as Bailey's lawyer, presenting Bailey's position to the Government – not as a witness independent from Bailey. If Governor Siegelman "misled" the lawyer, then Bailey did so by the same token at the same time. And so, on the prosecution's theory, every time one falsely denies guilt to his criminal lawyer and hopes that the lawyer will profess the client's innocence to the Government, there is a crime! The absurdity, we trust, is apparent. We can find no hint that anyone has ever been prosecuted on such a theory.

viewed in the light most favorable to the prosecution.

4. The District Court erred in admitting hearsay statements attributed to non-witness Hanson, through a misapplication of Fed. R. Evid. 801(d)(2)(E).

Another reason for reversal is the erroneous admission of testimony about statements by non-witness Eric Hanson. The District Court, agreeing with the prosecution, allowed such evidence based on the "coconspirator hearsay" exception of Fed. R. Evid. 801(d)(2)(E) ("A statement is not hearsay if … [t]he statement is offered against a party and is … a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.") But this was error, because the statements did not meet the requirements of that Rule.

The critical statement attributed to Hanson, insofar as relevant to the case against Governor Siegelman, was found in Martin's testimony: that Hanson bragged at the Healthsouth annual retreat "that he was able to get us a spot on the CON Board with the help of the Integrated check." [R41-700 pp. 263-64 (Tr. 1781-82); *see also id.* p. 269 (Tr. 1787)].

This statement attributed to non-witness Hanson was crucial to the prosecution's case – so crucial in fact that the prosecution relied on it in the short rebuttal portion of its closing argument, the last argument before the jury retired to deliberate. It was, in the prosecutor's eyes, the knock-out punch:

> We're asking you to use your common sense, because we think

> that that evidence proves beyond a reasonable doubt that Richard Scrushy bribed Governor Don Siegelman for a seat on the CON Board.
>
> And when Mike Martin tells you that Eric Hanson, a lobbyist for HealthSouth, shows up at a HealthSouth retreat and he's bragging about how he got HealthSouth a seat on the CON Board by getting a check from IHS delivered to the Governor, that's the kind of evidence we're talking about. See, they don't want to talk about that kind of evidence. They want to focus on, well, Nick Bailey has been prosecuted, Lanny Young has been prosecuted, and Jim Allen ought to have been prosecuted. That's where their focus is.
>
> I want to bring you back to the evidence, and I don't have a lot of time to do it, but I want you to think about those kinds of things when you're looking at the evidence when you go in the back.

[R67-844 p. 57 (Tr. 7618); see also *id.* p. 68-69 (Tr. 7629-30) (returning to hearsay declarant Hanson once again, near the end of prosecution's final rebuttal closing)]

This statement was, undisputedly, offered for the truth of the matters asserted. It was therefore undoubtedly hearsay unless it came within the coconspirator hearsay exception, 801(d)(2)(E).[21]

The governing standard under Rule 801(d)(2)(E) is as follows:

> Under Rule 801(d)(2)(E), statements of co-conspirators made during the course and in furtherance of the conspiracy are not hearsay. For

[21] There was also a great deal of other testimony admitted in this trial under the coconspirator hearsay doctrine. This included testimony relating to the efforts of Healthsouth and Scrushy to get Integrated Health Services to make the first contribution, and testimony about things that various members of the CON Board allegedly did. The reason we are not including argument about those matters is that they have nothing whatsoever to do with Governor Siegelman. There is, as we have noted above, no proof that he had any involvement, knowledge, or intent related to any of those subjects.

> evidence to be admissible under Rule 801(d)(2)(E), the government must prove by a preponderance of the evidence these things: (1) a conspiracy existed; (2) the conspiracy included the declarant and the defendant against whom the statement is offered; and (3) the statement was made during the course and in furtherance of the conspiracy. In determining the admissibility of co-conspirator statements, the trial court may consider both the co-conspirator's statements and independent external evidence.

U.S. v. Magluta, 418 F.3d at 1177-78.

Here, Governor Siegelman simply was not a member of any conspiracy, certainly not with Hanson. But if the Court agrees with us on that point, then we expect that this evidentiary issue will not be the dispositive one; Governor Siegelman will have won on the more fundamental issue of the sufficiency of the evidence. Here, therefore, we focus at more length on the fact that the other requirements of the Rule have not been met.

The statements attributed to Hanson, when he was bragging at the company retreat, fail the Rule 801(d)(2)(E) test. This bragging, even assuming that it occurred and that the Rule's other requirements were met, was not "in furtherance of" any conspiracy. The standard for whether a statement is "in furtherance of the conspiracy" may be "liberal" in this Circuit, but it has not been stretched so far as to become meaningless. *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 558-59 (11th Cir. 1998).

In *Harcros Chemicals*, for instance, this Court held that certain statements were outside the scope of the rule.

> The statements could not have furthered the interests of the alleged conspiracy in any way. A statement that merely discloses the existence of a conspiracy to a non-conspirator, that merely "spills the beans," with no intention of recruiting the auditor into the conspiracy does not further the conspiracy. See United States v. Posner, 764 F.2d 1535, 1538 (11th Cir. 1985) (holding that a letter written by a co-conspirator, containing preliminary appraisals of real estate, was not made in furtherance of a conspiracy to overvalue the real estate and thus was not admissible as the statement of a co-conspirator because the letter was not written to conceal the conspiracy and served only to disclose the scheme); see also United States v. Moss, 138 F.3d 742, 744 (8th Cir. 1998) (holding that "[a] statement made in furtherance of a conspiracy 'must somehow advance the objectives of the conspiracy, not merely inform the listener of the declarant's activities,'" in order to be admissible under Rule 801(d)(2)(E) (citation omitted)).

Id. at 559. In other cases as well, this Court has recognized the meaning of the "in furtherance" part of the Rule. *U.S. v. McGuire*, 608 F.2d 1028, 1032 (5th Cir. 1979) ("the statements must simply be 'in furtherance of the conspiracy.' Mere conversation between co-conspirators is not admissible under this exception.").

Boasting or bragging *can* be in furtherance of a conspiracy, of course, as where it is done in an attempt to convince another person to join the conspiracy. Imagine, for instance, a participant in an existing drug conspiracy who brags to a potential new colleague about the extent of the ongoing operations. *See McGuire*, 608 F.2d at 1033. But this of course does not mean that *every* boast is "in furtherance of" a conspiracy. *U.S. v. Miller*, 664 F.2d 94, 98 (5th Cir. 1981) ("Puffing, boasts, and other conversation, however, are admissible <u>when used by the declarant to obtain the confidence of one involved in the conspiracy</u>. ….

Statements made by the coconspirator to allay suspicions are also admissible.") (emphasis supplied); *U.S. v. Santiago*, 837 F.2d 1545, 1549 (11th Cir. 1988) ("boasts and other conversations may be in furtherance of a conspiracy if such statements are used to obtain the confidence or to allay the suspicions of a co-conspirator.") (emphasis supplied). But on the other hand, a statement that merely "spills the beans," without serving to further the conspiracy in any way, is not admissible under Rule 801. *U.S v. Blakey*, 960 F.2d 996, 998 (11th Cir. 1992); *U.S. v. Posner*, 764 F.2d 1535, 1538 (11th Cir. 1985).

In this case, there was no proof that Hanson's bragging furthered the alleged conspiracy in any way. Instead it calls to mind this Court's quotation of *U.S. v. Moss*, 138 F.3d 742, 744 (8th Cir. 1998), in *Harcros Chemicals, Inc.*, 158 F.3d at 559: "'[a] statement made in furtherance of a conspiracy 'must somehow advance the objectives of the conspiracy, not merely inform the listener of the declarant's activities,' in order to be admissible under Rule 801(d)(2)(E)." There is no proof that Hanson was accomplishing or trying to accomplish *anything* but bragging, and certainly no proof that he was trying to accomplish anything that was a goal of the putative conspiracy. He may have been trying to enhance his own image, but that is all. There is certainly no proof that he was trying to enlist Martin into the conspiracy; he was instead, taking Martin's testimony as true, simply talking about things that were already done with no hint that there was any conspiracy with

anything left to accomplish. If there ever had been a conspiracy and Martin was a part of it, still Martin's activity was long finished and Hanson was not asking him to do anything further; then this was inadmissible under *McGuire*, 608 F.2d 1028 at 1032: "Mere conversation between co-conspirators is not admissible under this exception." And if there ever had been a conspiracy but Martin was not a part of it, then Hanson was merely "spilling the beans" and this too would be inadmissible under *Blakey*, 960 F.2d at 998. There simply was no evidence upon which a reasonable fact-finder could conclude that Hanson's bragging was in furtherance of a conspiracy involving Governor Siegelman.

For these reasons, the evidence plainly did not meet the requirements for admissibility under Rule 801(d)(2)(E). Any contrary findings of fact, whether explicit or implicit, were clearly erroneous. This evidentiary error is therefore another ground for reversal.[22]

[22] Upon holding that this evidence should not have been admitted, this Court should also exclude that evidence when deciding whether to order a judgment of acquittal. In civil cases involving motions for judgment as a matter of law, this Court can first exclude any erroneously-admitted evidence, and then deem the remaining evidence insufficient. *See Weisgram v. Marley*, 528 U.S. 440, 120 S.Ct. 1011 (2000). The Court has the same power in criminal cases, for the same reasons identified in *Weisgram*. While we have shown that the evidence was insufficient even if this hearsay is considered, it is all the more clear that the evidence was insufficient without it.

5. The Court violated the First Amendment, and 18 U.S.C. § 3553, by increasing the punishment based on out-of-court statements on matters of grave public concern.

On sentencing, the issue is simple: neither the First Amendment, nor the sentencing factors in 18 U.S.C. § 3553, allow Governor Siegelman's sentence to be increased as punishment for out-of-court statements on a matter of grave public concern, i.e., the motivations and actions of prosecutors.

The District Court plainly did this: it applied a Guidelines upward departure, on the prosecution's motion, based on taking "judicial notice" of out-of-court statements by Governor Siegelman to the effect that his prosecution was improperly motivated. No such specific statement was cited, much less quoted. The particulars of the argument in this regard, and of the District Court's action, have been quoted extensively in the statement of facts, above. In summary, Governor Siegelman received a longer sentence than he would otherwise received, because he made certain unknown, unquoted and unspecified out-of-court statements questioning the motives and actions of the Executive branch of the United States Government.[23]

[23] This case does not involve punishment of any in-court statement, punishment of any criticism of a court itself, or even punishment of any statement that interfered with the fairness of a trial. It also does not involve any statement that was completely lacking in factual basis, and that the speaker knew to have no factual basis. There is no finding – and equally important, no evidence whatsoever – that (footnote continues on next page)

Whether the prosecutors in this case were improperly motivated (and whether their actions and tactics were ethical and lawful) was, and is, a matter of grave public concern. It is a legitimate – even a vitally important – subject of inquiry in a free society: whether prosecutors, rather than investigating a crime, have set their sights on an *individual* because of partisan politics. Since sentencing, it has become all the more clear that this is a matter of real public concern in this case, and in the nation more generally. The public concern includes the firing of United States Attorneys who, in the view of many, were removed because they did not undertake prosecutions to the partisan advantage of the political party that currently controls the Executive Branch. It includes whether there was improper political motivation, in Alabama and in Washington DC, for this prosecution in particular. It has been, and still is, the subject of investigatory journalism, editorials, Congressional investigation, and public debate. This Court can and should take judicial notice of this public concern, without taking sides on whether the facts will ultimately bear out the concern.

Public concern on this very issue, relative to this very case, has been expressed by public officials, the nationwide media, and private individual citizens. The Committee on the Judiciary of the United States House of Representatives, as

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Governor Siegelman made any statement coming within any of those categories. Statements of those other sorts might, on some sets of facts, raise questions that are not present here.

we discussed above, has declared in a report:

> There is extensive evidence that the prosecution of former Governor Don Siegelman was directed or promoted by Washington officials, likely including former White House Deputy Chief of Staff and Advisor to the President Karl Rove, and that political considerations influenced the decision to bring charges.

"Allegations of Selective Prosecution in Our Federal Criminal Justice System," p. ii.[24] The report continues, "There is also significant evidence of selective prosecution in the Siegelman case." *Id.* The report recognizes that this is a matter of wide public concern:

> Concerns that politics may have played a role in the investigation and prosecution of Don Siegelman have been widely aired in the local and national press, culminating in a petition urging the Committee to open this inquiry that was signed by 44 former state Attorneys General, both Democrats and Republicans, and received by the Committee in July 2007.

Id., pp. 8-9. The speech for which the District Court increased Governor Siegelman's sentence was speech on topics that are of wide and intense public concern.

The First Amendment does not permit punishment for such speech on such matters of public concern. "There can be no doubt that the constitution continues to operate, even after a valid conviction, in the sentencing process. … Accordingly, a court may not punish an individual by imposing a heavier sentence for the exercise of first amendment rights." *U.S. v. Lemon*, 723 F.2d 922, 937 (D.C. Cir.

[24] Available at http://judiciary.house.gov/Media/PDFS/SelProsReport080417.pdf

1983). After canvassing caselaw from other Circuits, the Court in *Lemon* continued: "These decisions declare what we believe the constitution compels: A sentence based to any degree on activity or beliefs protected by the first amendment is constitutionally invalid." *Id.* at 938.

Even if some might argue that this quote from *Lemon* is somewhat too broadly stated, it is surely correct at its core – and this case is at that very core. We recognize, of course, that the Supreme Court has allowed a sentencing court to consider a defendant's beliefs and statements, to the extent that they demonstrate a particular motive for the defendant's criminal offense. But this case is nothing like that. Here, the "speech" for which the District Court punished Governor Siegelman was not part of, and sheds no light on, the offenses for which he was convicted. It is, instead, pure speech critical of Government action, which is at the core of the First Amendment. If the constitutional right to freedom of speech means anything, it is that the United States cannot punish people for questioning or criticizing the actions of federal government officials. And there is no "criticism of federal prosecutors" exception to the First Amendment.

"It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions … and this opportunity is to be afforded for 'vigorous advocacy' no less than 'abstract discussion.'" *New York Times v. Sullivan*, 376 U.S. 254, 269, 84 S.Ct. 710, 720 (1964) (citations and

internal quotation marks omitted). So, the Supreme Court recognized in *Sullivan*, we have "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.*, 376 U.S. at 270, 84 S.Ct. at 721. Our system of freedom has no room for a judicial order imposing a lengthier prison term on a person because he has spoken out about possible governmental misconduct. And again, there is no constitutional reason to place federal prosecutors on a different plane from all other government officials, as though their actions alone are somehow beyond public questioning or criticism.

The District Court's rationale for the sentence increase, by its terms, was premised on the possibility that some members of the public might *believe* and *agree with* Governor Siegelman's (again, unquoted and unspecified) criticisms of the prosecution. This is the only conceivable meaning of the District Court's conclusion [R34-654 p. 127] 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." In this, the District Court forgot what the Supreme Court has said: "Criticism of [government representatives'] official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their

official reputations." *Sullivan*, 376 U.S. at 273, 84 S.Ct. at 722. Certainly, a lengthened sentence cannot be justified on the grounds that criticism of the prosecutors is *plausible* and *believable*; to the extent that an allegation of governmental misconduct is plausible and believable (as it is, here) that is all the more reason to protect, rather than to punish, discussion about it.[25] So, the increase in punishment for Governor Siegelman's statements, on these vital matters of public concern, was contrary to the First Amendment.

In order to avoid the constitutional question, the Court could also hold that such speech is also not a permissible basis for punishment under § 3553; it is not the sort of conduct that the Congress meant to deter or to punish. A sentence is unreasonable if it is based on an impermissible factor. *See*, *e.g.*, *U.S. v. Pugh*, 515 F.3d 1179, 1191-92 (11th Cir. 2008). Criticism of Executive-branch government officials is simply not a valid basis for punishment under any of the factors enumerated in 18 U.S.C. § 3553(a). Naturally, the prosecution may claim that such criticism can be considered under § 3553(a)(2)(A), which provides that

[25] If there is *ever* any room under the Constitution for a sentencing increase based on public statements critical of prosecutors, it would surely require at least specific proof of specific statements raising specific legitimate reasons for punishment – not the sort of generic factual finding that the District Court made here. If the Court does not hold that the enhancement was improper as a matter of law, it should at least hold that it was improper because the District Court did not make adequate findings to support it, and did not make findings that are sufficient to allow meaningful appellate review.

"promot[ing] respect for the law" is a goal of sentencing. But that argument would be wrong, precisely because in our nation we do not seek to "promote respect for the law" *by forbidding or punishing criticism of the Executive branch*. Other nations try to squelch such criticism, wrongly thinking that such is the way to promote respect for the law. In our nation, by contrast, we "promote respect for the law" by criticizing government officials when they deserve it, and by protecting the freedom that allows us to do so. We recognize that government officials are not "the law," and that we cannot be punished for failing to "respect" them.[26]

For these reasons, even if the Court affirms the convictions, it should reverse the sentence and remand for resentencing by a District Judge who has not evidenced an intention to punish constitutionally protected conduct. Because the District Court's error demonstrates a stark departure from fundamental principles of constitutional law and of sentencing, it casts doubt on every other aspect of the District Court's sentencing calculus as well. On remand and reassignment, the Court should begin the sentencing process anew.

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[26] While the District Court stated that it would have reached the same sentence even without the upward Guidelines departure [R34-654 p. 297], this does not make the error harmless. The reason is that the Court did not say that it would have reached the same sentence without considering the out-of-court statements on matters of public concern. Those statements were not only part of the parties' arguments about the departure; they were part of the prosecution's arguments about the sentencing factors under 18 U.S.C. § 3553. [*E.g.*, R34-654 p. 270].

6. Governor Siegelman is entitled to a new trial based on juror misconduct; and the District Court refused to undertake or to allow adequate inquiry into the matter.

If the Court does not render a judgment of acquittal, Governor Siegelman will also be entitled to a new trial based on juror misconduct, and based on the District Court's refusal to undertake or to allow adequate inquiry into the matter. Governor Siegelman fully raised this issue in the District Court, preserving all relevant objections. As we have noted (*supra* pp. ix, 2), Governor Siegelman adopts all pertinent portions of the brief of appellant Scrushy in this respect, including the statements of the relevant proceedings, issues, and facts, the summary of the argument, and the argument. Having thus raised the issue, Governor Siegelman reserves the right to discuss it further in his reply brief as necessary.

Conclusion

For the reasons stated herein, the judgment of conviction should be reversed. Governor Siegelman should receive a judgment of acquittal. If the Court does not render such a judgment, it should order a new trial. Absent acquittal or new trial, the sentence should be vacated. If the Court remands the case, the Court should order reassignment as well.

Respectfully submitted,

_____

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Certificate of Compliance

The foregoing was prepared in Times New Roman, 14 point, and contains 21,655 words according to the word-processing application that was used to prepare it. The Court has expanded the word limits for briefs in this case, and this brief comes within the expanded limits.

Certificate of Service

I certify that copies of the foregoing have been served by U.S. Mail on the following this ____ day of May, 2008, that on the same day the brief has been uploaded electronically to the Court, and that an original and six copies have been sent by U.S. Mail to the Clerk for filing.

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