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

UNITED STATES OF AMERICA	)	
	)	
v.	)	**CRIMINAL NO. 2:05-CR-119-F**
	)	
DON EUGENE SIEGELMAN,	)	
PAUL MICHAEL HAMRICK,	)	
GARY MACK ROBERTS, and	)	**SECOND SUPERSEDING**
RICHARD M. SCRUSHY.	)	**INDICTMENT**

THE GRAND JURY CHARGES:

INTRODUCTION

1. At all times material to this Indictment:

a. The State of Alabama was governed according to a Constitution and Statutes providing for an Executive Department, headed by the Governor of the State of Alabama as the Supreme Executive, and by a Lieutenant Governor.

b. The Executive Department of the State of Alabama was comprised of various government agencies, including the Alabama Alcoholic Beverage Control Board, the Alabama Certificate of Need Review Board, the Alabama Licensing Board General Contractors , the Alabama Department of Environmental Management, the Alabama Department of Finance, the Alabama Department of Transportation, the Alabama Department of Revenue, the Alabama Department of Economic and Community Affairs, the Alabama Development Office, and other Alabama departments, agencies, and authorities.

c. DON EUGENE SIEGELMAN was, from on or about January 16, 1995, to on or about January 18, 1999, the Lieutenant Governor of the State of Alabama, and while Lieutenant Governor was also, from on or about March 31, 1996, to on or about November 3, 1998, a

candidate for Governor of the State of Alabama, and was, from on or about January 18, 1999, to on or about January 20, 2003, the Governor of the State of Alabama.

d. PAUL MICHAEL HAMRICK was, from on or about January 16, 1995, to on or about May 8, 1998, employed in the Lieutenant Governor's Office of the State of Alabama; and was, from on or about January 19, 1999, to on or about June 30, 2001, the Chief of Staff to the Governor of the State of Alabama.

e. GARY MACK ROBERTS was, from on or about December 23, 1996, to on or about January 18, 1999, an employee of a business owned by Jimmy Lynn Allen, and from on or about January 19, 1999, to on or about June 30, 2001, the Director of the Alabama Department of Transportation.

f. RICHARD M. SCRUSHY was the Chairman and Chief Executive Officer of HealthSouth Corporation (hereafter sometimes "HealthSouth"), a business selling medical products and services in the State of Alabama and elsewhere, which was regulated by the State of Alabama Certificate of Need Review Board (hereafter sometimes "CON Board").

COUNT ONE
(RICO Conspiracy, 18 U.S.C. § 1962(d))

2. The Grand Jury realleges and incorporates Paragraph 1 of this Indictment as though fully set forth in this Count.

The Enterprise

3. At all times relevant to this Indictment, the Executive Department of the State of Alabama constituted an "enterprise," as defined by Title 18, United States Code, Section 1961(4) (hereafter sometimes "the enterprise"), which was engaged in, and the activities of which

affected, interstate and foreign commerce, and the enterprise constituted an ongoing organization, whose members functioned as a continuing unit for a common purpose of achieving the objectives of the enterprise.

The Racketeering Conspiracy

4. From in or about August 1997, to on or about January 20, 2003, within the Middle District of Alabama and elsewhere, the defendants

DON EUGENE SIEGELMAN and
PAUL MICHAEL HAMRICK,

together with Nicholas D. Bailey, Clayton "Lanny" Young, and other persons known and unknown to the Grand Jury, being persons employed by and associated with the enterprise, which engaged in, and the activities of which affected, interstate and foreign commerce, knowingly, and intentionally conspired to violate 18 U.S.C. § 1962(c), that is, to conduct and participate, directly and indirectly, in the conduct of the affairs of that enterprise through a pattern of racketeering activity, as that term is defined in Sections 1961(1) and 1961(5) of Title 18, United States Code, consisting of multiple acts indictable under the following provisions of federal law:

a. 18 U.S.C. §§ 2, 1341, 1343, and 1346 (Honest Services Fraud);
b. 18 U.S.C. §§ 2, 1951 (Extortion);
c. 18 U.S.C. §§ 2, 1956 (Money Laundering);
d. 18 U.S.C. §§ 2, 1512 (Obstruction of Justice);

and multiple acts involving bribery in violation of ALA. CODE 1975 §§ 13A-10-61 & ALA. CODE 1975 § 17-22A-7. It was a further part of the conspiracy that each defendant agreed that a conspirator would commit at least two acts of racketeering activity in the conduct of the affairs of the enterprise.

Purpose of the Conspiracy

5. The purpose of the racketeering activity was:

a. to give or withhold official governmental acts and influence, and to threaten to give and withhold official governmental acts and influence, in exchange for money and property to which the participants in the conspiracy were not entitled;

b. to deprive the State of Alabama of its right to the honest services of its public officials and employees in exchange for money and property; and

c. to conceal and otherwise protect the conspiracy and its participants from detection and prosecution.

Manner and Means of the Conspiracy

6. It was a part of the conspiracy that defendants DON EUGENE SIEGELMAN and PAUL MICHAEL HAMRICK, as well as other co-conspirators known and unknown to the Grand Jury, engaged in a scheme to defraud and deprive the State of Alabama of its right to the honest services of DON EUGENE SIEGELMAN and PAUL MICHAEL HAMRICK in their capacity as state officials and employees, and of other state officials and employees, as more fully described in Count Two.

7. It was a part of the conspiracy that defendants DON EUGENE SIEGELMAN and PAUL MICHAEL HAMRICK, as well as other co-conspirators known and unknown to the Grand Jury, engaged in bribery and extortion under color of official right, as more fully described in Count Two.

8. It was a part of the conspiracy that defendant DON EUGENE SIEGELMAN as well as co-conspirators known and unknown to the Grand Jury, engaged in money laundering by

financial transactions concealing the proceeds of unlawful activity, as more fully described in Count Two.

9. It was a part of the conspiracy that defendants DON EUGENE SIEGELMAN and PAUL MICHAEL HAMRICK, as well as co-conspirators known and unknown to the Grand Jury, attempted to obstruct justice by corruptly persuading others, and engaging in misleading conduct toward others, to hinder, delay, and prevent the communication to law enforcement officers of the United States of information relating to the commission and possible commission of a federal offense, as more fully described in Count Two.

10. It was also part of the conspiracy that defendants DON EUGENE SIEGELMAN, PAUL MICHAEL HAMRICK, and co-conspirators known and unknown to the Grand Jury would and did knowingly give and withhold, and threaten to give and withhold, official action and influence to benefit the personal and financial interests of themselves and others not entitled to such benefits.

All done in violation of Title 18, United States Code, Section 1962(d).

COUNT TWO
(RICO, 18 U.S.C. § 1962(c))

11. The Grand Jury realleges and incorporates Paragraphs 1-5 of this Indictment as though fully set forth in this Count.

The Racketeering Violation

12. From in or about August 1997, to on or about January 20, 2003, within the Middle District of Alabama and elsewhere, defendants DON EUGENE SIEGELMAN and PAUL MICHAEL HAMRICK, and others known and unknown to the Grand Jury, being employed by

and associated with the enterprise, which was engaged in and the activities of which affected interstate and foreign commerce, unlawfully and knowingly conducted and participated, directly and indirectly, in the conduct of the affairs of the enterprise through a pattern of racketeering activity, as set forth in Paragraphs 13-47 below.

Pattern of Racketeering Activity

13. The pattern of racketeering activity, as that term is defined in Sections 1961(1) and 1961(5) of Title 18, United States Code, consisted of the following acts.

Racketeering Act 1

14. Defendant DON EUGENE SIEGELMAN committed the following acts, any one of which alone constitutes the commission of Racketeering Act 1:

Racketeering Act 1(a)
(Extortion under Color of Official Right,
18 U.S.C. § 1951)

15. From on or about November 3, 1998, to on or about May 23, 2000, in the Middle District of Alabama and elsewhere, defendant

DON EUGENE SIEGELMAN

aided and abetted by others known and unknown to the Grand Jury, did knowingly obstruct, delay, affect and attempt to obstruct, delay and affect commerce and the movement of articles and commodities in commerce by extortion, as those terms are defined in Title 18, United States Code, Section 1951; that is, defendant DON EUGENE SIEGELMAN, unlawfully obtained $500,000 from and at the direction of Richard M. Scrushy, with consent, under color of official right, in return for official action and influence to afford HealthSouth official membership on, representation at, and influence over, the CON Board, all in violation of 18 U.S.C. § 1951.

Racketeering Act 1(b)
(Bribery, ALA. CODE 1975 § 13A-10-61(a)(2))

16. From on or about November 3, 1998, to on or about May 23, 2000, in the Middle District of Alabama and elsewhere, defendant

DON EUGENE SIEGELMAN

while a public servant, solicited, accepted, and agreed to accept a pecuniary benefit upon an agreement and understanding that his vote, opinion, judgment, exercise of discretion, and other action as a public servant would thereby be corruptly influenced, to wit defendant DON EUGENE SIEGELMAN, while the Governor-elect of the State of Alabama and while Governor of the State of Alabama, solicited, accepted, and agreed to accept $500,000 from and at the direction of Richard M. Scrushy upon an agreement and understanding that defendant DON EUGENE SIEGELMAN would give official action and influence to afford HealthSouth official membership on, representation at, and influence over the CON Board, all in violation of ALA. CODE 1975 § 13A-10-61(a)(2).

Racketeering Acts 1(c)-(e)
(Honest Services Mail Fraud,
18 U.S.C. §§ 2, 1341, & 1346)

The Scheme

17. From on or about November 3, 1998, and continuing through on or about January 20, 2003, in the Middle District of Alabama and elsewhere, defendant

DON EUGENE SIEGELMAN,

aided and abetted by Richard M. Scrushy and others known and unknown to the Grand Jury, knowingly and willfully devised and intended to devise a scheme and artifice to defraud and

deprive the State of Alabama of its right to his honest and faithful services in his capacity as Governor of the State of Alabama, performed free from deceit, favoritism, bias, self-enrichment, self-dealing, and conflict of interest concerning the CON Board.

Purpose of the Scheme

18. It was the purpose of the scheme for DON EUGENE SIEGELMAN, Richard M. Scrushy, and others to give HealthSouth official membership on, representation at, and influence over the CON Board by means of hidden payments and financial relationships, and to conceal these activities.

Manner and Means of the Scheme

19. It was part of the scheme and artifice to defraud that:

a. Richard M. Scrushy would and did pay $500,000 to DON EUGENE SIEGELMAN in two disguised and concealed payments of $250,000.

b. DON EUGENE SIEGELMAN would and did appoint Richard M. Scrushy to the CON Board.

c. Richard M. Scrushy would and did take a seat on the CON Board.

d. Richard M. Scrushy would and did use his seat on the CON Board to attempt to affect the interests of HealthSouth and its competitors.

e. Richard M. Scrushy and DON EUGENE SIEGELMAN would and did orchestrate Richard M. Scrushy's replacement on the CON Board by another person employed by HealthSouth.

Execution of the Scheme

20. On or about each date listed below, in the Middle District of Alabama and

elsewhere, defendant DON EUGENE SIEGELMAN, aided and abetted by Richard M. Scrushy and others known and unknown to the Grand Jury, for the purpose of executing and attempting to execute the above-described scheme and artifice to defraud and deprive, placed and caused to be placed in a post office and an authorized depository for mail, to be sent and delivered by the United States Postal Service, and to be sent and delivered by a private and commercial interstate carrier, the following matters and things:

Act	Date	Description
1(c)	7/26/99	Letter of Appointment of Richard M. Scrushy to the Alabama CON Board, mailed from Montgomery, AL, to Birmingham, AL
1(d)	1/18/01	Letter of Appointment of a member of the CON Board employed by HealthSouth, mailed from Montgomery, AL, to Birmingham, AL

all in violation of 18 U.S.C. §§ 2, 1341, & 1346.

Racketeering Act 1(e)
(Honest Services Wire Fraud,
18 U.S.C. §§ 2, 1343, & 1346)

21. The Grand Jury realleges and incorporates Paragraphs 17-19 of this Indictment, describing the Scheme, the Purpose of the Scheme, and the Manner and Means of the Scheme, as though fully set forth in this Racketeering Act.

Execution of the Scheme

22. On or about the date of the Racketeering Act listed below, in the Middle District of Alabama and elsewhere, defendant DON EUGENE SIEGELMAN, aided and abetted by others known and unknown to the Grand Jury, for the purpose of executing the above-described scheme and artifice to defraud and deprive, transmitted and caused to be transmitted by means of wire communication in interstate commerce, the following writings, signals and sounds:

Act	Date	Description
1(e)	7/16/99	Facsimile transmission from HealthSouth in Birmingham, AL, to an employee of a company in Sparks, MD

all in violation of 18 U.S.C. §§ 2, 1343, & 1346.

Racketeering Act 1(f)
(Money Laundering,
18 U.S.C. §§ 2 & 1956(a)(1)(B)(i))

23. On or about November 5, 1999, in the Northern District of Alabama and elsewhere, the defendant DON EUGENE SIEGELMAN, aided and abetted by others known and unknown to the Grand Jury, did knowingly conduct and attempt to conduct a financial transaction, such transaction involving the use of a financial institution which is engaged in, and the activities of which affect, interstate commerce, to wit: defendant DON EUGENE SIEGELMAN caused the deposit of a check, made payable to the Alabama Education Lottery Foundation and drawn on the account of a business in the amount of $250,000, to account number 59468 in the name of the Alabama Education Foundation, at First Commercial Bank, Birmingham, AL, said transaction involving the proceeds of a specified unlawful activity, that is violation of 18 U.S.C. §§ 666, 1341, 1343, 1346, and 1951, and an act involving bribery in violation of ALA. CODE 1975 § 13A-10-61, knowing that the transaction was designed in whole and in part to conceal and disguise the nature, location, source, ownership, and control of the proceeds of said specified unlawful activity, and that while conducting and attempting to conduct such financial transaction knew that the property involved in the financial transaction represented the proceeds of some form of unlawful activity, all in violation of 18 U.S.C. §§ 2 & 1956(a)(1)(B)(i).

Racketeering Act 1(g)
(Money Laundering,
18 U.S.C. §§ 2 & 1956(a)(1)(B)(i))

24. On or about May 23, 2000, in the Northern District of Alabama and elsewhere, the defendant DON EUGENE SIEGELMAN, aided and abetted by others known and unknown to the Grand Jury, did knowingly conduct and attempt to conduct a financial transaction, such transaction involving the use of a financial institution which is engaged in, and the activities of which affect, interstate commerce, to wit: defendant DON EUGENE SIEGELMAN caused the deposit of a check, made payable to the Alabama Education Foundation and drawn on the account of HealthSouth, in the amount of $250,000 to an outstanding loan account in the name of the Alabama Education Foundation, at First Commercial Bank, Birmingham, AL, said transaction involving the proceeds of a specified unlawful activity, that is violation of 18 U.S.C. §§ 666, 1341, 1343, 1346, 1951, and ALA. CODE 1975 § 13A-10-61, knowing that the transaction was designed in whole and in part to conceal and disguise the nature, location, source, ownership, and control of the proceeds of said specified unlawful activity, and that while conducting and attempting to conduct such financial transaction knew that the property involved in the financial transaction represented the proceeds of some form of unlawful activity, all in violation of 18 U.S.C. §§ 2 & 1956(a)(1)(B)(i).

Racketeering Act 2

25. The defendants named below committed the following acts, any one of which alone constitutes the commission of Racketeering Act 2.

Racketeering Act 2(a)
(Conspiracy to Commit Extortion under Color of Official Right,
18 U.S.C. § 1951)

26. From on or about November 3, 1998, to December 1, 1999, in the Middle District of Alabama and elsewhere, defendant

DON EUGENE SIEGELMAN,

did knowingly conspire to obstruct, delay, and affect commerce and the movement of articles and commodities in commerce by extortion, as those terms are defined in Title 18, United States Code, Section 1951; that is, defendant DON EUGENE SIEGELMAN, unlawfully conspired with Clayton "Lanny" Young and others known and unknown to the grand jury to obtain money from a business represented by Clayton "Lanny" Young, with consent, under color of official right, in exchange for official action and influence to advance the financial interests of that business as to waste disposal fees and taxes at a facility at Emelle, Alabama, all in violation of 18 U.S.C. § 1951.

Racketeering Act 2(b)
(Bribery, ALA. CODE 1975 § 13A-10-61(a)(2))

27. Between on or about November 3, 1998, to on or about December 1, 1999, in the Middle District of Alabama and elsewhere, defendant

DON EUGENE SIEGELMAN,

while a public servant, did solicit, accept, and agree to accept pecuniary benefits upon an agreement and understanding that his vote, opinion, judgment, exercise of discretion, and other action as a public servant would thereby be corruptly influenced, to wit, defendant DON EUGENE SIEGELMAN, while Governor of the State of Alabama and having been elected

Governor of the State of Alabama, solicited, accepted, and agreed to accept a pecuniary benefit, to-wit: money, in return for being influenced in the performance of official acts concerning waste disposal fees and taxes at a facility at Emelle, Alabama, in favor of a business represented by Clayton "Lanny" Young, all in violation of ALA. CODE 1975 § 13A-10-61(a)(2).

Racketeering Acts 2(c)-(o)
(Honest Services Mail Fraud,
18 U.S.C. §§ 2, 1341, & 1346)

The Scheme

28. From in or about August 1997, to on or about January 20, 2003, in the Middle District of Alabama and elsewhere, defendants

DON EUGENE SIEGELMAN and
PAUL MICHAEL HAMRICK,

aided and abetted by each other, by Clayton "Lanny" Young, by Nicholas D. Bailey, and by others known and unknown to the Grand Jury, knowingly and willfully devised and intended to devise a scheme and artifice to defraud and deprive the State of Alabama of its right to the honest and faithful services of themselves as public officials and employees of the State of Alabama, performed free from deceit, favoritism, bias, self-enrichment, self-dealing, and conflict of interest, concerning alcoholic beverage and waste disposal regulation, the assessment and collection of hazardous waste fees and taxes, allocation of municipal bond funding, and state construction contracting.

Purpose of the Scheme

29. It was the purpose of the scheme for DON EUGENE SIEGELMAN and PAUL MICHAEL HAMRICK to use their positions in the Executive Department of the State of

Alabama to obtain money, property, and other things of value, in exchange for their official power, actions, and influence, concerning the business and financial interests of Clayton "Lanny" Young and persons represented by Clayton "Lanny" Young, and thus enriching Clayton "Lanny" Young so that they would have continued access to his money, property, and other things of value.

Manner and Means of the Scheme

30. It was part of the scheme and artifice to defraud that:

a. Defendants DON EUGENE SIEGELMAN and PAUL MICHAEL HAMRICK engaged in a course of conduct with Clayton "Lanny" Young establishing an agreement and understanding by which Clayton "Lanny" Young could obtain official acts in exchange for money, property, and other things of value.

b. Clayton "Lanny" Young would and did give valuable private airplane transportation to DON EUGENE SIEGELMAN and PAUL MICHAEL HAMRICK.

c. Clayton "Lanny" Young would and did give, directly and indirectly, valuable property to DON EUGENE SIEGELMAN including a Polaris Magnum 325 4X4 All Terrain Vehicle and other items worth approximately $23,000.

d. Clayton "Lanny" Young would and did give, directly and indirectly, approximately $204,200 to DON EUGENE SIEGELMAN.

e. Clayton "Lanny" Young would and did give, directly and indirectly, approximately $20,000 to Nicholas D. Bailey.

f. Clayton "Lanny" Young would and did give, directly and indirectly, approximately $46,000 to PAUL MICHAEL HAMRICK.

g. DON EUGENE SIEGELMAN and PAUL MICHAEL HAMRICK would and did assist Clayton "Lanny" Young and endeavor to enrich him and enable him to provide them with money and property through their official power, actions, and influence, including the following acts on or about the following dates:

Date	**Action**
between August 1997 and September 1997	Influencing passage of legislation allowing sale of alcoholic beverages each day of the week, including Sunday, at a motor speedway
between 11/3/98 and 1/31/99	Influencing the Cherokee County Commission in favor of Clayton "Lanny" Young's business interests
between July 1998 and 7/15/99	Influencing a waste disposal business represented by Clayton "Lanny" Young to continue paying for his services, and influencing regulation of waste disposal fees and taxes at a facility at Emelle, AL
between 7/1/00 and 11/2/00	Influencing the *de facto* Director of the Alabama Development Office to advance a business represented by Clayton "Lanny" Young on the list of the companies eligible for industrial tax-free bond issues
between September 2000 and May 2001	Influencing the award of a construction management contract to a company controlled by Clayton "Lanny" Young to build warehouses for the Alabama Department of Economic and Community Affairs and the State of Alabama Alcoholic Beverage Control Board

h. DON EUGENE SIEGELMAN would and did solicit and obtain money and property from businesses that benefitted from official action taken by DON EUGENE SIEGELMAN and PAUL MICHAEL HAMRICK for Clayton "Lanny" Young.

Execution of the Scheme

31. On or about the date of each Racketeering Act listed below, in the Middle District of Alabama and elsewhere, defendants DON EUGENE SIEGELMAN and PAUL MICHAEL HAMRICK, aided and abetted by each other and others known and unknown to the Grand Jury, for the purpose of executing and attempting to execute the above-described scheme and artifice to

defraud and deprive, placed and caused to be placed in a post office and an authorized depository for mail, to be sent and delivered by the United States Postal Service, and to be sent and delivered by a private and commercial interstate carrier, the following matters and things:

Act	Date	Description
2(c)	12/2/98	Letter concerning $1,000,000 payment to Clayton "Lanny" Young for reduction of fees at Cherokee County landfill via Federal Express from Birmingham, AL, to Antioch, TN
2(d)	1/19/00	Hazardous Waste Fee Report mailed from a facility in Emelle, AL, to the Alabama Department of Revenue in Montgomery, AL
2(e)	1/10/01	Hazardous Waste Fee Report mailed from a facility in Emelle, AL, to the Alabama Department of Revenue in Montgomery, AL
2(f)	1/15/02	Hazardous Waste Fee Report mailed from a facility in Emelle, AL, to the Alabama Department of Revenue in Montgomery, AL
2(g)	1/14/03	Hazardous Waste Fee Report mailed from a facility in Emelle, AL, to the Alabama Department of Revenue in Montgomery, AL

all in violation of 18 U.S.C. §§ 2, 1341, & 1346.

Racketeering Acts 2(h)-(o)
(Honest Services Wire Fraud,
18 U.S.C. §§ 2, 1343, & 1346)

32. The Grand Jury realleges and incorporates Paragraphs 28-30 of this Indictment, describing the Scheme, the Purpose of the Scheme, and the Manner and Means of the Scheme, as though fully set forth in this Racketeering Act.

Execution of the Scheme

33. On or about the date of each Racketeering Act listed below, in the Middle District of Alabama and elsewhere, defendants

DON EUGENE SIEGELMAN and
PAUL MICHAEL HAMRICK,

aided and abetted by each other and others known and unknown to the Grand Jury, for the purpose of executing the above-described scheme and artifice to defraud and deprive, transmitted and caused to be transmitted by means of wire communication in interstate commerce, the following writings, signals and sounds:

Act	Date	Description
2(h)	12/7/98	Wire transfer of $1,000,000 from Chicago, IL, to Montgomery, AL, concerning Cherokee County landfill
2(i)	1/29/99	Wire transfer of $2,000,000 from Chicago, IL, to Montgomery, AL, concerning Cherokee County landfill
2(j)	8/12/99	Facsimile transmission of DON EUGENE SIEGELMAN's resume from Montgomery, AL, to a business in Atlanta, GA
2(k)	9/7/00	Facsimile transmission from Cincinnati, OH, to Montgomery, AL, concerning $10,000,000 bond issuance
2(l)	3/15/01	Facsimile transmission from Roanoke, AL, to an insurance company, in Nashville, TN, concerning performance bonds for the GH Construction project
2(m)	3/23/01	Facsimile transmission from an insurance company in Nashville, TN, to Louisville, KY, concerning performance bonds for the GH Construction project
2(n)	4/6/01	Facsimile transmission from Montgomery, AL, to an insurance company in Nashville, TN, concerning performance bonds for the GH Construction project
2(o)	4/6/01	Facsimile transmission from Louisville, KY, to an insurance company in Nashville, TN, relating to the issuance of performance bonds for the GH Construction project

all in violation of 18 U.S.C. §§ 2, 1343, & 1346.

Racketeering Act 3
(Obstruction of Justice,
18 U.S.C. § 1512(b)(3))

34. On or about October 9, 2001, in the Middle District of Alabama, the defendant

PAUL MICHAEL HAMRICK,

did knowingly corruptly persuade and attempt to knowingly corruptly persuade another person, and did engage in misleading conduct toward another person, with intent to hinder, delay, and prevent the communication to a law enforcement officer of the United States of information relating to the commission of a federal offense and a possible commission of a federal offense, to wit, defendant PAUL MICHAEL HAMRICK did give a check in the amount of $3,000 to Clayton "Lanny" Young with intent to hinder, delay, and prevent communication to the Federal Bureau of Investigation by Clayton "Lanny" Young of information concerning federal offenses related to $6,000 that Clayton "Lanny" Young gave to PAUL MICHAEL HAMRICK on September 25, 2000, all in violation of 18 U.S.C. § 1512(b)(3).

Racketeering Act 4

35. The defendant DON EUGENE SIEGELMAN committed the following acts, any one of which alone constitutes the commission of Racketeering Act 4.

Racketeering Act 4(a)
(Obstruction of Justice,
18 U.S.C. §§ 2 & 1512(b)(3))

36. On or about June 5, 2001, in the Middle District of Alabama, the defendant

DON EUGENE SIEGELMAN,

aided and abetted by others known and unknown to the Grand Jury, did knowingly corruptly persuade and attempt to knowingly corruptly persuade another person, and did engage in misleading conduct toward another person, with intent to hinder, delay, and prevent the communication to a law enforcement officer of the United States of information relating to the commission of a federal offense and a possible commission of a federal offense, to wit, defendant

DON EUGENE SIEGELMAN did cause Nicholas D. Bailey to write a check in the amount of $10,503.39 to Clayton "Lanny" Young with the notation "repayment of loan plus interest" with intent to hinder, delay, and prevent communication to the Federal Bureau of Investigation by Clayton "Lanny" Young and Nicholas D. Bailey of information concerning federal offenses related to $9,200 that Clayton "Lanny" Young gave to DON EUGENE SIEGELMAN on January 20, 2000, all in violation of 18 U.S.C. §§ 2 & 1512(b)(3).

Racketeering Act 4(b)
(Obstruction of Justice,
18 U.S.C. §§ 2 & 1512(b)(3))

37. On or about October 16, 2001, in the Middle District of Alabama, the defendant

DON EUGENE SIEGELMAN,

aided and abetted by others known and unknown to the Grand Jury, did knowingly corruptly persuade and attempt to knowingly corruptly persuade another person, and did engage in misleading conduct toward another person, with intent to hinder, delay, and prevent the communication to a law enforcement officer of the United States of information relating to the commission of a federal offense and a possible commission of a federal offense, to wit, defendant DON EUGENE SIEGELMAN did cause Nicholas D. Bailey to provide him with a check in the amount of $2,973.35 with the notation "balance due on m/c" with intent to hinder, delay, and prevent communication to the Federal Bureau of Investigation by Clayton "Lanny" Young and Nicholas D. Bailey, and by counsel for Nicholas D. Bailey, of information concerning federal offenses related to $9,200 that Clayton "Lanny" Young gave to DON EUGENE SIEGELMAN on January 20, 2000, all in violation of 18 U.S.C. §§ 2 & 1512(b)(3).

Racketeering Act 5

38. Defendant DON EUGENE SIEGELMAN committed the following acts, any one of which alone constitutes the commission of Racketeering Act 5:

Racketeering Act 5(a)
(Extortion under Color of Official Right and
by Fear of Economic Harm, 18 U.S.C. § 1951)

39. From on or about October 15, 1998, to on or about November 2, 1998, in the Middle District of Alabama and elsewhere, defendant

DON EUGENE SIEGELMAN

did knowingly obstruct, delay, affect, and attempt to obstruct, delay, and affect, commerce and the movement of articles and commodities in commerce by extortion, as those terms are defined in Title 18, United States Code, Section 1951; that is, defendant DON EUGENE SIEGELMAN, while Lieutenant Governor and a candidate for Governor of the State of Alabama, unlawfully demanded $100,000 and obtained $40,000 from Jimmy Lynn Allen, with Jimmy Lynn Allen's consent, induced by wrongful use of fear of economic harm and under color of official right in that defendant DON EUGENE SIEGELMAN demanded $100,000 and accepted $40,000 from Jimmy Lynn Allen upon a threat to use official action and official influence as the Governor of the State of Alabama to cause economic harm to Jimmy Lynn Allen's business interests involving the Alabama Department of Transportation if Jimmy Lynn Allen did not consent to pay, and upon a promise to use official action and official influence as the Governor of the State of Alabama to facilitate Jimmy Lynn Allen's business interests involving the Alabama Department of Transportation if Jimmy Lynn Allen did consent to pay, all in violation of 18 U.S.C. § 1951.

Racketeering Act 5(b)
(Fair Campaign Practices Act Bribery,
ALA. CODE 1975 § 17-22A-7(c))

40. From on or about October 15, 1998, to on or about November 2, 1998, in the Middle District of Alabama and elsewhere, defendant

DON EUGENE SIEGELMAN

while a candidate for Governor of the State of Alabama, solicited, accepted, agreed to accept, and received contributions upon an agreement and understanding that his vote, opinion, judgment, exercise of discretion, and other action as a public servant would thereby be corruptly influenced and for the intention of corruptly influencing his official actions, to wit, defendant DON EUGENE SIEGELMAN, as a candidate for Governor of the State of Alabama, solicited $100,000, and accepted, agreed to accept, and received $40,000 from Jimmy Lynn Allen upon a promise to use official action and official influence as the Governor of the State of Alabama to facilitate Jimmy Lynn Allen's business interests involving the Alabama Department of Transportation, all in violation of ALA. CODE 1975 § 17-22A-7(c).

Racketeering Act 5(c)
(Extortion under Color of Official Right and
by Fear of Economic Harm, 18 U.S.C. § 1951)

41. In or about September 2002, in the Middle District of Alabama and elsewhere, defendant

DON EUGENE SIEGELMAN

while the Governor of the State of Alabama, did knowingly obstruct, delay, affect, and attempt to obstruct, delay, and affect, commerce and the movement of articles and commodities in commerce by extortion, as those terms are defined in Title 18, United States Code, Section 1951; that is,

defendant DON EUGENE SIEGELMAN, unlawfully demanded $250,000 from Forrest "Mac" Marcato, induced by wrongful use of fear of economic harm and under color of official right in that defendant DON EUGENE SIEGELMAN demanded $250,000 from Forrest "Mac" Marcato upon a threat to use official action and official influence as the Governor of the State of Alabama to cause economic harm to Forrest "Mac" Marcato's business interests involving the Alabama Department of Transportation if Forrest "Mac" Marcato did not consent to pay, all in violation of 18 U.S.C. § 1951.

Racketeering Act 5(d)
(Bribery, ALA. CODE 1975 § 13A-10-61(a)(2))

42. In or about September 2002, in the Middle District of Alabama and elsewhere, defendant

DON EUGENE SIEGELMAN

while a public servant, solicited a pecuniary benefit upon an agreement and understanding that his vote, opinion, judgment, exercise of discretion, and other action as a public servant would thereby be corruptly influenced, to wit defendant DON EUGENE SIEGELMAN, as the Governor of the State of Alabama, solicited $250,000 from Forrest "Mac" Marcato in exchange for official action and influence to protect Forrest "Mac" Marcato's business interests involving the Alabama Department of Transportation from economic harm, all in violation of ALA. CODE 1975 § 13A-10-61(a)(2).

Racketeering Acts 5(e)-(kk)
(Honest Services Mail Fraud,
18 U.S.C. §§ 2, 1341, & 1346)

The Scheme

43. From on or about October 15, 1998, and continuing through on or about January 20, 2003, in the Middle District of Alabama and elsewhere, defendant

DON EUGENE SIEGELMAN

aided and abetted by Gary Mack Roberts and others known and unknown to the Grand Jury, knowingly and willfully devised and intended to devise a scheme and artifice to defraud and deprive the State of Alabama of its right to the honest and faithful services of DON EUGENE SIEGELMAN as Governor of the State of Alabama and of Gary Mack Roberts as Director of the Alabama Department of Transportation (hereafter sometimes "ALDOT"), performed free from deceit, favoritism, bias, self-enrichment, self-dealing, and conflict of interest concerning ALDOT.

Purpose of the Scheme

44. It was the purpose of the scheme for DON EUGENE SIEGELMAN to use the Executive Department of the State of Alabama to exchange official position, power, actions, and influence concerning ALDOT for money and property to which he was not entitled.

Manner and Means of the Scheme

45. It was part of the scheme and artifice to defraud that:

a. DON EUGENE SIEGELMAN would and did demand money and property to which he was not entitled from Jimmy Lynn Allen in exchange for DON EUGENE SIEGELMAN's official protection from economic harm of Jimmy Lynn Allen's business interests involving ALDOT, including Jimmy Lynn Allen's investment of approximately $20 million in

certain bridges affected by prospective Alabama road construction contracts.

b. DON EUGENE SIEGELMAN would and did demand money and property to which he was not entitled from Jimmy Lynn Allen in exchange for allowing Jimmy Lynn Allen to select for appointment by DON EUGENE SIEGELMAN a Director of ALDOT who would both protect and further Jimmy Lynn Allen's business interests involving ALDOT, including Jimmy Lynn Allen's investment of approximately $20 million in certain bridges affected by Alabama road construction contracts, and ALDOT's specifications of Rainline Inverted Profile Traffic Stripe (hereafter sometimes "Rainline") for use in Alabama road construction contracts.

c. DON EUGENE SIEGELMAN would and did demand $100,000 to which he was not entitled from Jimmy Lynn Allen.

d. DON EUGENE SIEGELMAN would and did accept $40,000 to which he was not entitled from Jimmy Lynn Allen.

e. DON EUGENE SIEGELMAN and Jimmy Lynn Allen would and did make Gary Mack Roberts aware of the scheme.

f. Gary Mack Roberts would and did monitor election polls prior to the 1998 general election in Alabama to advise Jimmy Lynn Allen on the likelihood of DON EUGENE SIEGELMAN becoming Governor of the State of Alabama.

g. Gary Mack Roberts would and did accept the position of Director of ALDOT from DON EUGENE SIEGELMAN with Jimmy Lynn Allen's approval.

h. Gary Mack Roberts would and did use official action and official influence as the Director of ALDOT to facilitate Jimmy Lynn Allen's business interests involving ALDOT, including Jimmy Lynn Allen's investment of approximately $20 million in certain bridges affected

by Alabama road construction contracts, and ALDOT's specifications of Rainline for use in Alabama road construction contracts.

i. DON EUGENE SIEGELMAN would and did demonstrate to Jimmy Lynn Allen that DON EUGENE SIEGELMAN was aware of benefits to Jimmy Lynn Allen's business interests in Rainline from ALDOT actions under the Directorship of Gary Mack Roberts.

j. DON EUGENE SIEGELMAN would and did demand $250,000 to which he was not entitled from Forrest "Mac" Marcato, owner of the Rainline patent, in exchange for official protection from economic harm of Forrest "Mac" Marcato's business interests, including ALDOT's specifications of Rainline for use in Alabama road construction contracts.

Execution of the Scheme

46. On or about each date listed below, in the Middle District of Alabama and elsewhere, defendant DON EUGENE SIEGELMAN, aided and abetted by Gary Mack Roberts and others known and unknown to the Grand Jury, for the purpose of executing and attempting to execute the above-described scheme and artifice to defraud and deprive, placed and caused to be placed in a post office and an authorized depository for mail, to be sent and delivered by the United States Postal Service, the following matters and things:

Act	Date	Description
5(e)	5/24/99	Agreement allocating $1,265,280 from ALDOT in Montgomery, AL, to Tuscaloosa County Commission, Tuscaloosa, AL
5(f)	5/24/99	Agreement allocating $502,000 from ALDOT in Montgomery, AL, to Tuscaloosa County Commission, Tuscaloosa, AL
5(g)	5/24/99	Agreement allocating $309,191 from ALDOT in Montgomery, AL, to the Tuscaloosa County Commission, Tuscaloosa, AL

5(h)	7/2/99	Agreement allocating $3,107,500 from ALDOT in Montgomery, AL, to Tuscaloosa County Commission, Tuscaloosa, AL
5(i)	11/10/99	Agreement allocating $13,392,600, from ALDOT in Montgomery, AL, to Tuscaloosa County Commission, Tuscaloosa, AL
5(j)	11/10/99	Agreement allocating $3,456,200 from ALDOT in Montgomery, AL, to Tuscaloosa County Commission, Tuscaloosa, AL
5(k)	9/11/00	Agreement allocating $5,960,000 from ALDOT in Montgomery, AL, to Tuscaloosa County Commission, Tuscaloosa, AL
5(l)	5/23/01	Agreement allocating $10,153,100 from ALDOT in Montgomery, AL, to Tuscaloosa County Commission, Tuscaloosa, AL
5(m)	6/29/01	Agreement allocating $4,397,800 from ALDOT in Montgomery, AL, to Tuscaloosa County Commission, Tuscaloosa, AL
5(n)	9/19/01	Revised Agreement allocating $13,392,600 from ALDOT in Montgomery, AL, to Tuscaloosa County Commission, Tuscaloosa, AL
5(o)	10/26/99	A check in the amount of $37,752 from a contractor in Huntsville, AL, to Rainline Corporation in Montgomery, AL
5(p)	12/23/99	A check in the amount of $37,752 from a contractor in Huntsville, AL, to Rainline Corporation in Montgomery, AL
5(q)	1/3/00	A check in the amount of $71,588.88 from a contractor in Ozark, AL, to Rainline Corporation in Montgomery, AL
5(r)	3/29/00	A check in the amount of $104,897.61 from a contractor in Ozark, AL, to Rainline Corporation in Montgomery, AL
5(s)	4/24/00	A check in the amount of $69,931.74 from a contractor in Ozark, AL, to Rainline Corporation in Montgomery, AL
5(t)	5/15/00	A check in the amount of $139,863.48 from a contractor in Ozark, AL, to Rainline Corporation in Montgomery, AL
5(u)	6/19/00	A check in the amount of $139,863.48 from a contractor in Ozark, AL, to Rainline Corporation in Montgomery, AL
5(v)	8/14/00	A check in the amount of $139,863.48 from a contractor in Ozark, AL, to Rainline Corporation in Montgomery, AL
5(w)	9/13/00	A check in the amount of $314,692.83 from a contractor in Ozark, AL, to Rainline Corporation in Montgomery, AL

5(x)	10/19/00	A check in the amount of $291,577.25 from a contractor in Ozark, AL, to Rainline Corporation in Montgomery, AL
5(y)	12/21/00	A check in the amount of $36,300 from a contractor in Huntsville, AL, to Rainline Corporation in Montgomery, AL
5(z)	12/30/00	A check in the amount of $35,464 from a contractor in Saraland, AL, to Rainline Corporation in Montgomery, AL
5(aa)	5/4/01	A check in the amount of $36,300 from a contractor in Saraland, AL, to Rainline Corporation in Montgomery, AL
5(bb)	5/14/01	A check in the amount of $99,429 from a contractor in Ozark, AL, to Rainline Corporation in Montgomery, AL
5(cc)	6/25/01	A check in the amount of $36,300 from a contractor in Pascagoula, MS, to Rainline Corporation in Montgomery, AL
5(dd)	6/26/01	A check in the amount of $38,500 from a contractor in Huntsville, AL, to Rainline Corporation in Montgomery, AL
5(ee)	9/25/01	A check in the amount of $36,300 from a contractor in Huntsville, AL, to Rainline Corporation in Montgomery, AL
5(ff)	9/26/01	A check in the amount of $36,300 from a contractor in Pascagoula, MS, to Rainline Corporation in Montgomery, AL
5(gg)	12/18/01	A check in the amount of $38,500 from a contractor in Enterprise, AL, to Rainline Corporation in Montgomery, AL
5(hh)	1/3/02	A check in the amount of $38,500 from a contractor in Saraland, AL, to Rainline Corporation in Montgomery, AL
5(ii)	2/19/02	A check in the amount of $38,500 from a contractor in Enterprise, AL, to Rainline Corporation in Montgomery, AL
5(jj)	8/21/02	A check in the amount of $64,922.60 from a contractor in Saraland, AL, to Rainline Corporation in Montgomery, AL
5(kk)	9/9/02	A check in the amount of $50,000 from a contractor in Theodore, AL, to Rainline Corporation in Montgomery, AL

all in violation of 18 U.S.C. §§ 2, 1341, & 1346.

Racketeering Act 5(ll)-(tt)
(Money Laundering,
18 U.S.C. §§ 2 & 1956(a)(1)(B)(i))

47. On or about November 3, 1998, in the Middle District of Alabama, the defendant

DON EUGENE SIEGELMAN,

aided and abetted by others known and unknown to the Grand Jury, did knowingly conduct and attempt to conduct a financial transaction, such transaction involving the use of a financial institution which is engaged in, and the activities of which affect, interstate commerce, to wit: defendant DON EUGENE SIEGELMAN caused the deposit of each check described below and written on the account of Black Warrior Parkway, LLC, at Regions Bank in Montgomery, AL, into the account of a political action committee named below at Colonial Bank in Montgomery, AL, and each transaction involved the proceeds of a specified unlawful activity, that is violation of 18 U.S.C. §§ 1341, 1343, & 1951, and an act involving bribery in violation of ALA. CODE 1975 § 17-22A-7, knowing that the transaction was designed in whole and in part to conceal and disguise the nature, location, source, ownership, and control of the proceeds of said specified unlawful activity, and that while conducting and attempting to conduct such financial transaction knew that the property involved in the financial transaction, that is each check described below represented the proceeds of some form of unlawful activity.

Act	Check Number	Payee\PAC	Amount
5(ll)	1628	21st Cen Pac	$4,444.44
5(mm)	1629	Alabez Pac	$4,444.44
5(nn)	1630	Ecodev Pac	$4,444.44
5(oo)	1631	Enviro Pac	$4,444.48

5(pp)	1632	Green Pac	$4,444.44
5(qq)	1633	Growth-Pac	$4,444.44
5(rr)	1634	JDC Pac	$4,444.44
5(ss)	1635	Jefferson Pac	$4,444.44
5(tt)	1636	Vision Pac	$4,444.44

all in violation of 18 U.S.C. §§ 2 & 1956(a)(1)(B)(i).

All done in violation of Title 18, United States Code, Section 1962(c).

COUNT THREE
(Federal Funds Bribery,
18 U.S.C. §§ 2 & 666(a)(1)(B))

48. The executive branch of the State of Alabama (the "State") received benefits in excess of $10,000 in every twelve month period from January 1998 to the present pursuant to federal programs providing assistance to the State.

49. From on or about July 19, 1999, and continuing through on or about May 23, 2000, the exact dates being unknown to the grand jury, in Montgomery County, Alabama, within the Middle District of Alabama and elsewhere, the defendant

DON EUGENE SIEGELMAN

being an agent of a State government, aided and abetted by defendant

RICHARD SCRUSHY

and others known and unknown to the grand jury, which State government received federal assistance in excess of $10,000 in a one-year period, did corruptly solicit and demand for the benefit of any person, and accept and agree to accept, anything of value from any person,

intending to be influenced and rewarded in connection with any business, transaction, and series of transactions of such State government involving anything of value of $5,000 or more, to wit: defendant DON EUGENE SIEGELMAN, being Governor of the State of Alabama, corruptly solicited, demanded, accepted, and agreed to accept $500,000 from defendant RICHARD SCRUSHY, intending to be influenced and rewarded in connection with the appointment of defendant RICHARD SCRUSHY to the CON Board.

All done in violation of Title 18, United States Code, Sections 666(a)(1)(B) and 2.

COUNT FOUR
(Federal Funds Bribery,
18 U.S.C. §§ 2 & 666(a)(2))

50. The executive branch of the State of Alabama (the "State") received benefits in excess of $10,000 in every twelve month period from January 1998 to the present pursuant to federal programs providing assistance to the State.

51. From on or about July 19, 1999, and continuing through on or about May 23, 2000, the exact dates being unknown to the grand jury, in Montgomery County, Alabama, within the Middle District of Alabama and elsewhere, the defendant

RICHARD SCRUSHY

aided and abetted by defendant

DON EUGENE SIEGELMAN

and others known and unknown to the grand jury, did corruptly give, offer, and agree to give anything of value to any person, with intent to influence and reward an agent of State government, which State government received federal assistance in excess of $10,000 in a one-year period, in connection with any business, transaction, or series of transactions of such State government

involving anything of value of $5,000 or more, to wit: defendant SCRUSHY corruptly gave, offered, and agreed to give $500,000 to defendant DON EUGENE SIEGELMAN, Governor of the State of Alabama, intending to influence and reward defendant DON EUGENE SIEGELMAN in connection with the appointment of defendant RICHARD SCRUSHY to the CON Board.

All done in violation of Title 18, United States Code, Sections 666(a)(2) and 2.

COUNT FIVE
(18 U.S.C. § 371)

INTRODUCTION

52. The Grand Jury realleges and incorporates Paragraph 1 as though fully set forth in this Count.

THE CONSPIRACY AND ITS OBJECTS

53. From on or about November 3, 1998, and continuing through at least on or about January 20, 2003, in the Middle District of Alabama and elsewhere, defendants

DON EUGENE SIEGELMAN and
RICHARD M. SCRUSHY

knowingly and willfully did combine, conspire, confederate, and agree among themselves and each other, and with persons both known and unknown to the Grand Jury, to violate Title 18, United States Code, Sections 1341 and 1346. It was the object of the conspiracy for the defendants to devise and intend to devise a scheme and artifice to defraud and deprive the State of Alabama of its right to the honest and faithful services of DON EUGENE SIEGELMAN and RICHARD M. SCRUSHY in their capacities as Governor of the State of Alabama and a member of the CON Board, respectively, as well as other members of the CON Board, performed free from deceit, favoritism, bias, self-enrichment, self-dealing, and conflict of interest concerning the

CON Board to give HealthSouth membership on and representation at the CON Board and to allow HealthSouth to exert influence over the CON Board.

MANNER AND MEANS OF THE CONSPIRACY

54. It was a part of the conspiracy that DON EUGENE SIEGELMAN and RICHARD M. SCRUSHY and others would give HealthSouth official membership on, representation at, and influence over the CON Board by means of hidden payments and financial relationships, and to conceal the conspiracy.

55. It was a further part of the conspiracy that:

a. RICHARD M. SCRUSHY would and did pay $500,000 to DON EUGENE SIEGELMAN in two disguised and concealed payments of $250,000.

b. DON EUGENE SIEGELMAN would and did appoint RICHARD M. SCRUSHY to the CON Board.

c. RICHARD M. SCRUSHY would and did take a seat on the CON Board.

d. RICHARD M. SCRUSHY would and did use his seat on the CON Board to attempt to affect the interests of HealthSouth and its competitors.

e. RICHARD M. 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.

f. RICHARD M. SCRUSHY and DON EUGENE SIEGELMAN would and did orchestrate RICHARD M. SCRUSHY's replacement on the CON Board by another person employed by HealthSouth.

g. DON EUGENE SIEGELMAN, RICHARD M. SCRUSHY, and others knowingly caused to be mailed, by the United States Postal Service, letters from the CON Board in Montgomery, Alabama, to HealthSouth and its agents in Birmingham, Alabama.

OVERT ACTS

56. In furtherance of the conspiracy and to affect the objects of the conspiracy, the following overt acts, among others, were caused and committed on or about the date alleged below in the Middle District of Alabama and elsewhere, by at least one of the co-conspirators herein:

Act	Date	Description
8(a)	1/18/01	Letter of Appointment of a member of the CON Board employed by HealthSouth, mailed from Montgomery, AL, to Birmingham, AL
8(b)	7/27/01	Letter of Re-appointment of a member of the CON Board employed by HealthSouth, mailed from Montgomery, AL, to Birmingham, AL
8(c)	8/2/02	Letter Notifying HealthSouth of final order for Certificate of Need for HealthSouth Regional Rehabilitation Hospital mailed from Montgomery, AL, to Birmingham, AL.
8(d)	8/2/02	Undisclosed payment of $3,000 to CON Board member for attending and creating a quorum at the meeting of the CON Board on July 17, 2002, at which the CON Board approved the final order for HealthSouth Regional Rehabilitation Hospital.
8(e)	1/2/03	Letter Notifying HealthSouth of final order for Certificate of Need for PET scanner for HealthSouth mailed from Montgomery, AL, to Birmingham, AL.
8(f)	2/6/02	Undisclosed payment of $8,000 to CON Board member for drafting a Certificate of Need application for the PET scanner which was approved by the CON Board on December 18, 2002, at which meeting the presence of the CON Board member who had been paid by HealthSouth created a quorum.

All in violation of Title 18, United States Code, Section 371.

COUNTS SIX THROUGH NINE
(Honest Services Mail Fraud,
18 U.S.C. §§ 2, 1341, & 1346)

The Scheme

57. From on or about November 3, 1998, and continuing through at least on or about January 20, 2003, in the Middle District of Alabama and elsewhere, defendants

DON EUGENE SIEGELMAN and
RICHARD M. SCRUSHY,

aided and abetted by each other and others known and unknown to the Grand Jury, knowingly and willfully devised and intended to devise a scheme and artifice to defraud and deprive the State of Alabama of its right to the honest and faithful services of DON EUGENE SIEGELMAN and RICHARD M. SCRUSHY in their capacities as Governor of the State of Alabama and a member of the CON Board, respectively, as well as other members of the CON Board, performed free from deceit, favoritism, bias, self-enrichment, self-dealing, and conflict of interest concerning the State of Alabama Certificate of Need Review Board.

Purpose of the Scheme

58. It was the purpose of the scheme that DON EUGENE SIEGELMAN and RICHARD M. SCRUSHY and others known and unknown to the Grand Jury would give HealthSouth official membership on, representation at, and influence over the CON Board by means of hidden payments and financial relationships, and to conceal these activities.

Manner and Means of the Scheme

59. It was part of the scheme and artifice to defraud that:

a. RICHARD M. SCRUSHY would and did pay $500,000 to DON EUGENE

SIEGELMAN in two disguised and concealed payments of $250,000.

b. DON EUGENE SIEGELMAN would and did appoint RICHARD M. SCRUSHY to the CON Board.

c. RICHARD M. SCRUSHY would and did take a seat on the CON Board.

d. RICHARD M. SCRUSHY would and did use his seat on the CON Board to attempt to affect the interests of HealthSouth and its competitors.

e. RICHARD M. 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.

f. RICHARD M. SCRUSHY and DON EUGENE SIEGELMAN would and did orchestrate RICHARD M. SCRUSHY's replacement on the CON Board by another person employed by HealthSouth.

g. DON EUGENE SIEGELMAN, RICHARD M. SCRUSHY, and others knowingly caused to be mailed, by the United States Postal Service, letters from the CON Board in Montgomery, Alabama, to HealthSouth and its agents in Birmingham, Alabama.

Execution of the Scheme

60. On or about the date listed below, in the Middle District of Alabama and elsewhere, defendants DON EUGENE SIEGELMAN and RICHARD M. SCRUSHY, aided and abetted by each other and others known and unknown to the Grand Jury, for the purpose of executing and attempting to execute the above-described scheme and artifice to defraud and deprive, placed and caused to be placed in a post office and an authorized depository for mail, to

be sent and delivered by the United States Postal Service, and to be sent and delivered by a private and commercial interstate carrier, the following matters and things:

COUNT	Date	Description
SIX	1/18/01	Letter of Appointment of a member of the CON Board employed by HealthSouth Corporation, mailed from Montgomery, AL, to Birmingham, AL
SEVEN	7/27/01	Letter of Re-appointment of a member of the CON Board employed by HealthSouth, mailed from Montgomery, AL, to Birmingham, AL
EIGHT	8/2/02	Letter Notifying HealthSouth of final order for Certificate of Need for HealthSouth Regional Rehabilitation Hospital mailed from Montgomery, AL, to Birmingham, AL.
NINE	1/2/03	Letter Notifying HealthSouth of final order for Certificate of Need for PET scanner for HealthSouth mailed from Montgomery, AL, to Birmingham, AL.

All in violation of Title 18, United States Code, Sections 2, 1341, & 1346.

COUNTS TEN THROUGH TWELVE
(Honest Services Mail Fraud,
18 U.S.C. §§ 2, 1341, & 1346)

The Scheme

61. From in or about August 1997, to on or about January 20, 2003, in the Middle District of Alabama and elsewhere, defendants

DON EUGENE SIEGELMAN and
PAUL MICHAEL HAMRICK,

aided and abetted by each other, by Clayton "Lanny" Young, by Nicholas D. Bailey, and by others known and unknown to the Grand Jury, knowingly and willfully devised and intended to devise a scheme and artifice to defraud and deprive the State of Alabama of its right to the honest and faithful services of themselves as public officials and employees of the State of Alabama,

performed free from deceit, favoritism, bias, self-enrichment, self-dealing, and conflict of interest, concerning alcoholic beverage and waste disposal regulation, the assessment and collection of hazardous waste fees and taxes, allocation of municipal bond funding, and state construction contracting.

62. The Grand Jury realleges and incorporates Paragraphs 29-30 of this Indictment, describing the Purpose of the Scheme and the Manner and Means of the Scheme, as though fully set forth in this Count.

Execution of the Scheme

63. On or about the date of each Count listed below, in the Middle District of Alabama and elsewhere, defendants DON EUGENE SIEGELMAN and PAUL MICHAEL HAMRICK, aided and abetted by each other and others known and unknown to the Grand Jury, for the purpose of executing and attempting to execute the above-described scheme and artifice to defraud and deprive, placed and caused to be placed in a post office and an authorized depository for mail, to be sent and delivered by the United States Postal Service, and to be sent and delivered by a private and commercial interstate carrier, the following matters and things:

COUNT	Date	Description
TEN	1/10/01	Hazardous Waste Fee Report mailed from a facility in Emelle, AL, to the Alabama Department of Revenue in Montgomery, AL
ELEVEN	1/15/02	Hazardous Waste Fee Report mailed from a facility in Emelle, AL, to the Alabama Department of Revenue in Montgomery, AL
TWELVE	1/14/03	Hazardous Waste Fee Report mailed from a facility in Emelle, AL, to the Alabama Department of Revenue in Montgomery, AL

All done in violation of Title 18, United States Code, Sections 2, 1341, & 1346.

COUNTS THIRTEEN THROUGH FOURTEEN
(Honest Services Wire Fraud,
18 U.S.C. §§ 2, 1343, & 1346)

64. The Grand Jury realleges and incorporates Paragraphs 55 and 29-30 of this Indictment, describing the Scheme, the Purpose of the Scheme, and the Manner and Means of the Scheme, as though fully set forth in this Count.

Execution of the Scheme

65. On or about the date of each Count listed below, in the Middle District of Alabama and elsewhere, defendants DON EUGENE SIEGELMAN and PAUL MICHAEL HAMRICK, aided and abetted by each other and others known and unknown to the Grand Jury, for the purpose of executing the above-described scheme and artifice to defraud and deprive, transmitted and caused to be transmitted by means of wire communication in interstate commerce, the following writings, signals and sounds:

COUNT	Date	Description
THIRTEEN	3/15/01	Facsimile transmission from Roanoke, AL, to an insurance company in Nashville, TN, concerning performance bonds for the GH Construction project
FOURTEEN	4/6/01	Facsimile transmission from Montgomery, AL, to an insurance company in Nashville, TN, concerning performance bonds for the GH Construction project

All done in violation of Title 18, United States Code, Sections 2, 1343, & 1346.

COUNT FIFTEEN
(Obstruction of Justice,
18 U.S.C. § 1512(b)(3))

66. On or about October 9, 2001, in the Middle District of Alabama, the defendant

PAUL MICHAEL HAMRICK,

did knowingly corruptly persuade and attempt to knowingly corruptly persuade another person, and did engage in misleading conduct toward another person, with intent to hinder, delay, and prevent the communication to a law enforcement officer of the United States of information relating to the commission of a federal offense and a possible commission of a federal offense, to wit, defendant PAUL MICHAEL HAMRICK did give a check in the amount of $3,000 to Clayton "Lanny" Young with intent to hinder, delay, and prevent communication to the Federal Bureau of Investigation by Clayton "Lanny" Young of information concerning federal offenses related to $6,000 that Clayton "Lanny" Young gave to PAUL MICHAEL HAMRICK on September 25, 2000.

All done in violation of Title 18, United States Code, Section 1512(b)(3).

COUNT SIXTEEN
(Obstruction of Justice,
18 U.S.C. §§ 2 & 1512(b)(3))

67. On or about June 5, 2001, in the Middle District of Alabama, the defendant

DON EUGENE SIEGELMAN,

aided and abetted by others known and unknown to the Grand Jury, did knowingly corruptly persuade and attempt to knowingly corruptly persuade another person, and did engage in misleading conduct toward another person, with intent to hinder, delay, and prevent the communication to a law enforcement officer of the United States of information relating to the commission of a federal offense and a possible commission of a federal offense, to wit, defendant DON EUGENE SIEGELMAN did cause Nicholas D. Bailey to write a check in the amount of $10,503.39 to Clayton "Lanny" Young with the notation "repayment of loan plus interest" with

intent to hinder, delay, and prevent communication to the Federal Bureau of Investigation by Clayton "Lanny" Young and Nicholas D. Bailey of information concerning federal offenses related to $9,200 that Clayton "Lanny" Young gave to DON EUGENE SIEGELMAN on January 20, 2000.

All done in violation of Title 18, United States Code, Sections 2 & 1512(b)(3).

COUNT SEVENTEEN
(Obstruction of Justice,
18 U.S.C. §§ 2 & 1512(b)(3))

68. On or about October 16, 2001, in the Middle District of Alabama, the defendant

DON EUGENE SIEGELMAN,

aided and abetted by others known and unknown to the Grand Jury, did knowingly corruptly persuade and attempt to knowingly corruptly persuade another person, and did engage in misleading conduct toward another person, with intent to hinder, delay, and prevent the communication to a law enforcement officer of the United States of information relating to the commission of a federal offense and a possible commission of a federal offense, to wit, defendant DON EUGENE SIEGELMAN did cause Nicholas D. Bailey to provide him with a check in the amount of $2,973.35 with the notation "balance due on m/c" with intent to hinder, delay, and prevent communication to the Federal Bureau of Investigation by Clayton "Lanny" Young and Nicholas D. Bailey, and by counsel for Nicholas D. Bailey, of information concerning federal offenses related to $9,200 that Clayton "Lanny" Young gave to DON EUGENE SIEGELMAN on January 20, 2000.

All done in violation of Title 18, United States Code, Sections 2 and 1512(b)(3).

COUNTS EIGHTEEN THROUGH THIRTY-THREE
(Honest Services Mail Fraud,
18 U.S.C. §§ 2, 1341, & 1346)

The Scheme

69. From on or about October 15, 1998, and continuing through on or about January 20, 2003, in the Middle District of Alabama and elsewhere, defendant

DON EUGENE SIEGELMAN

aided and abetted by defendant

GARY MACK ROBERTS

and others known and unknown to the Grand Jury, knowingly and willfully devised and intended to devise a scheme and artifice to defraud and deprive the State of Alabama of its right to the honest and faithful services of DON EUGENE SIEGELMAN as Governor of the State of Alabama and of GARY MACK ROBERTS as Director of the Alabama Department of Transportation (hereafter sometimes "ALDOT"), performed free from deceit, favoritism, bias, self-enrichment, self-dealing, and conflict of interest concerning ALDOT.

70. The Grand Jury realleges and incorporates Paragraphs 44-45 of this Indictment, the Purpose of the Scheme and the Manner and Means of the Scheme, as though fully set forth in this Count.

Execution of the Scheme

71. On or about the date of each Count listed below, in the Middle District of Alabama and elsewhere, defendant DON EUGENE SIEGELMAN, aided and abetted by GARY MACK ROBERTS and others known and unknown to the Grand Jury, for the purpose of executing and attempting to execute the above-described scheme and artifice to defraud and deprive, placed and

caused to be placed in a post office and an authorized depository for mail, to be sent and delivered by the United States Postal Service, the following matters and things:

COUNT	Date	Description
EIGHTEEN	5/23/01	Agreement allocating $10,153,100 from ALDOT in Montgomery, AL, to Tuscaloosa County Commission, Tuscaloosa, AL
NINETEEN	6/29/01	Agreement allocating $4,397,800 from ALDOT in Montgomery, AL, to Tuscaloosa County Commission, Tuscaloosa, AL
TWENTY	9/19/01	Revised Agreement allocating $13,392,600 from ALDOT in Montgomery, AL, to Tuscaloosa County Commission, Tuscaloosa, AL
TWENTY-ONE	12/21/00	A check in the amount of $36,300 from a contractor in Huntsville, AL, to Rainline Corporation in Montgomery, AL
TWENTY-TWO	12/30/00	A check in the amount of $35,464 from a contractor in Saraland, AL, to Rainline Corporation in Montgomery, AL
TWENTY-THREE	5/4/01	A check in the amount of $36,300 from a contractor in Saraland, AL, to Rainline Corporation in Montgomery, AL
TWENTY-FOUR	5/14/01	A check in the amount of $99,429 from a contractor in Ozark, AL, to Rainline Corporation in Montgomery, AL
TWENTY-FIVE	6/25/01	A check in the amount of $36,300 a contrator in Pascagoula, MS, to Rainline Corporation in Montgomery, AL.
TWENTY-SIX	6/26/01	A check in the amount of $38,500 from a contractor in Huntsville, AL, to Rainline Corporation in Montgomery, AL
TWENTY-SEVEN	9/25/01	A check in the amount of $36,300 from a contractor in Huntsville, AL, to Rainline Corporation in Montgomery, AL
TWENTY-EIGHT	9/26/01	A check in the amount of $36,300 from a contractor in Pascagoula, MS, to Rainline Corporation in Montgomery, AL
TWENTY-NINE	12/18/01	A check in the amount of $38,500 from a contractor in Enterprise, AL, to Rainline Corporation in Montgomery, AL

THIRTY	1/3/02	A check in the amount of $38,500 from a contractor in Saraland, AL, to Rainline Corporation in Montgomery, AL
THIRTY-ONE	2/19/02	A check in the amount of $38,500 from a contractor in Enterprise, AL, to Rainline Corporation in Montgomery, AL
THIRTY-TWO	8/21/02	A check in the amount of $64,922.60 from a contractor in Saraland, AL, to Rainline Corporation in Montgomery, AL
THIRTY-THREE	9/9/02	A check in the amount of $50,000 from a contractor in Theodore, AL, to Rainline Corporation in Montgomery, AL

All done in violation of Title 18, United States Code, Sections 2, 1341, & 1346.

COUNT THIRTY-FOUR
(Extortion under Color of Official Right and by Fear of Economic Harm, 18 U.S.C. § 1951)

72. In or about September 2002, in the Middle District of Alabama and elsewhere, defendant

DON EUGENE SIEGELMAN

while the Governor of the State of Alabama, did knowingly obstruct, delay, affect, and attempt to obstruct, delay, and affect, commerce and the movement of articles and commodities in commerce by extortion, as those terms are defined in Title 18, United States Code, Section 1951; that is, defendant DON EUGENE SIEGELMAN, unlawfully demanded $250,000 from Forrest "Mac" Marcato, induced by wrongful use of fear of economic harm and under color of official right in that defendant DON EUGENE SIEGELMAN demanded $250,000 from Forrest "Mac" Marcato upon a threat to use official action and official influence as the Governor of the State of Alabama to cause economic harm to Forrest "Mac" Marcato's business interests involving the Alabama Department of Transportation if Forrest "Mac" Marcato did not consent to pay.

All done in violation of Title 18, United States Code, Section 1951.

A TRUE BILL:

Foreperson

NOEL L. HILLMAN
Chief, Public Integrity Section
Criminal Division
United States Department of Justice

LOUIS V. FRANKLIN, SR.
Acting United States Attorney

Richard C. Pilger
Trial Attorney
Public Integrity Section

Stephen P. Feaga
Assistant United States Attorney

J.B. Perrine
Assistant United States Attorney

Joseph L. Fitzpatrick, Jr.
Special Assistant United States Attorney
Middle District of Alabama

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

UNITED STATES OF AMERICA	)	
	)	
v.	)	Case No. 2:05-cr-119-MEF
	)	(WO)
RICHARD SCRUSHY	)	
GARY MACK ROBERTS	)	

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

Defendants Scrushy and Roberts have filed motions to sever pursuant to Federal Rules of Criminal Procedure 8(b) and 14. (Docs. # 69 & 70). A Rule 8(b) claim questions the propriety of joining two or more defendants in a single indictment in the first instance. A Rule 14 claim assumes that the initial joinder of the defendants was proper but challenges their joint trial as unduly prejudicial. *See United States v. Bryan*, 843 F.2d 1339, 1342 (11th Cir. 1988). For the reasons that follow, the Court concludes that neither Scrushy nor Roberts were improperly joined under Rule 8(b), nor is their joinder unduly prejudicial under Rule 14. Thus, it is ORDERED that Defendant Scrushy and Roberts' Motions for Severance (Docs. # 69 & 70) are DENIED.

The court will first describe the counts of the second superseding indictment and then explain its conclusions that there is no improper joinder in this case.

II. THE INDICTMENT[1]

The indictment in this case names Don Eugene Siegelman as a defendant and alleges that during relevant periods of time, he held various public offices in the executive branch of the government of the State of Alabama.

> [F]rom on or about January 16, 1995, to on or about January 18, 1999, [Siegelman was] the Lieutenant Governor of the State of Alabama, and while Lieutenant Governor was also, from on or about March 31, 1996, to on or about November 3, 1998, a candidate for Governor of the State of Alabama, and was, from on or about January 18, 1999, to on or about January 20, 2003, the Governor of the State of Alabama.

(Second Superseding Indictment, ¶ 1.c).

The indictment also names as defendants Paul Michael Hamrick, Gary Mack Roberts and Richard Scrushy. During the relevant time periods, Defendant Hamrick was employed in the Lieutenant Governor's Office of the State of Alabama and later as Chief of Staff to the Governor. Defendant Roberts was appointed by Siegelman as the Director of the Alabama Department of Transportation.[2] Defendant Scrushy was the Chairman and Chief Executive Officer of Healthsouth Corporation which was regulated by the State of Alabama Certificate of Need Review Board ("CON Board").

Count One of the indictment alleges that Defendants Siegelman and Hamrick engaged

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[1] Unless otherwise specifically noted, all references to the indictment are to the second superseding indictment in this case.

[2] Prior to his appointment, Roberts was employed by a business which had substantial dealings with the Alabama Department of Transportation.

in a RICO conspiracy in violation of 18 U.S.C. § 1962(d).[3] With respect to the "enterprise" requirement of the RICO statutes, the indictment alleges that the "enterprise" is the "Executive Department of the State of Alabama . . . whose members functioned as a continuing unit for a common purpose of achieving the objectives of the enterprise." The alleged broad purpose of the racketeering conspiracy alleged in Count One was "to give or withhold official governmental acts and influence . . . in exchange for money and property to which the participants in the conspiracy were not entitled," and "to deprive the State of Alabama of its right to the honest services of its public officials and employees in exchange for money and property" and "to conceal and otherwise protect the conspiracy and its participants from detection and prosecution." (Indict. at ¶ 5).

Count Two of the indictment is a substantive RICO count charging a violation of 18 U.S.C. § 1962(c) which provides as follows:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Count Two of the indictment alleges that Defendants Siegelman and Hamrick "unlawfully and knowingly conducted and participated . . . in the conduct of the affairs of the enterprise through a pattern of racketeering activity" as further set out in the indictment. Count Two sets forth a number of separate racketeering acts, and the Court will describe the

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[3] This section of the statute provides that it is "unlawful for any person to conspire to violate any of the provisions" of the first three subsections of 18 U.S.C. § 1962.

two that are relevant to this opinion.

Count Two alleges that Racketeering Act 1 consisted of Siegelman, Scrushy[4] and others using various means[5] to engage in a scheme through which a representative[6] of HealthSouth would obtain a position on Alabama's CON Board in exchange for Scrushy's payment to Siegelman of the sum of $500,000.

Count Two alleges that Racketeering Act 5 consisted of Siegelman and others, including Roberts,[7] using various illegal means including bribery, extortion, mail fraud, and money laundering to obtain money and property to which they were not entitled in exchange for the use of official action and influence regarding the work and business of the Alabama Department of Transportation.[8]

Counts Three and Four of the indictment, in which Siegelman and Scrushy are named, charges them with federal funds bribery and aiding and abetting each other "in connection

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[4] Scrushy is not named as a defendant in count two of the indictment.

[5] Those means are extortion under color of official right in violation of 18 U.S.C. § 1951; bribery in violation of ALA. CODE 13A-10-61(a)(2); honest services mail fraud in violation of 18 U.S.C. §§ 2, 1341 and 1346; and money laundering in violation of 18 U.S.C. §§ 2 and 1956(a)(1)(B)(i).

[6] Scrushy was appointed to the CON Board in 1999; another HealthSouth employee was appointed in 2001.

[7] Roberts is not named as a defendant in Count Two. However, the indictment does allege in Count Two, ¶ 43 that Roberts aided and abetted Siegelman to deprive the State of Alabama of the honest services of Siegelman as Governor and Roberts as Director of the Alabama Department of Transportation.

[8] Racketeering Acts 2 through 4 do not involve Scrushy or Roberts but do allege similar acts of conducting the "enterprise" for illegal activities.

with the appointment of Richard Scrushy to the CON Board," all in violation of 18 U.S.C. §§ 2 & 666(a)(1)(B). (Indict. at ¶¶ 49-51).

Count Five, in which Siegelman and Scrushy are named, charges them with conspiracy to "defraud and deprive the State of Alabama of its right to the honest and faithful services" of Siegelman as Governor and Scrushy as a member of the CON board, in violation of 18 U.S.C. § 371. (Indict. at ¶ 52-66)

Counts Six through Nine, in which Siegelman and Scrushy are named, charge them with aiding and abetting each other to commit honest services mail fraud as part of their scheme to defraud and deprive the State of Alabama of its right to honest and faithful services of Siegelman and Scrushy in connection with the CON board, in violation of 18 U.S.C. §§ 2, 1341 & 1346. (Indict. at ¶ 57-60).

Counts Ten through Twelve, in which Siegelman and Hamrick are named, charge them with aiding and abetting each other to commit honest services mail fraud as part of their scheme to defraud and deprive the State of Alabama of its right to honest and faithful services from themselves as public officials in connection with governmental regulation of specified activities, allocation of bond funding and construction contracting, in violation of 18 U.S.C. §§ 2, 1341 & 1346. (Indict. at ¶ 61- 63).

Counts Thirteen and Fourteen, in which Siegelman and Hamrick are named, charge them with aiding and abetting each other to commit honest services mail fraud concerning performance bonds on a construction contract as part of their scheme to defraud and deprive the State of Alabama of its right to honest and faithful services from themselves as public

officials, in violation of 18 U.S.C. §§ 2, 1343 & 1346. (Indict. at ¶ 64- 65).

Count Fifteen, in which Hamrick is charged, and Counts Sixteen and Seventeen, in which Siegelman is named, charges them with obstruction of justice, in violation of 18 U.S.C. §§ 1512(b)(3) & 2. (Indict. at ¶ 64- 68).

Counts Eighteen through Thirty-Three, in which Siegelman and Roberts are named, charge them with aiding and abetting each other to commit honest services mail fraud as part of their scheme to defraud and deprive the State of Alabama of its right to honest and faithful services from themselves as public officials in connection with functions of the Alabama Department of Transportation, in violation of 18 U.S.C. §§ 2, 1341 & 1346. (Indict. at ¶ 69-71).

Finally, Count Thirty-Four, in which Siegelman is named, charges him with extortion under color of official right and by fear of economic harm, in violation of 18 U.S.C. § 1951. (Indict. at ¶ 72).

III. DISCUSSION

A. Joinder under Rule 8(b)

Federal Rule of Criminal Procedure 8(b) is a pleading rule. *United States v. Morales*, 868 F.2d 1562, 1567-68 (11th Cir.1989). The rule permits two or more defendants to be charged in the same indictment if "they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." FED.R.CRIM.P. 8(b). *See also United States v. Blankenship*, 382 F.3d 1110, 1120 (11th Cir. 2004); *United States v. Liss*, 265 F.3d 1220, 1227 (11th Cir. 2001); *United States v. Andrews*,

765 F.2d 1491, 1496 (11th Cir. 1985). The rule is "to be construed liberally in favor of joinder." *Bryan*, 843 F.2d at 1342. In analyzing a Rule 8(b) claim, the court looks only to the indictment in order to determine if the initial joinder was proper. *Liss*, 265 F.3d at 1228; *Morales*, 868 F.2d at 1567; *Andrews*, 765 F.2d at 1496.

The Defendants argue that because they are not charged in either RICO count or in "an overall conspiracy . . . the multiple criminal acts alleged in the indictment are not part of the 'same act or transaction, or in the same series of acts or transactions' as required by Rule 8(b) . . ." (Scrushy Mot. For Severance (Doc. # 69) at 12). Rule 8(b) is not so limiting as the Defendants argue.[9] "[I]n order to establish that the [defendants] have engaged in the 'same series of acts or transactions' under Rule 8(b) the government must demonstrate that the acts alleged are united by some substantial identity of facts and/or participants." *United States v. Wilson*, 894 F.2d 1245, 1253 (11th Cir. 1990) (quoting *Morales*, 868 F.2d at 1569). "[E]ach participant need not have been involved in every phase of the venture, however, and each participant need not know each of the other participants' roles and identities." *Wilson*, 894 F.2d at 1253 (citing *Andrews*, 765 F.2d at 1496). *See also United States v. Holloway*, 971 F.2d 675, 679 (11th Cir. 1992).

The Defendants rely on *United States v. Ellis*, 709 F.2d 688 (11th Cir. 1983) in which the court found joinder improper.

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[9] The Defendants rely on broad statements of the law in several cases (which have effectively been overruled on other grounds by *United States v. Lane*, 474 U.S. 438 (1986)) including *United States v. Levine*, 546 F.2d 658 (5th Cir. 1977), *United States v. Bova*, 493 F.2d 33 (5th Cir. 1974), and *United States v. Marionneaux*, 514 F.2d 1244 (5th Cir. 1975).

> A short-handed rendition of the Government's theory is that Dixie Pipe devised a scheme to defraud the citizens of Bullock County, Alabama, of honest public service within the intendment of the mail fraud statute (R.Vol. II, pp. 131- 32) and that appellants knowingly entered a conspiracy to effectuate such scheme. To paraphrase Judge Fay's opinion for the Court in *United States v. Nettles*, 570 F.2d 547, 551 (5th Cir. 1978), if the evidence showed one large conspiracy with Dixie Pipe as the hub, the three appellants as the spokes, and some interaction between the bribes to provide the rim, then the defendants could have been joined in one indictment. However, "for a wheel conspiracy to exist, those people who form the wheel's spokes must have been aware and must do something in furtherance of some single, illegal enterprise. If not, there is no rim to enclose the spokes." *United States v. Levine*, 546 F.2d 658, 663 (5th Cir.1977).

Ellis, 709 F.2d at 689 - 690 (footnote omitted).

Albeit in the civil context, the First Circuit's analysis shows that reliance on *Ellis*' metaphor is misplaced.

> A defendant who does not know the "entire conspiratorial sweep" is nevertheless jointly and severally liable, in the civil context, for all acts in furtherance of the conspiracy. Using a common metaphor, one may say . . . the Aetna appraisers, were at the hub of the overall RICO conspiracy, providing the central point through which all the defendant body shops were connected.

Aetna Cas. Sur. Co. v. P & B Autobody, 43 F.3d 1546, 1562 (1st Cir. 1994). In the instant case, assuming the allegations in the indictment are true, Siegelman is was at the hub of the overall RICO conspiracy, providing the central point through which all of the participants sought to exert influence over and deprive the citizens of Alabama of the honest services of its executive department. Scrushy and Roberts acted in a manner which furthered the enterprise. Consequently, the Court concludes that the alleged offenses are factually similar, involving corruption and conspiracy in the Governor's office, and fully satisfy Rule 8(b)'s requirements.

The linchpin of the Defendants' argument to the contrary is based on their lack of knowledge about the enterprise that forms the basis of the RICO charges or the overall RICO scheme. They argue that they are improperly joined because the indictment contains no allegation that either Scrushy or Roberts knew about the RICO conspiracy or the other Defendants' schemes.[10] However, the actions of both Scrushy and Roberts form the basis of two of the predicate racketeering acts alleged in the RICO conspiracy. In addition, if the allegations set forth in the indictment are true, Siegelman is the common thread that links both Scrushy and Roberts to the overall scheme to deprive the citizens of Alabama of the honest services of its executive department.

Thus, the ultimate issue becomes whether, as a matter of law, Scrushy and Roberts must have had knowledge of the entire RICO enterprise or whether it is sufficient, for Rule 8(b) purposes, that they knew about and played a part in the overarching scheme. "[I]n proving the existence of a single RICO conspiracy, the government does not need to prove that each conspirator agreed with every other conspirator, knew his fellow conspirators, was aware of all of the details of the conspiracy, or contemplated participating in the same related crime." *United States v. Castro*, 89 F.3d 1443, (11th Cir. 1996). In *Bryan*, the court held that it is permissible to allege "one overarching RICO conspiracy and then list[] other separate charges, including specific conspiracies that arose from and [make] up that RICO scheme."

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[10] The government readily admits that Scrushy and Roberts are not named in the RICO conspiracy count or the RICO substantive count precisely because they had no knowledge of the RICO conspiracy.

Bryan, 843 F.2d at 1342. Rule 8(b) does not require that Scrushy or Roberts be charged in each count, or even in the RICO count. *Id.* In this case, a jury reasonably could conclude that the Defendants agreed on a single objective – to devise a scheme to deprive the State of Alabama of honest and fair services of its officials.

The Defendants seek to distance themselves from the overall scheme by emphasizing their limited roles and involvement only with Defendant Siegelman. For example, Scrushy argues that all of his charges relate to and arise out of the single transaction involving membership on and representation at the CON Board. In *United States v. Liss*, the defendants were physicians charged with conspiring with a laboratory to defraud the United States by receiving kickbacks for referring Medicare patients to the laboratory. The physicians did not know of each other and did not meet until they were indicted. The court held that their joinder was proper because they were both named in a conspiracy with the laboratory. 265 F.3d at 1227. In this case, both Scrushy and Roberts are charged, albeit in different counts, with conspiring with Siegelman to deprive the State of Alabama of the honest and fair services of its state officials. "Joinder under Rule 8(b) . . . is proper where, as here, an indictment charges multiple defendants with participation in a single conspiracy and also charges some but not all of the defendants with substantive counts arising out of the conspiracy." *Liss*, 265 F.3d at 1227. *See also United States v. Alvarez*, 755 F.2d 857 (11th Cir. 1985).

In *United States v. Andrews*, the court looked to the character of the acts, and knowledge of a common plan. 765 F.2d at 1496. "[E]ach participant need not have been

involved in every phase of the venture, . . . , nor need he have known the identity and role of each of the other participants. . . . Repetition of the same mode of operation may also provide a strong indiction of a larger scheme behind numerous individual offenses." *Id.* at 1496-97 (internal citations omitted). In this case, the indictment charges that each Defendant knew and participated with the main actor, Defendant Siegelman; they shared a general objective – to deprive the State of Alabama of the honest and fair services of the Governor; and they shared a common mode of operation of exchanging money and property to give or withhold official governmental influence. *See generally, Andrews*, 765 F.2d at 1497. The Court thus concludes that joinder under Rule 8(b) is proper.

B. Severance under Rule 14

The general rule in this Circuit is that defendants who are jointly indicted should be tried together. *United States v. Baker*, 432 F.3d 1189, 1236 (11th Cir. 2005); *Morales*, 868 F.2d at 1571. This rule has been held to be particularly applicable to conspiracy cases. *Baker,* 432 F.3d at 1236. *See also United States v. Castillo-Valencia*, 917 F.2d 494, 498 (11th Cir. 1990); *Alvarez*, 755 F.2d at 857.

However, Defendants argue that they are entitled to severance under Federal Rule of Criminal Procedure 14 because they will be subjected to "compelling prejudice" if they are tried with the other Defendants. Federal Rule of Criminal Procedure 14(a) provides as follows:

> If the joinder of offenses or defendants in an indictment, an information, or consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or

provide any other relief that justice requires.

When deciding whether to sever based on Rule 14, the court "must balance the right of the defendant to a fair trial against the public's interest in efficient and economic administration of justice." *Baker*, 432 F.3d at 1236; *Alvarez*, 755 F.2d at 857.

"[W]hen defendants properly have been joined under Rule 8(b), a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent a jury from making a reliable judgment about guilt or innocence." *Zafiro*, 506 U.S. at 539; *Blankenship*, 382 F.3d at1123. A severance becomes necessary if, without a severance, a defendant would be unable to receive a fair trial and he would suffer "compelling prejudice against which a trial court could offer no protection." *United States v. Freyre-Lazaro*, 3 F.3d 1496, 1501 (11th Cir. 1993) (quoting *United States v. Magdaniel-Mora*, 746 F.2d 715, 718 (11th Cir. 1984)). *See also United States v. Morales*, 868 F.2d 1562.

To justify severance, a defendant must demonstrate "'specific and compelling prejudice' to the conduct of his or her defense . . . resulting in 'fundamental unfairness.'" *Baker*, 432 F.3d at 1236 (quoting *United States v. Knowles*, 66 F.3d 1146, 1159 (11th Cir. 1995)). *See also United States v. Meester*, 762 F.2d 867, 883 (11th Cir. 1985). The standard for determining compelling prejudice is whether the jury could compare and evaluate the independent evidence against each defendant on each count and reach individual verdicts as to each count. *Wilson*, 894 F.2d at 1253. *See also United States v. Pirolli*, 742 F.2d 1382, 1386 (11th Cir. 1984); *United States v. Silien*, 825 F.2d 320, 323 (11th Cir. 1987). A

defendant does not incur compelling prejudice merely because he may be acquitted if he is tried separately or because much of the trial evidence is applicable to his co-defendants.[11] *Baker*, 432 F.3d at 1236; *Alvarez*, 755 F.2d at 857. *See also United States v. Kabbaby*, 672 F.2d 857, 861-62 (11th Cir. 1982) (per curiam). A severance "is justified only if prejudice flowing from a joint trial is clearly beyond the curative powers of a cautionary instruction." *Baker*, 432 F.3d at 1237; *Alvarez*, 755 F.2d at 857.

The Defendants concede that their burden is daunting. At this juncture, the Defendants do not raise a *Bruton*[12] issue or assert inconsistent antagonistic defenses. In this case, the court finds that there is no reasonable possibility that the jury will not be able to keep track of the evidence as it pertains to each Defendant. *See Bryan*, 843 F.2d at 1341. There are only four Defendants. The charges against each Defendant contain discreet, factually distinct and relatively uncomplicated offenses. Key witnesses against the Defendants will be different. "[T]here [i]s relatively little potential for jury confusion resulting from evidentiary 'spill-over' or 'guilt by association.'" *Id.* Moreover, the Court can ameliorate any possible prejudice by giving contemporaneous cautionary instructions as well as appropriate instructions at the conclusion of the trial. Consequently, the Court

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[11] The mere fact that there may be some prejudice to a defendant is insufficient to justify severance because, as the courts have recognized, "[a] joint trial is necessarily going to involve some degree of prejudice." *Morales*, 868 F.2d at 1572.

[12] *See Bruton v. United States*, 391 U.S. 123 (1968). In *Bruton*, the Court held that the Sixth Amendment was violated by the introduction at a joint trial of the confession of one defendant implicating another defendant when the confessing defendant did not testify and was not subject to cross-examination.

concludes that the Defendants have failed to demonstrate that they would suffer specific and compelling prejudice.

Finally, the Defendants question the abilities of any potential jurors in this cases, as non-legal lay people, to properly weigh the evidence as well as properly follow the court's instructions at the conclusion of the trial. The Court does not share the Defendants' concerns about the abilities of jurors who in this district are drawn from the rolls of those Alabama citizens registered to vote. "Juries are presumed to follow their instructions." *Zafiro*, 506 U.S. at 540 *quoting Richardson v. Marsh*, 481 U.S. 200, 211 (1987). In this Circuit, "the strong presumption is that jurors are able to compartmentalize evidence by respecting limiting instructions specifying the defendants against whom the evidence may be considered." *Blankenship*, 382 F.3d at 1123.

CONCLUSION

Accordingly, for the reasons as stated, it is

ORDERED that the Defendants' motions to sever (Docs. # 69 & 70) be and are hereby DENIED.

Done this the 2nd day of February, 2006.

/s/ Mark E. Fuller
CHIEF UNITED STATES DISTRICT JUDGE

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

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	CASE NO.: 2:05-cr-119-MEF
	)	(WO-Not Intended for Publication)
DON EUGENE SIEGELMAN and	)	
RICHARD M. SCRUSHY	)	

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the motions for judgments of acquittal made by Defendants Don Eugene Siegelman ("Siegelman") and Richard M. Scrushy ("Scrushy") pursuant to Federal Rule of Criminal Procedure 29.[1] The Court has carefully considered the arguments in support of and in opposition to these motions. For the reasons stated herein, Defendants' motions for judgment of acquittal are due to be **DENIED**.[2]

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[1] Both Siegelman and Scrushy made oral motions for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(a) before the case was submitted to the jury. Scrushy also made a written motion for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(a) before the case was submitted to the jury. *See* Doc. # 413. Pursuant to the Federal Rule of Criminal Procedure 29(b), the Court reserved decision on the motions. After the jury's verdict, both Siegelman and Scrushy filed written motions for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(c). *See* Doc. # 453, Doc. # 454, & Doc. # 455.

[2] This Memorandum Opinion and Order is not intended to address any pending motions other than the motions seeking judgment of acquittal.

BACKGROUND

The indictment[3] in this case named Siegelman as a defendant and alleged that during relevant periods of time, he held various public offices in the executive branch of the government of the State of Alabama.

> [F]rom on or about January 16, 1995, to on or about January 18, 1999, [Siegelman was] the Lieutenant Governor of the State of Alabama, and while Lieutenant Governor was also, from on or about March 31, 1996, to on or about November 3, 1998, a candidate for Governor of the State of Alabama, and was, from on or about January 18, 1999, to on or about January 20, 2003, the Governor of the State of Alabama.

(Second Superseding Indictment at ¶ 1.c).

The indictment also named as defendants Paul Michael Hamrick ("Hamrick"), Gary Mack Roberts ("Roberts"), and Scrushy. During the relevant time periods, Hamrick was employed in the Lieutenant Governor's Office of the State of Alabama and later as Chief of Staff to the Governor. Siegelman appointed Roberts to serve as the Director of the Alabama Department of Transportation.[4] Scrushy was the Chairman and Chief Executive Officer of Healthsouth Corporation, an entity which was regulated by the State of Alabama Certificate of Need Review Board ("CON Board").

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[3] Unless otherwise specifically noted, all references to the indictment are to the second superseding indictment in this case.

[4] Prior to his appointment, Roberts was employed by a business which had substantial dealings with the Alabama Department of Transportation.

Count One of the indictment alleged that Siegelman and Hamrick engaged in a RICO conspiracy in violation of 18 U.S.C. § 1962(d).[5] With respect to the "enterprise" requirement of the RICO statutes, the indictment alleged that the "enterprise" is the "Executive Department of the State of Alabama . . . whose members functioned as a continuing unit for a common purpose of achieving the objectives of the enterprise." The alleged broad purpose of the racketeering conspiracy alleged in Count One was "to give or withhold official governmental acts and influence . . . in exchange for money and property to which the participants in the conspiracy were not entitled," and "to deprive the State of Alabama of its right to the honest services of its public officials and employees in exchange for money and property" and "to conceal and otherwise protect the conspiracy and its participants from detection and prosecution." (Second Superseding Indict. at ¶ 5).

Count Two of the indictment alleged a substantive RICO count charging a violation of 18 U.S.C. § 1962(c) which provides as follows:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Count Two of the indictment alleged that Defendants Siegelman and Hamrick "unlawfully

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[5] This section of the statute provides that it is "unlawful for any person to conspire to violate any of the provisions" of the first three subsections of 18 U.S.C. § 1962.

and knowingly conducted and participated . . . in the conduct of the affairs of the enterprise through a pattern of racketeering activity" as further set out in the indictment. Count Two set forth a number of separate racketeering acts.

Counts Three and Four of the indictment, in which Siegelman and Scrushy were originally named, charged them with federal funds bribery and aiding and abetting each other "in connection with the appointment of Richard Scrushy to the CON Board," all in violation of 18 U.S.C. §§ 2 & 666(a)(1)(B). (Second Superseding Indict. at ¶¶ 49-51).

Count Five, in which Siegelman and Scrushy were named, charged them with conspiracy to "defraud and deprive the State of Alabama of its right to the honest and faithful services" of Siegelman as Governor and Scrushy as a member of the CON board, in violation of 18 U.S.C. § 371. (Second Superseding Indict. at ¶ 52-66)

Counts Six through Nine, in which Siegelman and Scrushy were named, charged them with aiding and abetting each other to commit honest services mail fraud as part of their scheme to defraud and deprive the State of Alabama of its right to honest services of Siegelman and Scrushy in connection with the CON board, in violation of 18 U.S.C. §§ 2, 1341, & 1346. (Second Superseding Indict. at ¶ 57-60).

Counts Ten through Twelve, in which Siegelman and Hamrick were named, charged them with aiding and abetting each other to commit honest services mail fraud as part of their scheme to defraud and deprive the State of Alabama of its right to honest services from

themselves as public officials in connection with governmental regulation of specified activities, allocation of bond funding and construction contracting, in violation of 18 U.S.C. §§ 2, 1341, & 1346. (Second Superseding Indict. at ¶ 61- 63).

Counts Thirteen and Fourteen, in which Siegelman and Hamrick were named, charged them with aiding and abetting each other to commit honest services mail fraud concerning performance bonds on a construction contract as part of their scheme to defraud and deprive the State of Alabama of its right to honest services from themselves as public officials, in violation of 18 U.S.C. §§ 2, 1343 & 1346. (Second Superseding Indict. at ¶ 64- 65).

Count Fifteen, in which Hamrick was charged, and Counts Sixteen and Seventeen, in which Siegelman was named, charged them with obstruction of justice, in violation of 18 U.S.C. §§ 1512(b)(3) & 2. (Indict. at ¶ 64- 68).

Counts Eighteen through Thirty-Three, in which Siegelman and Roberts were named, charged them with aiding and abetting each other to commit honest services mail fraud as part of their scheme to defraud and deprive the State of Alabama of its right to honest and faithful services from themselves as public officials in connection with functions of the Alabama Department of Transportation, in violation of 18 U.S.C. §§ 2, 1341, & 1346. (Second Superseding Indict. at ¶ 69-71).

Finally, Count Thirty-Four, in which Siegelman was named, charged him with extortion under color of official right and by fear of economic harm, in violation of 18 U.S.C.

§ 1951. (Second Superseding Indict. at ¶ 72).

During the trial, the Court threw out Count Three against Scrushy and Count Four against Siegelman because it found that they were multiplicitous. All other counts were submitted to the jury. On June 29, 2006, the jury returned unanimous verdicts. The jury found Defendants Hamrick and Roberts not guilty on all counts. The jury found Scrushy guilty on Counts Four, Five, Six, Seven, Eight, and Nine. The jury found Siegelman guilty on Counts Three, Five, Six, Seven, Eight, Nine, and Seventeen. The jury found Siegelman not guilty on Counts One, Two, Ten, Eleven, Twelve, Thirteen, Fourteen, Sixteen, Eighteen, Nineteen, Twenty, Twenty-One, Twenty-Two, Twenty-Three, Twenty-Four, Twenty-Five, Twenty-Six, Twenty-Seven, Twenty-Eight, Twenty-Nine, Thirty, Thirty-One, Thirty-Two, Thirty-Three, and Thirty-Four.

After receiving the jury's verdicts, the Court set deadlines for the submission of briefs on post-trial motions. Both Scrushy and Siegelman filed written motions for judgment of acquittal which the Government opposed in writing. All pending motions for judgment of acquittal are now fully briefed and ready for determination.

DISCUSSION

The test in considering a motion for judgment of acquittal is whether, viewing all evidence in the light most favorable to the Government and drawing all reasonable inferences from the evidence and credibility choices in favor of the jury's verdict, a reasonable trier of

fact could find that evidence established guilt beyond a reasonable doubt. *See United States v. O'Keefe*, 825 F.2d 314 (11th Cir. 1987). *Accord, United States v. Grigsby,* 111 F.3d 806, 833 (11th Cir. 1997). Put another way, to challenge a jury's guilty verdict on the grounds of insufficiency of the evidence, it must be established that "no reasonable jury could have found Defendant guilty beyond a reasonable doubt on the evidence presented." *United States v. Ruiz*, 253 F.3d 634, 639 (11th Cir. 2001). The evidence may be sufficient even when it does not "exclude every reasonable hypothesis of innocence or [is not] wholly inconsistent with every conclusion except that of guilt," because a "jury is free to choose among reasonable constructions of the evidence." *United States v. Peters,* 403 F.3d 1263, 1268 (11th Cir. 2005).

Siegelman and Scrushy have presented a variety of arguments in their motions for judgment of acquittal. The Court has carefully considered all of them, as well as the responses to those arguments made by the Government. The Court finds that during the course of this very lengthy trial, the Government presented substantial evidence upon which a reasonable trier of fact could conclude that Siegelman and Scrushy engaged in the conduct for which they were convicted. Viewing the evidence presented in a light most favorable to the Government, the Court holds that a reasonable jury could find the evidence established the charged offenses. This is true both when the Court considers the evidence submitted in the Government's case in chief for the purpose of addressing the motions for judgment of

acquittal made at the close of the Government's case pursuant to Federal Rule of Criminal Procedure 29(a) and when the Court considers all evidence submitted at trial for the purpose of addressing the motions for judgment of acquittal made after trial pursuant to Federal Rule of Criminal Procedure 29(c). Thus, having applied that test to the evidence presented in this case, the Court has determined that the evidence was sufficient to sustain each Defendant's conviction on each count in the Second Superceding Indictment. Accordingly, this Court finds that Defendants' arguments are without merit and concludes that Defendants' requests for acquittal are due to be DENIED.

CONCLUSION

For the reasons stated above, the all pending motions for judgment of acquittal filed by either Defendant Don Eugene Siegelman or Richard M. Scrushy are DENIED.

DONE this 2nd day of October, 2006.

/s/ Mark E. Fuller
CHIEF UNITED STATES DISTRICT JUDGE

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

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	CASE NO.: 2:05-cr-119-MEF
	)	
DON EUGENE SIEGELMAN and RICHARD M. SCRUSHY	)	(WO)
	)	

MEMORANDUM OPINION AND ORDER

This cause is before the Court on matters relating to Defendants Don Eugene Siegelman's and Richard M. Scrushy's Motion for New Trial Pursuant to Rule 33(a) of the Federal Rules of Criminal Procedure (Doc. # 467). In this joint motion, Defendants Don Eugene Siegelman ("Siegelman") and Richard M. Scrushy ("Scrushy") contend that their Sixth Amendment right to trial by an impartial jury has been denied based on a variety of arguments relating to the conduct of the jurors during the lengthy[1] and high-profile[2] trial.[3] Consequently, they seek a new trial. In the alternative, they seek further information about

[1] The presentation of the case to the jury began on the morning of May 1, 2006. The jury's verdict was delivered on the afternoon of June 29, 2006.

[2] The case drew significant media attention because it involved allegations of public corruption. Additionally, Siegelman, a former Governor of Alabama, was seeking his party's nomination to run for Governor again when the trial started. Scrushy is a prominent businessman, who had previously been tried and acquitted of federal criminal charges relating to certain events while he was the Chief Executive Officer of a large health care corporation.

[3] The joint motion for new trial also raised an argument which related to the Court's communications with the jury. After considering this argument, the Court denied to the motion on that ground during a hearing held on October 31, 2006.

possible juror misconduct or improper extraneous influence on juror deliberations. To that end, both Siegelman and Scrushy have filed additional motions seeking an expedited ruling on certain discovery from third parties relating to the jurors, which discovery was originally sought as part of the alternative relief requested in the joint motion for new trial.[4] Generally, speaking the Government opposes all of the relief Defendants seek on a variety of grounds.

DISCUSSION

When confronted with a motion for new trial predicated on an argument that a defendant's right to an impartial jury has been violated, a court must start with the presumption that the jury has been impartial and unbiased. *United States v. Winkle,* 587 F.2d 705, 714 (5th Cir.), *cert. denied,* 444 U.S. 827 (1979); *United States v. Robbins,* 500 F.2d

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[4] Roughly one week after the filing of the joint motion for new trial, Siegelman filed Don Eugene Siegelman's Emergency Motion for Order to Require Preservation of Evidence (Doc. # 469). By this motion, Siegelman reiterated a request made in the joint motion for new trial that this Court to use its subpoena powers to collect certain evidence from jurors regarding their internet and cellular phone service provides and to then preserve or obtain records relating to juror internet and cellular phone usage for a period beginning one month before the trial and lasting until roughly two weeks after the verdict. This motion, which seeks the previously requested relief on an expedited basis, appears to have been inspired, at least in part, by published reports about the investigation of a scandal involving a Florida Congressman's use of email and instant messages to contact Congressional Pages. When the Court did not immediately grant Siegelman's "Emergency" motion, Scrushy filed two motions of his own (one of which was filed under seal) seeking an expedited ruling on the third party discovery requested. *See* Defendant Richard M. Scrushy's Motions for Expedited Consideration of an Order to Require Preservation of Evidence (Doc. # 472 & Doc. #474). None of these motions contains any legal precedent or authority for the specific kind of relief requested. The Government opposes the motions. The Court is of the opinion that the relief sought in these defense motions is not necessary, appropriate, or required by law. Accordingly, these motions are due to be DENIED.

650, 653 (5th Cir. 1974). Given this presumption and the factual record currently before this Court, the Court is unwilling, at this time, to find that Defendants have shown they are entitled to a new trial on their motion and submissions in support of the motion alone. In light of this finding, the Court must turn its attention to the request for further investigation into the jury's conduct during the trial, including the conduct of jurors during deliberations and the body of law governing such requests.

A defendant seeking to attack a juror verdict against him on the ground that his right to an impartial jury has been violated does not have an unfettered ability to assail the verdict on that basis. Local rules limit a defendant's ability to contact jurors and may prevent a defendant from gathering evidence relating to the jury's deliberations.[5] Indeed, if a juror's affidavit submitted in support of a new trial motion was obtained in clear violation of a court order or a local rule against interrogation of jurors, then the court may disregard that affidavit. *See, e.g., Tanner v. United States,* 483 U.S. 107, 126 (1987); *See, e.g., United*

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[5] For example, Local Rule 47.1 of the Local Rules for the United States District Court for the Middle District of Alabama prohibits post-verdict interrogation of jurors, by providing:

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

States v. Venske, 296 F.3d 1284, 1291-92 (11th Cir. 2002), *cert. denied sub nom McCorkle v. United States v. McCorkle*, 540 U.S. 1011 (2003).

Moreover, for nearly a century, courts have recognized a near-universal and firmly established common-law rule flatly prohibiting the admission of juror testimony to impeach a jury verdict. *See Tanner v. United States,* 483 U.S. at 117. Courts recognize few exceptions to this common-law rule and allow juror testimony on the jury's activities *only* in situations in which an *extraneous influence*[6] been shown. *Id.* "In situations that did not fall into this exception for external influence, however, the [Supreme] Court [has] adhered to the common-law rule against admitting juror testimony to impeach a verdict." *Id.* On more than one occasion, the Supreme Court has considered and affirmed the wisdom of this approach and in so doing has discussed the numerous and substantial policy considerations supporting this approach. *See, e.g., Tanner,* 483 U.S. at 117-121 (collecting cases). Indeed, the Eleventh Circuit and the Supreme Court have repeatedly found that district courts did not abuse their discretion in denying motions for new trial or inrejecting defendants' demands for the examination of jurors predicated on arguments of a variety of types of juror misconduct *not encompassing* external influence on the jury.

The Federal Rules of Evidence buttress the common law rule against the admission

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[6] Extraneous influence on a jury would include: (a) a bribe paid to influence a juror; (b) a threat made to influence a juror; (c) exposure of jurors to prejudicial information not admitted into evidence, such as media reports or the fruits of independent juror investigations of facts relating to the case; or (d) other prejudicial contacts between jurors and third parties.

of jury testimony to impeach a verdict and the exception for juror testimony relating to *extraneous influences*. Federal Rule of Evidence 606(b), which addresses the competency of jurors as witnesses, provides:

> **(b) Inquiry into validity of verdict or indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Fed. R. Evid. 606(b). While Rule 606(b) specifically applies only to juror testimony or juror affidavits, the Eleventh Circuit has held that it applies equally to juror statements reported by the press. *See United States v. Sjeklocha,* 843 F.2d 485, 488 (11th Cir. 1988).

Not surprisingly, the Eleventh Circuit enforces the bar to using certain types of evidence to attack the impartiality of a jury's verdict set forth in the common law and Rule 606(b). As one panel put it, "[p]ost-verdict inquiries into the existence of impermissible extraneous influences on a jury's deliberations are allowed under appropriate circumstances, but inquiries that seek to probe mental processes of jurors are impermissible." *United States v. Ayarza-Garcia*, 819 F.2d 1043, 1051 (11th Cir.), *cert. denied,* 484 U.S. 969 (1987) (citations omitted). Indeed, courts faced with affidavits from jurors containing information

about the jury's deliberative processes along with information about possible impermissible extraneous influences are to disregard the portions of the affidavits dealing with forbidden testimony under Federal Rule of Evidence 606(b) and must only have a hearing on possible extraneous influences on the jury's deliberations if the remaining content warrants one. *See, e.g., United States v. Venske,* 296 F.3d at 1290.

Thus, in order to determine whether this Court must inquire further into possible extraneous influences on the jury, as Siegelman and Scrushy request, the Court must determine whether they have proffered sufficient appropriate evidence of extrinsic influence on the jury. Indeed, Siegelman and Scrushy bear

> the burden of establishing that extrinsic matters have been considered by the jury during its deliberations. *United States v. Winkle,* 587 F.2d 705, 714 (5th Cir.), *cert. denied,* 444 U.S. 827 (1979). It is only when the defendant has made a colorable showing of extrinsic influence that the court must investigate the asserted impropriety. *Id.*

United States v. Ayarza-Garcia, 819 F.2d at 1051. *Accord, United States v. Barshov,* 733 F.2d 842, 851 (11th Cir. 1984), *cert. denied,* 469 U.S. 1158 (1985). Furthermore, this Court

> has broad discretion as to how to proceed when confronted with an allegation of jury misconduct, including discretion with regard to the initial decision as to whether to interrogate the jurors. Cases dealing with the degree of investigation required fall along a continuum focusing on two factors: the certainty that some impropriety has occurred and the seriousness of the accusation. The more speculative or unsubstantiated the allegation of misconduct, the less burden there is to investigate; the more serious the potential jury contamination, especially where alleged extrinsic influence is involved, the heavier the burden to investigate.

United States v. Ayarza-Garcia, 819 F.2d at 1051 (internal citations omitted).

Under the relevant legal precedents, the Court finds that most of the evidence on which Siegelman and Scrushy rely in their joint motion fails to help them to satisfy their burden or to satisfy this Court that it must investigate various aspects of alleged juror misconduct. Much of the evidence on which Siegelman and Scrushy base their joint motion does not relate in any way to extraneous influences on the jury. Some of the evidence on which Siegelman and Scrushy rely is speculative and unsubstantiated. Clearly, some of the evidence on which Siegelman and Scrushy rely is improper under the aforementioned common-law rule and Federal Rule of Evidence 606(b).

The strongest evidence that there may have possibly been extraneous influences on the jury warranting further investigation is contained in portions of the two "affidavits" of Juror #5.[7] Because this Court had questions and concerns about the origins of these "affidavits," it held an evidentiary hearing circumstances surrounding possible post-trial contact with jurors on October 31, 2006. The Court cannot say that this hearing assuaged all of its concerns about whether the "affidavits" of Juror #5 were obtained through a violation of Local Rule 47.1 of the Local Rules for the United States District Court for the Middle District of Alabama for Civil and Criminal Cases. Indeed, the Court cannot even say that it found the relevant testimony on this issue to be at all credible. Nevertheless, there is

[7] These "affidavits" are Exhibits 8 and 9 to Defendants Don Eugene Siegelman's and Richard M. Scrushy's Motion for New Trial Pursuant to Rule 33(a) of the Federal Rules of Criminal Procedure (Doc. # 467).

insufficient evidence currently before this Court on which to base a ruling that the August 9, 2006 "Affidavit"[8] of Juror #5 was obtained in violation of Local Rule 47.1. Given the content of the August 9, 2006 Affidavit and the testimony of Juror #5 regarding that document, the Court finds that Siegelman and Scrushy have made colorable showing of extrinsic influence on the jury sufficient to warrant a further inquiry by the Court[9] into certain aspects of the jury's conduct during the trial.

The Court notes that its decision to conduct a further inquiry into this aspect of the case is not dispositive all remaining portions of joint motion for new trial still pending. Not every case in which a jury has been exposed to extrinsic evidence results in finding that a new trial must be granted. *See, e.g., United States v. Ronda,* 455 F.3d 1273, 1299 (2006);

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[8] It is very clear from the testimony at the October 31, 2006 hearing that the August 9, 2006 Affidavit of Juror #5 (Ex. 8 to Doc. # 467) was not properly notarized. Moreover, it is amply clear from the testimony at the hearing that the specific content of the "affidavit" concerning alleged consideration by the jury during deliberations of information obtained from the internet is not actually in the words of the affiant despite the fact that it appears in quotation marks. Nevertheless, Juror #5 does maintain that it is his belief that information obtained from the internet was discussed during the jury's deliberations in this case. Given that the applicable legal precedents does not seem to require that a defendant rely on properly notarized affidavits or other sworn testimony to satisfy the burden of making a colorable showing of extrinsic influence on the jury, the Court cannot disregard the August 9, 2006 Affidavit due to the defects inherent in it.

[9] The Court will conduct this hearing. It will determine the witnesses that it will subpoena and the documents those witnesses are to bring with them. The Court will determine the appropriate scope of the inquiry made of these witnesses at the hearing, and it alone will question the witnesses. Siegelman and Scrushy must be present along with their counsel and the counsel for the United States. As with the October 31, 2006 hearing, jurors will be referred to only by their juror number. All exhibits admitted at the hearing will remain under seal until further order of the Court. The Court will not entertain *any argument* from counsel on any pending motion at the hearing.

United States v. Bolinger, 837 F.2d 436, 440-41 (11th Cir.), *cert. denied sub nom De La Fuente v. United States,* 486 U.S. 1009 (1988). Thus, the Court will further address the merits of the request for a new trial after considering the evidence obtained at the hearing.

CONCLUSION

For the foregoing reasons, it is hereby **ORDERED** as followed:

(1) The Court will conduct an evidentiary hearing whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror in this case on **November 17, 2006** beginning at **8:30 a.m.,** in **Courtroom 2F**, United States Courthouse, One Church Street, Montgomery, Alabama.

(2) It is further ORDERED that Defendants Don Eugene Siegelman and Richard M. Scrushy SHALL attend the November 17, 2006 hearing along with their counsel.

(3) Don Eugene Siegelman's Emergency Motion for Order to Require Preservation of Evidence (Doc. # 469) is DENIED.

(4) Defendant Richard M. Scrushy's Motions for Expedited Consideration of an Order to Require Preservation of Evidence (Doc. # 472 & Doc. #474) are DENIED.

DONE this the 6th day of November, 2006.

/s/ Mark E. Fuller
CHIEF UNITED STATES DISTRICT JUDGE

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

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	CASE NO.: 2:05-cr-119-MEF
	)	
DON EUGENE SIEGELMAN and RICHARD M. SCRUSHY	)	(WO-Recommended for Publication)
	)	

MEMORANDUM OPINION AND ORDER

This cause is before the Court on matters relating to Defendants Don Eugene Siegelman's and Richard M. Scrushy's Motion for New Trial Pursuant to Rule 33(a) of the Federal Rules of Criminal Procedure (Doc. # 467). On September 29, 2006, Defendants Don Eugene Siegelman ("Siegelman") and Richard M. Scrushy ("Scrushy")[1] jointly filed this motion. In their joint motion, Defendants argued that their Sixth Amendment right to trial by an impartial jury had been denied based on a variety of arguments relating to the conduct of the jurors during the lengthy and high-profile trial.[2] Consequently, they jointly sought a new trial based on the exhibits and argument then submitted to the Court. In the alternative, they sought further information about possible juror misconduct or improper extraneous influence on juror deliberations and a future opportunity to argue that the additional

[1] Unless otherwise indicated, the use of the word "Defendants" in this Memorandum Opinion and Order is intended to refer to Siegelman and Scrushy.

[2] The joint motion for new trial also raised an argument which related to the Court's communications with the jury. After considering this argument, the Court denied the motion on that ground during a hearing held on October 31, 2006.

information provided further support for their contention that a new trial was warranted. The Government opposed all of the relief Defendants sought on a variety of grounds. By prior Memorandum Opinion and Order, this Court denied the joint motion to the extent that it sought a new trial solely on the basis of exhibits and arguments initially submitted. Additionally, this Court denied the various mechanisms proposed by Defendants' joint motion for gathering additional factual evidence relating to possible juror misconduct or exposure to extrinsic evidence. Instead, following the relevant precedents from the Eleventh Circuit Court of Appeals, this Court itself conducted two evidentiary hearings and allowed limited supplemental argument on the issue of whether a new trial was required in light of the evidence revealed at those hearings. Not surprisingly, the parties maintain their original positions on the appropriateness of a new trial. After careful consideration, it is the conclusion of this Court that the sole remaining requested relief in the Defendants' joint motion, the grant of a new trial, is due to be DENIED.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND INFORMATION

The Indictment of Siegelman and Scrushy

On May 17, 2005, a federal grand jury handed down an indictment against Siegelman and Scrushy. Initially, the indictment was sealed. In October of 2005, a Superseding Indictment was handed down by the grand jury which added additional defendants and charges to the case. In December of 2005, the grand jury handed down the Second Superseding Indictment. It is this indictment which presented the actual charges against the

four defendants who proceeded to trial.

From the moment that the indictment was unsealed, the case drew significant media attention. The indictment included allegations of public corruption. Additionally, Siegelman, a former Governor of Alabama, was seeking his political party's nomination to run for Governor again and remained a candidate for that office when the trial started.[3] Scrushy is a prominent Alabama businessman. In 2005, Scrushy had been tried and acquitted of federal criminal charges in another case filed in the United States District Court for the Northern Division of Alabama, relating to certain events while he was the Chief Executive Officer of HealthSouth, a large health care corporation.

Because of the intense public interest in this case and the large volume of requests made to the Clerk's office for a copy of the Second Superseding Indictment, the Court posted a link to a copy of the Second Superseding Indictment on the home page of the website maintained by the United States District Court for the Middle District of Alabama. The link was posted before trial began, and it remained active until sometime after the jury had reached its verdict. The posting of this link was consistent with this Court's prior practice in other cases of posting links to court filings which generate significant public interest. The link enabled anyone accessing the website to view or print a copy of the Second Superseding Indictment.

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[3] In fact, the primary election was held during the trial on June 6, 2006. Siegelman did not win the primary.

The Specific Charges Against All Of The Defendants

The indictment[4] named Siegelman as a defendant and alleged that during relevant periods of time, he held various public offices in the executive branch of the government of the State of Alabama.

> [F]rom on or about January 16, 1995, to on or about January 18, 1999, [Siegelman was] the Lieutenant Governor of the State of Alabama, and while Lieutenant Governor was also, from on or about March 31, 1996, to on or about November 3, 1998, a candidate for Governor of the State of Alabama, and was, from on or about January 18, 1999, to on or about January 20, 2003, the Governor of the State of Alabama.

(Second Superseding Indictment at ¶ 1.c).

The indictment also named as defendants Paul Michael Hamrick ("Hamrick"), Gary Mack Roberts ("Roberts"), and Scrushy. During the relevant time periods, Hamrick was employed in the Lieutenant Governor's Office of the State of Alabama and later as Chief of Staff to the Governor. Siegelman appointed Roberts to serve as the Director of the Alabama Department of Transportation.[5] Scrushy was the Chairman and Chief Executive Officer of HealthSouth Corporation, an entity which was regulated by the State of Alabama Certificate of Need Review Board ("CON Board").

Count One of the indictment alleged that Siegelman and Hamrick engaged in a RICO

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[4] Unless otherwise specifically noted, all references to the indictment are to the Second Superseding Indictment in this case.

[5] Prior to his appointment, Roberts was employed by a business which had substantial dealings with the Alabama Department of Transportation.

conspiracy in violation of 18 U.S.C. § 1962(d).[6] With respect to the "enterprise" requirement of the RICO statutes, the indictment alleged that the "enterprise" is the "Executive Department of the State of Alabama . . . whose members functioned as a continuing unit for a common purpose of achieving the objectives of the enterprise." The alleged broad purpose of the racketeering conspiracy alleged in Count One was "to give or withhold official governmental acts and influence . . . in exchange for money and property to which the participants in the conspiracy were not entitled," and "to deprive the State of Alabama of its right to the honest services of its public officials and employees in exchange for money and property" and "to conceal and otherwise protect the conspiracy and its participants from detection and prosecution." (Second Superseding Indict. at ¶ 5).

Count Two of the indictment alleged a substantive RICO count charging a violation of 18 U.S.C. § 1962(c) which provides as follows:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Count Two of the indictment alleged that Defendants Siegelman and Hamrick "unlawfully and knowingly conducted and participated . . . in the conduct of the affairs of the enterprise through a pattern of racketeering activity" as further set out in the indictment. Count Two

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[6] This section of the statute provides that it is "unlawful for any person to conspire to violate any of the provisions" of the first three subsections of 18 U.S.C. § 1962.

set forth a number of separate racketeering acts.

Counts Three and Four of the indictment, in which both Siegelman and Scrushy were originally named, charged them with federal funds bribery and aiding and abetting each other "in connection with the appointment of Richard Scrushy to the CON Board," all in violation of 18 U.S.C. §§ 2 & 666(a)(1)(B). (Second Superseding Indict. at ¶¶ 49-51).

Count Five, in which Siegelman and Scrushy were named, charged them with conspiracy to "defraud and deprive the State of Alabama of its right to the honest and faithful services" of Siegelman as Governor and Scrushy as a member of the CON board, in violation of 18 U.S.C. § 371. (Second Superseding Indict. at ¶¶ 52-66).

Counts Six through Nine, in which Siegelman and Scrushy were named, charged them with aiding and abetting each other to commit honest services mail fraud as part of their scheme to defraud and deprive the State of Alabama of its right to honest services of Siegelman and Scrushy in connection with the CON board, in violation of 18 U.S.C. §§ 2, 1341, & 1346. (Second Superseding Indict. at ¶¶ 57-60).

Counts Ten through Twelve, in which Siegelman and Hamrick were named, charged them with aiding and abetting each other to commit honest services mail fraud as part of their scheme to defraud and deprive the State of Alabama of its right to honest services from themselves as public officials in connection with governmental regulation of specified activities, allocation of bond funding and construction contracting, in violation of 18 U.S.C. §§ 2, 1341, & 1346. (Second Superseding Indict. at ¶¶ 61- 63).

Counts Thirteen and Fourteen, in which Siegelman and Hamrick were named, charged them with aiding and abetting each other to commit honest services mail fraud concerning performance bonds on a construction contract as part of their scheme to defraud and deprive the State of Alabama of its right to honest services from themselves as public officials, in violation of 18 U.S.C. §§ 2, 1343, & 1346. (Second Superseding Indict. at ¶¶ 64-65).

Count Fifteen, in which Hamrick was charged, and Counts Sixteen and Seventeen, in which Siegelman was named, charged them with obstruction of justice, in violation of 18 U.S.C. §§ 1512(b)(3) & 2. (Indict. at ¶¶ 64-68).

Counts Eighteen through Thirty-Three, in which Siegelman and Roberts were named, charged them with aiding and abetting each other to commit honest services mail fraud as part of their scheme to defraud and deprive the State of Alabama of its right to honest and faithful services from themselves as public officials in connection with functions of the Alabama Department of Transportation, in violation of 18 U.S.C. §§ 2, 1341, & 1346. (Second Superseding Indict. at ¶¶ 69-71).

Finally, Count Thirty-Four, in which Siegelman was named, charged him with extortion under color of official right and by fear of economic harm, in violation of 18 U.S.C. § 1951. (Second Superseding Indict. at ¶ 72).

Jury Selection

In March of 2006, the Court sent out Summonses for Jury Service for the trial of this case. The packet sent to prospective jurors included a cover letter, an expanded juror

questionnaire, a memo on proper attire from the Jury Administrator, a notice regarding the Jury Automated System, information and materials about parking, and a six page document entitled Jury Instructions.[7] The last paragraph of the Jury Instructions materials included the following information:

> *Questions?*
>
> **If you have any questions/problems in connections with your service as a juror in this court,** please call the jury administrator, Ms. Melissa Myers, at 334-954-3950, write us at Office of the Clerk, U.S. District Court, P.O. Box 711, Montgomery, AL 36101, **or check the Court's website http://www.almd.uscourts.gov.**

Jury Instructions at p. 6 (emphasis added with bold typeface).

Indeed, the Court's website has on its home page a link to information for jurors. The information for jurors addresses several topics: the importance of jury service, service in the Middle District, the courts, the voir dire examination, the jurors' solemn oath, the eight stages of the trial, an explanation of the role of various people in the courtroom, courtroom etiquette, conduct of the jury during trial, information on what happens in the jury room, information about events after the trial, courthouse locations, and information about the plan for selection of jurors. The first paragraph of the information on the website under the topic of what happens in the jury room includes the following statements: "In this district, jurors

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[7] While some portions of the materials sent to the potential jurors in this case was different than that which is commonly used in this Court, the 6 page document entitled Jury Instructions is no different than what is used in other cases.

elect a foreperson. The foreperson presides over the jury's deliberations and must give every juror a fair opportunity to express his or her views." For the sake of the completeness of the record, a copy of the information for jurors from the Court's website is attached to this Memorandum Opinion and Order as Appendix A.[8]

On April 19, 2006, this Court convened for the purpose of selecting a jury for the trial of this cause. The Court brought in separate panels of potential jurors. While the Court conducted most of the voir dire of the potential jurors, it also allowed counsel for the Government and each of the defendants to conduct limited voir dire of each panel and to question particular members of the panel individually. The Court addressed the challenges for cause raised by various parties, including such a challenge to Juror #5 from Siegelman and Roberts. Juror #5 and other potential jurors were brought before the Court and counsel individually for additional questioning. After the individual voir dire, neither the Government, nor any defendant made any argument that Juror # 5 should be removed for cause; moreover, no one used a peremptory challenge to remove him from the jury. The voir dire process was completed on the afternoon of April 20, 2006. Counsel then struck a jury of twelve and six alternate jurors.[9]

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[8] This information was printed from the website in December of 2006, for the purpose of making it an Appendix to this Memorandum Opinion and Order. The Court is not aware of any changes made to the content of this material during 2006.

[9] Consistent with this Court's practice, the members of the jury were not informed that some of them were alternates until after all parties had rested and the alternates were excused.

Despite the intense public interest in the case and the widespread media reporting on the case, neither the Government, nor *any* defendant requested that the jury be sequestered. The Court considered completely sequestering the jury, but had concerns about the hardship that would impose on the jurors. The Court determined that it would be appropriate to partially sequester the jurors during the trial. To that end, the jurors met each day at a location away from the courthouse and were driven into the courthouse compound by the United States Marshal's Service. Additionally, meals were provided to the jury in the courthouse during trial and deliberations so that the jurors would not have to be exposed to the large phalanx of reporters encamped outside the courthouse. At the end of the day, the United States Marshal's Service delivered jurors back to their vehicles. Some jurors who had transportation problems or long commutes were provided with rooms at area hotels. Steps were taken to allow the jurors to remain anonymous if they wished to be able to do so.

The Trial

The trial began on the morning of Monday, May 1, 2006. The Court gave preliminary instructions to the jury based on the long version of the Eleventh Circuit Court of Appeals' Pattern Jury Instructions. Included in these instructions was the following:

> During the trial you must not discuss the case in any manner among yourselves or with anyone else, and you must not permit anyone to attempt to discuss it with you or in your presence; and, insofar as the lawyers are concerned, as well as others whom you may come to recognize as having some connection with the case, you are instructed that, in order to avoid even the appearance of impropriety, you should have no conversation whatever with those persons while you are serving

on the jury.

> You must also avoid reading any newspaper articles that might be published about the case now that the trial has begun, and you must also avoid listening to or observing any broadcast news program on either television or radio because of the possibility that some mention might be made of the case during such a broadcast now that the trial is in progress.
>
> The reason for these cautions, of course, lies in the fact that it will be your duty to decide this case only on the basis of the testimony and evidence presented during the trial without consideration of any other matters whatever.

The Government and each defendant gave opening statements. In these opening statements the parties addressed the various charges set forth in the Second Superseding Indictment.

The Government began its case in chief and presented sixty-five witnesses and evidence for parts of twenty-seven trial days. Many trial days began at 8:30 a.m. and did not finish until after 5:30 p.m. The Court does not mean to attribute the length of the trial to solely to the length of the Government's examination of witnesses; to the contrary, many witnesses endured exceptionally lengthy cross-examination by counsel for the defendants.

As the June 6, 2006 primary election approached, the Court became concerned about the escalating media attention given to the case and about certain political advertisements Siegelman's campaign ran which attacked the motivations of the Government for bringing the criminal charges against him and alleged political bias. Consequently, on June 2, 2006, the Court gave the jury a special supplemental instruction to the jury noting that the case had

attracted media attention including reporting in newspapers, on the radio, on the television, *and on the internet*. The Court admonished the jury that *anything* that they heard outside of the courtroom about the case or the charges in the case was not evidence and was not equivalent to testimony given under oath and subject to cross-examination. The Court further warned the jurors that such outside information might be inaccurate or might emphasize unimportant points. The Court instructed the jury that it must make its decision in the case only and exclusively on the basis of testimony and other evidence presented in the courtroom during the trial and that the jury must not be influenced in any way by other information. Finally, the Court told the jury to immediately communicate with the Court if any of its members became concerned that something seen or heard outside of the courtroom may have in any way compromised the ability of the juror to serve as a fair and impartial juror in the case.

In addition to this special instruction on June 2, 2006, the Court instructed the members of the jury several times a day on each and every day of the trial not to discuss the facts of the case and not to allow anyone to discuss the facts of the case with them. Certainly these broad prohibitions were sufficiently clear for the members of the jury to know that they should not discuss the case by any means, including email, telephone, or text message. Additionally, the Court instructed the jurors at the close of every day of trial to avoid any discussions regarding the case and any contact with any information about the case, especially from news reports.

On Thursday, June 8, 2006, the Government rested its case in chief after presenting evidence and witnesses over twenty-seven trial days. The Court heard argument from each defendant on motions for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29 on June 8, 2006 and June 9, 2006. As part of his Rule 29 motion, Siegelman argued, *inter alia*, that Counts 3 and 4 were multiplicitious and urged the Court to require the Government to elect between them.

Prior to trial, the Court had addressed the issue of whether Counts 3 and 4 were multiplicitous in conjunction with its ruling on motions to dismiss filed by Scrushy and Siegelman. In an Order dated March 22, 2006 (Doc. # 254), the Court ruled that as drafted Counts 3 and 4 were multiplicitous and that rather than dismissing the indictment, it would instead require the Government to elect, at an appropriate time prior to submission of the case to the jury, on which counts it would proceed before sending the case to the jury. On June 12, 2006, the Government filed a motion to reconsider that ruling (Doc. # 422). On June 13, 2006, the Court denied the Government's motion to reconsider and made it clear that either under its March 22, 2006 ruling or based on a ruling partially granting Defendants' Rule 29 motions, it was requiring the Government to elect how to redact the Second Superseding Indictment to address the multiplicity in Counts 3 and 4. At that time, the Government announced its intention to redact the Second Superseding Indictment by removing Scrushy's name from Count 3 and Siegelman's name from Count 4.

From June 9, 2006 to June 12, 2006, each of the defendants had the opportunity to

present witnesses and evidence in their defense. All defendants had rested their cases by Monday, June 12, 2006. The Government rested without calling rebuttal witnesses on June 12, 2006.

On June 14, 2006, closing arguments began. Closing arguments were completed by late morning on June 15, 2006.

Jury Deliberations

Around midday on June 15, 2006, the jury, having heard closing argument and the Court's instructions, began their deliberations by selecting Juror # 7 to serve as its foreman. At the start of their deliberations, the jury was provided with the exhibits admitted in evidence. Each juror also received a written copy of the jury instructions which the Court had read at the conclusion of the trial. The foreperson also received a copy of a redacted version of the Second Superseding Indictment.[10] Shortly after the jury returned to deliberate on the morning of June 16, 2006, the Court received a request from the jury for eleven additional copies of the redacted version of the Second Superseding Indictment. The requested copies were made and provided to the jury.

Verdicts

The jury deliberated for a total of nine days. On the afternoon of June 29, 2006, the jury returned unanimous verdicts. The jury found Defendants Hamrick and Roberts not

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[10] The redaction was necessary to remove Count Three against Scrushy and Count Four against Siegelman which had been withdrawn based on a ruling by the Court that the Counts were multiplicitous.

guilty on all counts. The jury found Scrushy guilty on Counts Four, Five, Six, Seven, Eight, and Nine. The jury found Siegelman guilty on Counts Three, Five, Six, Seven, Eight, Nine, and Seventeen. The jury found Siegelman not guilty on Counts One, Two, Ten, Eleven, Twelve, Thirteen, Fourteen, Sixteen, Eighteen, Nineteen, Twenty, Twenty-One, Twenty-Two, Twenty-Three, Twenty-Four, Twenty-Five, Twenty-Six, Twenty-Seven, Twenty-Eight, Twenty-Nine, Thirty, Thirty-One, Thirty-Two, Thirty-Three, and Thirty-Four.

Post-Trial Motions

Both Siegelman and Scrushy made oral motions for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(a) before the case was submitted to the jury. Scrushy also had made a written motion for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(a) before the case was submitted to the jury. *See* Doc. # 413. Pursuant to Federal Rule of Criminal Procedure 29(b), the Court reserved decision on the motions.

On June 30, 2006, this Court entered a written Order (Doc. # 443) setting deadlines for final written submissions relating to motions for judgment of acquittal. Additionally, this Order set a September 29, 2006 deadline for the filing of all motions for new trial pursuant to Federal Rule of Criminal Procedure 33(a). After the jury's verdicts, both Siegelman and Scrushy filed written motions for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(c). *See* Doc. # 453, Doc. # 454, & Doc. # 455. On October 2, 2006, this Court entered a Memorandum Opinion and Order (Doc. # 468) denying all pending motions for

judgment of acquittal. In so doing, this Court specifically held that substantial evidence supported the convictions of Siegelman and Scrushy. (Doc. # 468 at 7).

On September 25, 2006, Siegelman and Scrushy jointly filed Defendants Don Eugene Siegelman's and Richard M. Scrushy's Motion for New Trial Pursuant to Rule 33(a) of the Federal Rules of Criminal Procedure (Doc. # 462). Due to problems with how the motion was filed, it was stricken and Siegelman and Scrushy were granted leave to refile their joint motion. On September 29, 2006, Siegelman and Scrushy jointly filed Defendants Don Eugene Siegelman's and Richard M. Scrushy's Motion for New Trial Pursuant to Rule 33(a) of the Federal Rules of Criminal Procedure (Doc. # 467). The joint motion was initially supported by fourteen exhibits and thirty-three pages of argument. The joint motion sought a new trial on the basis of the exhibits and argument. In the alternative, the joint motion sought a broadening of the factual record by further investigation into juror misconduct which Siegelman and Scrushy contended had occurred and another opportunity based on the expanded factual record to argue that a new trial was warranted.[11]

As grounds for the relief requested in the joint motion, Siegelman and Scrushy pointed to the Sixth Amendment guarantee to every criminal defendant the constitutional right to a

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[11] Specifically, the joint motion asked the Court to: (a) allow Defendants' counsel to interview all jurors; (b) issue certain subpoenas relating to email or text messaging records of the jurors; (c) preserve certain computer records relating to juror internet usage; (d) require jurors to disclose the internet service providers, telephone companies and text-messaging services that they used during a specified period; (e) conduct an evidentiary hearing at which jurors would be caused to testify; and (f) expedite ruling on the requested measures to assure that the records or information would be preserved.

fair trial before an impartial jury. Siegelman and Scrushy argued that they were denied their right to a fair trial for three reasons: (1) because the jury was exposed to extraneous information, (2) because the jury engaged in premature deliberations, and (3) because the jurors engaged in misconduct by deliberating with fewer than all of the members of the jury present and by considering the severity of the penalties on the basis of what Defendants contend must have been exposure to extrinsic evidence regarding the applicable penalties. Finally, on the basis of certain post-trial news reports, Defendants raised a concern about the completeness of the record relating to possible *ex parte* contact between the Court and a juror and noted that, in certain circumstances, improper *ex parte* contact between the Court and a juror can require a new trial.[12]

Defendants' argument that the jury had been exposed to extraneous information was predicated on several evidentiary submissions. First, Defendants pointed to a post-trial newspaper interview given by Juror # 7, the foreman of the jury, in which he was quoted as having stated that he had conducted internet research using Google into what a foreman was supposed to do. *See* Doc. # 467-2. Second, Defendants pointed to a post-trial television interview given by Juror # 40, in which she stated that she saw one internet article or headline about the case. *See* Doc. # 462-7 at p. 24. Third, Defendants relied on two

[12] As previously noted, the Court has already addressed the issue of *ex parte* contact between it and the juror. At the October 31, 2006 hearing, this Court clarified the factual record on this issue and ruled that on the basis of the correct and complete factual record, the joint motion for new trial was DENIED to the extent it was predicated on an argument that there was *ex parte* contact between the Court and the jury foreman.

documents purporting to be copies of affidavits from Juror #5.[13] *See* Doc. # 467-11 & Doc. # 467-12. Finally, Defendants relied on a document which they contend was sent to them anonymously and which may be a copy of a June 25, 2006 email communication between Juror # 40 and someone who may be one of the other jurors in the case. This document states "penalty 2 severe...still unclear on a couple of counts against pastor & gov." *See* Doc. # 462-15.

Defendants' contentions that the jury had engaged in misconduct by improperly engaging in premature deliberations, improperly engaging in deliberations with fewer than all jurors present, and improperly considering the penalty defendants might face if convicted were based solely on documents they received in the mail from an anonymous source. These documents purport to be copies of email messages between jurors. The first purports to be a May 29, 2006 email from Juror # 40 to Juror # 7 indicating that Juror # 40 needed "to talk." *See* Doc. # 462-13. The second purports to be another May 29, 2006 email from Juror # 40 to Juror # 7 that says "I agree some of the kounts r confusing 2 our friends. Chek text.30/38 still off trac. [juror's first name]" *See* Doc. # 462-14. The third purports to be a June 25, 2006 email from an email address that does not indicate the sender's real name to Juror # 40 that says "penalty 2 severe...still unclear on a couple of counts against pastor & gov." *See*

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[13] Defendants also relied on two documents purporting to be affidavits from Juror #5's wife and her pastor which Defendants contend corroborate Juror #5's beliefs that improprieties occurred by showing that he made statements to them similar to the statements he made in his "affidavits."

Doc. # 462-15. The fourth purports to be an email from Juror # 40 to the sender of the document included in the record as Doc. # 462-15 that states "stay focused...remember what judge said...have plans for 4th...right? [Juror #40's first name]" *See* Doc. # 462-16. Finally, the fifth purports to be a June 25, 2006 email from Juror #40 to another email address from which it is not possible to ascertain the name of the recipient that states "proud of u...other 6 kounts most important...c.u.n. am [Juror #40's first name]" *See* Doc. # 473-1.

On October 13, 2006, the Government filed its response to the joint motion. The Government argued that the Court should deny all relief requested in the joint motion. The Government cast doubt on the reliability of Defendants' evidence. The Government argued that Federal Rule of Evidence 606(b) precluded inquiry into the jury's deliberations and mental processes. The Government characterized much of Defendants' evidence as speculative, unreliable, and unauthenticated. Additionally, the Government called into question whether the documents purporting to be affidavits of Juror # 5 had been obtained in violation of Rule 47.1 of the Local Rules for the United States District Court for the Middle District of Alabama for Civil and Criminal Cases, which prohibits post-verdict interrogation of jurors and which provides that:

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

Finally, the Government argued in general terms that there was no reasonable possibility of prejudice arising from any juror's alleged contact with extrinsic or extraneous information. Rather than filing a joint reply, Scrushy and Siegelman each filed a lengthy reply brief.

Post-Trial Proceedings Relating To Issues Raised By The Joint Motions For New Trial

As previously noted, in support of the joint motion for new trial, Defendants had provided to the Court four documents which purported to be affidavits from Juror # 5, Juror # 5's wife, and the pastor for Juror # 5's wife. The Court was only provided with copies of faxed documents purporting to be affidavits from these persons and a rather cryptic and incomplete explanation of how the documents came to be in the possession of the attorneys for the Defendants. The Court scheduled an evidentiary hearing to inquire into the origins and authenticity of the documents and to investigate whether any attorney or any other person acting on behalf of either Siegelman or Scrushy had violated Rule 47.1 of the Local Rules of the United States District Court for the Middle District of Alabama for Civil and Criminal Cases.

At the evidentiary hearing, the Court heard testimony from two notaries: Donna Armstrong, who had signed the August 9, 2006 documents purporting to be affidavits of Juror # 5, his wife, and her pastor; and Diana Flentory, who had signed the September 1, 2006 document purporting to be the second affidavit of Juror # 5. The Court also heard testimony from Juror # 5, his wife, and her pastor. Finally, the Court heard testimony from a Birmingham pastor named Charles Winston and his attorney wife Debra Bennett Winston.

The credible testimony at the hearing made it quite plain that Charles Winston authored the documents dated August 9, 2006 and that those documents were not sworn to or signed in the presence of a notary. The credible testimony at the hearing also made it quite plain that the document purporting to be an affidavit from Juror # 5 dated August 9, 2006 (Doc. # 467-11) was not in Juror # 5's own words, but rather the characterizations of events described in the documents are in Charles Winston's words. Juror # 5 and Charles Winston had a conversation. Charles Winston then created the document and read it to Juror # 5. Juror # 5, who does not read that well, questioned Charles Winston about the document's content, but Charles Winston told Juror # 5 that what he had written meant basically the same thing as what Juror # 5 had said. When asked about the veracity of the content of the first document, Juror # 5 said that it wasn't his words, but it was "kind of" in sync with what was going on.

With respect to the September 1, 2006 affidavit (Doc. # 467-12), the credible testimony presented at the October 31, 2006 evidentiary hearing indicated that the answers attributed to Juror # 5 were in his own words and that the affidavit was properly notarized. However, the credible testimony at the evidentiary hearing held on October 31, 2006 raised serious concerns in this Court's mind about whether the September 1, 2006 affidavit of Juror # 5 was obtained in violation of Local Rule 47.1 of the Local Rules for the United States District Court for the Middle District of Alabama for Civil and Criminal Cases. It is clear that both Charles Winston and Debra Bennett Winston had connections to Richard M.

Scrushy prior to August of 2006. It is clear that after Charles Winston obtained the August 9, 2006 documents from Juror # 5, Juror # 5's wife and her pastor, Charles Winston presented the documents to his wife, Debra Bennett Winston. Upon receiving the documents Debra Bennett Winston admits that she attempted to contact counsel for both Siegelman and Scrushy; but she did not attempt to provide any information about what she perceived to be problems with the conduct of the jury in the Siegelman/Scrushy trial with either the Court or the Office of the United States Attorney. Moreover, it is undisputed that Debra Bennett Winston met with counsel for Siegelman prior to meeting with Juror # 5 on September 1, 2006, to obtain a different affidavit from him.

This Court carefully considered the testimony it heard at the October 31, 2006 evidentiary hearing and the evidence Defendants submitted in support of their joint motion for new trial. On November 6, 2006, this Court entered a Memorandum Opinion and Order in which it found that Siegelman and Scrushy had made the requisite colorable showing of extrinsic influence on the jury sufficient to warrant a further inquiry by the Court into certain aspects of the jury's conduct during the trial. Accordingly, the Court set another evidentiary hearing for November 17, 2006.

Each of the twelve jurors who deliberated to verdict in the case were required to appear at the November 17, 2006 hearing and provide testimony regarding whether the jury had been exposed to extrinsic evidence or influences. The jurors were also required to bring certain documents or things relating to exposure to extrinsic evidence or influences with them

to the evidentiary hearing.[14] The Court conducted the questioning of the jurors and had an opportunity to directly assess the credibility and demeanor of each juror as testimony was given under oath. The Court's questioning of the jurors was intended to ascertain whether anything found in previous cases by either the United States Supreme Court or the Eleventh Circuit Court of Appeals to constitute extraneous information or outside influence warranting a new trial had reached the jury in this case. Prior to questioning the jurors, the Court

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[14] The subpoena delivered to the jurors required that they bring the following:

> To the extent that during either the trial or jury deliberations in the case of *United States v. Don Eugene Siegelman and Richard M. Scrushy,* 2:05-cr-119-MEF, any juror, including yourself, may have considered, consulted, viewed, or discussed **any information other than:** (1) the exhibits admitted into evidence, (2) the testimony of the witnesses, or (3) the judge's instructions, please bring any documents or objects which relate to the information considered, consulted, viewed, or discussed. For example, if you have knowledge that any juror, including yourself, may have considered, consulted, viewed, or discussed any of the following information during the trial or jury deliberations you should bring all documents or objects related to that information: (a) outside information relating to the facts of the case; (b) outside information relating to or concerning any defendant or witness in the case; (c) outside information relating to the law applicable to any aspect of the case; (d) outside information relating to the possible penalty any defendant might face if convicted; (e) outside information relating to the process of jury deliberations, the role of a juror, or the role of a foreperson of a jury; (f) outside information relating to any media coverage of the trial; or (g) outside information relating to or concerning any aspect of the law or legal procedures. Items (a) through (g) above are not an exhaustive list, but are intended to be examples of the types of documents you are to bring.

explained to them the limited scope of the evidentiary hearing, namely to determine whether any extraneous information was brought to the jury's attention by any person, including by any juror, and to determine whether any outside influence was improperly brought to bear upon any juror. In so doing, the Court explained that extraneous information referred to *any* information other than the information that the jury received from the Court's instructions on the law, the factual evidence presented in this case through witness testimony from the witness stand, and factual evidence presented in the case through exhibits properly admitted at trial, and that any information not from one of those three sources constitutes extraneous information. The Court also explained that outside influence referred to attempts to influence a juror's thoughts about the case or the outcome of the jury's deliberations by anyone other than another juror during the jury deliberations.

All twelve jurors denied any knowledge of any outside influence on any juror. The jurors' testimony about extraneous information was less than unanimous. At least one of the jurors, Juror # 8, denied any knowledge of any juror having had access to extraneous information.

Several other jurors testified that early in deliberations, Juror # 7, the foreman, had looked up the role of a foreman on an internet site. All jurors indicating that Juror # 7 had done so testified that Juror # 7 had made a very brief statement that he had looked up this information and that the matter was not discussed further. Juror # 7 testified under oath that he had accessed this Court's website and read a sentence regarding the role of the foreman

that indicated that the foreperson presides over the jury's deliberations and must give every juror a fair opportunity to express his or her views.[15] Juror # 7 also testified that he had printed a copy of the Second Superseding Indictment off of this Court's website after deliberations had begun so that he could read it and think about it at his leisure. Some, but not all of the other jurors were aware that he had done so. Jurors # 7, # 22, and # 40 each testified that they had incidental and inadvertent exposure to portions of media reports about the case during the trial, but each indicated that they did their best to avoid such exposure and that they did not read or watch the media coverage after they realized the nature of the information addressed.[16]

Like Juror # 7, Juror # 40 testified that she had printed a copy of the Second Superseding Indictment off of this Court's website during jury deliberations so that she could read it at her leisure. Some of the other jurors testified that Juror # 40 had admitted going

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[15] This sworn testimony is somewhat inconsistent with a media report which appeared shortly after trial in which Juror # 7 was quoted as having indicated that he conducted a Google search on the role of a foreperson.

[16] For example, Juror # 7 subscribes to two newspapers. He testified that during the trial he occasionally inadvertently saw a headline relating to the case, but did not read any articles until after the case was over. Similarly, he was aware of media coverage of the case on the internet because he inadvertently encountered it, but he did not read the stories until after the trial. Similarly, Juror # 22 testified that she tried to avoid media coverage by leaving the room or muting the television when stories came on the news, but she may have inadvertently heard some coverage before the mute button was pressed or before she could leave the room. Finally, Juror # 40 testified that she saw a headline on the *Montgomery Advertiser's* internet site when she was looking for an unrelated news story, but that she did not read the article. This testimony is arguably somewhat different than a media interview in which she appeared to admit that she read one news article about the case during the trial.

online to get a copy of the indictment. Other jurors testified that Juror # 40 had gotten some information from the internet, but they were not sure exactly what it was. Juror # 30 assumed that Juror # 40 was reading media reports about the case on the internet because Juror # 40 had mentioned that the whole trial was on the internet daily.

Having heard testimony from all twelve jurors who deliberated to a verdict in this case and considered all evidence properly before it, the Court found that there was credible evidence which established that during deliberations some of the jurors were exposed to the following extrinsic or extraneous evidence: (1) a complete copy of the Second Superseding Indictment obtained from the website of the United States District Court for the Middle District of Alabama and (2) juror information from the website of the United States District Court for the Middle District of Alabama concerning the foreperson's obligation to preside over the jury's deliberations and to give every juror a fair opportunity to express his or her views. The Court informed counsel for all parties of this finding and of its intention to apply the rebuttable presumption of prejudice set forth in *Remmer v. United States*, 347 U.S. 227 (1954)[17] and its progeny. The Court directed the parties to simultaneously submit briefs on the remaining issue in the legal analysis of the appropriateness of granting a new trial, namely, whether the jurors' consideration of the extrinsic evidence was harmless to the

[17] While it appears that the United States Circuit Court of Appeals for the Eleventh Circuit has been somewhat inconstant in its adherence to *Remmer* as binding precedent, this Court felt constrained to follow *Remmer* and the decisions from the Eleventh Circuit Court of Appeals which have recognized the presumption of prejudice from *Remmer*.

Defendants.[18]

SPECIFIC FACTUAL FINDINGS

The Court reaches the following specific factual findings after carefully studying the evidentiary record, including all post-trial testimony and exhibits, and after taking into account each juror's demeanor before the Court during his or her sworn testimony. In some respects the Court's factual findings in this cause are complicated by inconsistencies in the respective testimony of various jurors or by contradictions between sworn juror testimony and other evidence before this Court. The range of responses to the questions posed by the Court suggests that some jurors may have exaggerated the misconduct of their fellow jurors or assumed misconduct that may not have actually occurred and others may have been either oblivious to actions of other jurors or less than candid in their testimony. In the final analysis, this Court must judge the credibility of each juror and distinguish the believable from the unbelievable. Having done so, the Court makes the following specific factual findings relating to the issues raised by the joint motion for new trial:

1. The Court finds that there is no credible evidence that, prior to the verdict in this case, any juror was subjected to any outside influences such as bribes, threats or other attempts by anyone other than another juror to influence the juror's thinking about the case

[18] In its brief in opposition to the joint motion for new trial, the Government had argued that any purported instance of consideration of extrinsic evidence by a juror was harmless; however, given the expanded factual record, the Court deemed it appropriate to allow the parties further argument.

or the outcome of the case.

2. Based on the unanimous, sworn denials of the jurors at the November 17, 2006 hearing, the Court finds that there is absolutely no credible evidence that any juror was exposed to any extraneous or extrinsic information about the penalty that might be applicable to any defendant if he was convicted of the charges in this case. The Court further finds that the document (Doc. # 467-15), anonymously sent to Defendants, which purports to be an email between two jurors during the trial which says "penalty 2 severe" does not constitute credible information which can in any way cast doubt on the sworn testimony of the jurors before this Court to the effect that they were not exposed to any extraneous or extrinsic information about the penalty that might be applicable to any defendant if he was convicted of the charges in this case.

3. The Court finds that Juror # 7's sworn testimony at the November 17, 2006 hearing – that he had briefly viewed information on the role of a jury foreperson from this Court's website – is more credible than the media report in which an unsworn statement attributed to Juror # 7 indicated that he had conducted internet research using Google to find information on the role of the foreperson. Thus, the Court finds that the credible evidence establishes that Juror # 7 was exposed to extrinsic evidence during jury deliberations that indicated that the foreperson presides over the jury's deliberations and must give every juror a fair opportunity to express his or her views as set forth by the juror information on the Court's own web site.

4. The Court finds that the credible evidence establishes that Juror # 7 mentioned to the other members of the jury that he had researched the role of a jury foreperson, that this fact was mentioned early in deliberations, most likely on the second day of deliberations, and that total time this matter was discussed by any member of the jury was no more than a few minutes.

5. The Court does not find credible the wholly uncorroborated testimony of Juror # 66 to the effect that Juror # 7 looked up information on the employment of a defendant other than Scrushy or Siegelman (presumably Roberts).

6. Juror # 5's testimony before this Court is far more credible than any information attributed to him by any of the documents purporting to be affidavits dated August 9, 2006 (Doc. # 467-9, Doc. # 467-10, & Doc. # 467-11).

7. While Juror #5's testimony before this Court on November 17, 2006 is not necessarily inconsistent with his September 1, 2006 affidavit (Doc. # 467-12). To the extent that any variance between the two exists, the Court finds that due to the circumstances under which the affidavit was obtained from him, Juror # 5's testimony before this Court is far more credible than his September 1, 2006 affidavit.

8. Juror # 30's testimony regarding Juror # 40 and Juror # 7 having contact with extraneous information is based on assumption and speculation and therefore it is not more credible than the testimony of either Juror # 40 or Juror # 7.

9. Juror # 38 testified that Juror # 7 had been on the internet and one of the television

stations had all the proceedings on it and you could go read it does not constitute credible evidence that Juror # 7 or any other juror actually did read any internet media coverage relating to the trial.

10. The Court finds credible the testimony of Juror # 7, Juror # 22, and Juror # 40 regarding their response to inadvertent contact with media coverage relating to the trial. Specifically, the Court finds credible the testimony of Juror # 7 that he may have inadvertently seen news story headlines in the newspaper or on the internet, but that he did not read any articles or intentionally access such content until after the trial. Similarly, the Court finds credible the testimony of Juror # 22 that she may have inadvertently heard parts of television news coverage about the trial, but that she avoided it as best she could by leaving the room, turning off the television sound, or having her husband turn off the television sound. Finally, the Court finds credible the testimony of Juror # 40 that she saw a news headline on a newspaper internet site while she was looking for an unrelated news story, but that she did not read the article.

11. The Court finds that the credible evidence before it establishes that Juror # 40 did obtain an unredacted copy of the Second Superseding Indictment from the Court's internet website during the jury's deliberations and that she did read this document outside of the juror room for the purpose of being able to read it at her leisure. The Court further finds that the credible evidence before it establishes that Juror # 40 disclosed to the other jurors that she had obtained a copy of the Second Superseding Indictment from the internet and

reviewed it. The Court further finds that the total time the jury spent discussing this fact during deliberations did not exceed thirty minutes.

12. The Court finds that the credible evidence before it establishes that Juror # 7 did obtain an unredacted copy of the Second Superseding Indictment from the Court's internet website during the jury's deliberations and that he did read this document outside of the juror room for the purpose of being able to think about the document and how to organize the jury's discussion of the counts in it and the Court's instructions outside of the setting of the jury deliberation room. The Court further finds that the credible evidence before it establishes that Juror # 7 disclosed to the other jurors that he had obtained a copy of the Second Superseding Indictment from the internet and reviewed it and that he brought the document into the jury deliberation room. The Court further finds that Juror # 7 referred to this document during two days of the jury's deliberations toward the beginning of the process and then discarded the document. The Court finds credible the testimony of Juror # 7 that his notes and the use of this copy of the indictment was intended to help organize and facilitate the process of deliberations.

DISCUSSION

A. Juror Exposure to Extraneous Information

The Sixth Amendment to the United States Constitution provides that an individual

accused of a crime has a right to trial by an *impartial* jury.[19] Various court decisions addressing the contours of this right have expanded the protections implicit in this guarantee by holding that under our system of justice, the jury is to determine cases on the basis of the evidence developed in the adversary area of the courtroom and the instructions on the law provided by the court. *See, e.g., Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965); *Patterson v. Colorado*, 205 U.S. 454, 462 (1907); *United States v. De La Vega*, 913 F.2d 861, 870 (11th Cir. 1990), *cert. denied sub nom Carballo v. United States*, 500 U.S. 916 (1991); *United States v. Howard*, 506 F.2d 865, 866 (5th Cir. 1975).[20]

> However, "[w]hile due process of law mandates that a fair trial be provided to the appellants, there is no constitutional right to a perfect trial." *United States v. Alvarez,* 755 F.2d 830, 859 (11th Cir. 1985) (quoting *United States v. Ragsdale,* 438 F.2d 21 (5th Cir. 1971)). Mindful of this oft-quoted aphorism and cognizant that "it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their

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[19] The Sixth Amendment specifically provides that

> [i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury* of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. VI (emphasis added).

[20] In *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1209 (11th Cir. Nov. 3, 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

> vote," we recognize that "[d]ue process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences when they happen." *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

De La Vega, 913 F.2d at 870.

A defendant seeking to attack a jury verdict against him on the ground that his right to an impartial jury has been violated does not have an unfettered ability to assail the verdict on that basis. Local rules limit a defendant's ability to contact jurors and may prevent a defendant from gathering evidence relating to the jury's deliberations.[21] Indeed, if a juror's affidavit submitted in support of a new trial motion was obtained in clear violation of a court order or a local rule against interrogation of jurors, then the court may disregard that affidavit. *See, e.g., Tanner v. United States*, 483 U.S. 107, 126 (1987); *Venske*, 296 F.3d at

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[21] For example, Local Rule 47.1 of the Local Rules for the United States District Court for the Middle District of Alabama for Civil and Criminal Cases prohibits post-verdict interrogation of jurors, by providing:

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

The Eleventh Circuit Court of Appeals has found this very type of rule to be constitutional. *See, e.g., United States v. Venske*, 296 F.3d 1284, 1291 (11th Cir. 2002), *cert. denied sub nom McCorkle v. United States*, 540 U.S. 1011 (2003).

1291-92.

Moreover, for nearly a century, courts have recognized a near-universal and firmly established common-law rule flatly prohibiting the admission of juror testimony to impeach a jury verdict. *See Tanner*, 483 U.S. at 117. Courts recognize few exceptions to this common-law rule and allow juror testimony on the jury's activities *only* in situations in which an *extraneous influence*[22] been shown. *Id.* "In situations that did not fall into this exception for external influence, however, the [Supreme] Court [has] adhered to the common-law rule against admitting juror testimony to impeach a verdict." *Id.* On more than one occasion, the Supreme Court has considered and affirmed the wisdom of this approach and in so doing has discussed the numerous and substantial policy considerations supporting this approach. *See, e.g., Tanner*, 483 U.S. at 117-21 (collecting cases). Indeed, the Eleventh Circuit and the Supreme Court have repeatedly found that district courts did not abuse their discretion in denying motions for new trial or in rejecting defendants' demands for the examination of jurors predicated on arguments of a variety of types of juror misconduct *not encompassing* external influence on the jury.

While some might be tempted to criticize these well established limitations on a defendant's ability to attack a jury verdict, important policy considerations support such

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[22] Extraneous influence on a jury would include: (a) a bribe paid to influence a juror; (b) a threat made to influence a juror; (c) exposure of jurors to prejudicial information not admitted into evidence, such as media reports or the fruits of independent juror investigations of facts relating to the case; or (d) other prejudicial contacts between jurors and third parties.

limitations. Indeed, it is well-settled that without such limitations our very system of justice would be jeopardized.

"[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." *Williams v. Florida*, 399 U.S. 78, 100 (1970). Because our system of justice so prizes the unique and essential feature of our criminal justice system, the role of the jury, it tolerates some of the defects attendant to that system;[23] indeed, it is well-accepted that a lack of perfection inheres in the jury system. *See, e.g., United States v. D'Angelo*, 598 F.2d 1002, 1004-05 & n.4 (5th Cir. 1979). As the United States Supreme Court has explained:

> There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. *It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process. Moreover, full and frank discussions in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct.*

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[23] For example, a jury may render logically inconsistent verdicts on different counts of an indictment or as to different co-defendants. A jury may engage in jury nullification. Courts may not speculate as to whether a particular jury verdict may have been the result of compromise, mistake or even carelessness.

Tanner, 483 U.S. at 120-21 (internal citations omitted; emphasis added).

The United States Supreme Court has repeatedly emphasized the necessity of shielding jury deliberations from public scrutiny. *See, e.g., Tanner*, 483 U.S. 107; *McDonald v. Pless*, 238 U.S. 264 (1915); *Mattox v. United States*, 146 U.S. 140 (1892).[24] In so doing, the highest court in our land has repeatedly expressed concerns that defendants would launch inquiries into jury conduct in the hope of discovering something that might invalidate the verdicts against them; that jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which would establish misconduct sufficient to set aside the verdict; and that such events would result in the destruction of all frankness and

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[24] In this decision, the United States Supreme Court expressed other concerns inherent in allowing too much intrusion into or examination of the process by which a jury reached a verdict:

> Public policy forbids that a matter resting in the personal consciousness of one juror should be received to overthrow the verdict, because, being personal, it is not accessible to other testimony. It gives to the secret thought of one the power to disturb the expressed conclusions of twelve. Its tendency is to produce bad faith on the part of a minority; to induce an apparent acquiescence with the purpose of subsequent dissent; to induce tampering with individual jurors subsequent to the verdict. But as to overt acts, they are accessible to the knowledge of all the jurors. If one affirms misconduct, the remaining eleven can deny. One cannot disturb the action of the twelve; it is useless to tamper with one, for the eleven may be heard.

Mattox, 146 U.S. at 148-49.

freedom of discussion during jury deliberations. *Id.* The Eleventh Circuit Court of Appeals has echoed these important policy considerations. *See, e.g., Venske*, 296 F.3d at 1291-92.

The Federal Rules of Evidence buttress the common law rule against the admission of jury testimony to impeach a verdict and the exception for juror testimony relating to *extraneous influences*. Federal Rule of Evidence 606(b), which addresses the competency of jurors as witnesses, provides:

> **(b) Inquiry into validity of verdict or indictment.** *Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.* Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Fed. R. Evid. 606(b) (emphasis added). While Rule 606(b) specifically applies only to juror testimony or juror affidavits, the Eleventh Circuit has held that it applies equally to juror statements reported by the press. *See United States v. Sjeklocha*, 843 F.2d 485, 488 (11th Cir. 1988).

Not surprisingly, the Eleventh Circuit enforces the prohibition on using certain types of evidence to attack the impartiality of a jury's verdict set forth in the common law and Rule 606(b). As one panel put it, "[p]ost-verdict inquiries into the existence of impermissible

extraneous influences on a jury's deliberations are allowed under appropriate circumstances, but inquiries that seek to probe mental processes of jurors are impermissible." *United States v. Ayarza-Garcia*, 819 F.2d 1043, 1051 (11th Cir.), *cert. denied*, 484 U.S. 969 (1987) (citations omitted). Indeed, courts faced with affidavits from jurors containing information about the jury's deliberative processes along with information about possible impermissible extraneous influences are to disregard the portions of the affidavits dealing with forbidden testimony under Federal Rule of Evidence 606(b) and must only have a hearing on possible extraneous influences on the jury's deliberations if the remaining content warrants one. *See, e.g., Venske,* 296 F.3d at 1290.

In this case, Siegelman and Scrushy predicated their joint motion for a new trial on arguments that their right to trial by an impartial jury had been violated and they sought further factual inquiry into certain issues relating to that argument. The Court had little difficulty concluding that the evidentiary records submitted with the joint motion for new trial was insufficient as a matter of law to require a new trial. The more difficult question posed by Defendants' joint motion was whether the evidentiary record warranted further factual inquiry and interrogation of the jurors. While initially evaluating the joint new trial motion, the Court was mindful that it had

> broad discretion as to how to proceed when confronted with an allegation of jury misconduct, including discretion with regard to the initial decision as to whether to interrogate jurors. Cases dealing with the degree of investigation required fall along a continuum focusing on two factors: the certainty that some impropriety has occurred and the seriousness of the accusation.

> The more speculative or unsubstantiated the allegation of misconduct, the less burden there is to investigate; the more serious the potential jury contamination, especially where alleged extrinsic influence is involved, the heavier the burden to investigate.

Ayarza-Garcia, 819 F.2d at 1051 (internal citations omitted).

The Court began its analysis with the presumption that the jury had been impartial and unbiased. *See, e.g., United States v. Winkle,* 587 F.2d 705, 714 (5th Cir.), *cert. denied*, 444 U.S. 827 (1979) (When confronted with a motion for new trial predicated on an argument that a defendant's right to an impartial jury has been violated, a court must start with the presumption that the jury has been impartial and unbiased.); *United States v. Robbins*, 500 F.2d 650, 653 (5th Cir. 1974) (same). Given that presumption, Siegelman and Scrushy bore

> the burden of establishing that extrinsic matters have been considered by the jury during its deliberations. *United States v. Winkle,* 587 F.2d 705, 714 (5th Cir.), *cert. denied,* 444 U.S. 827 (1979). It is only when the defendant has made a colorable showing of extrinsic influence that the court must investigate the asserted impropriety. *Id.*

Ayarza-Garcia, 819 F.2d at 1051. *Accord, United States v. Barshov*, 733 F.2d 842, 851 (11th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985).

Under the relevant legal precedents, the Court found that most of the evidence on which Siegelman and Scrushy relied in their joint motion failed to help them satisfy their burden or failed to satisfy this Court that it must investigate various aspects of alleged juror misconduct. Much of the evidence on which Siegelman and Scrushy based their joint motion did not relate in any way to extraneous influences on the jury. Some of the evidence on

which Siegelman and Scrushy relied was speculative and unsubstantiated. Clearly, some of the evidence on which Siegelman and Scrushy relied was improper under the aforementioned common-law rule and Federal Rule of Evidence 606(b).

The strongest evidence that there may have possibly been extraneous influences on the jury warranting further investigation was contained in portions of the two "affidavits" of Juror #5.[25] Because this Court had questions and concerns about the origins of these "affidavits," it held an evidentiary hearing on the circumstances surrounding possible post-trial contact with jurors on October 31, 2006. The Court cannot say that this hearing assuaged all of its concerns about whether the "affidavits" of Juror # 5 were obtained through a violation of Local Rule 47.1 of the Local Rules for the United States District Court for the Middle District of Alabama for Civil and Criminal Cases. Indeed, the Court cannot even say that it found the relevant testimony on this issue to be at all credible. Nevertheless, there was insufficient evidence before this Court on which to base a ruling that the August 9, 2006 "affidavit"[26] of Juror #5 was obtained in violation of Local Rule 47.1. Given the content of

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[25] These "affidavits" are Exhibits 8 and 9 to Defendants Don Eugene Siegelman's and Richard M. Scrushy's Motion for New Trial Pursuant to Rule 33(a) of the Federal Rules of Criminal Procedure (Doc. # 467).

[26] It is very clear from the testimony at the October 31, 2006 hearing that the August 9, 2006 Affidavit of Juror #5 (Ex. 8 to Doc. # 467) was not properly notarized. Moreover, it is amply clear from the testimony at the hearing that the specific content of the "affidavit" concerning alleged consideration by the jury during deliberations of information obtained from the internet is not actually in the words of the affiant despite the fact that it appears in quotation marks. Nevertheless, Juror #5 did maintain that it was his belief that information obtained from the internet was discussed during the jury's deliberations in this case. Given that the applicable legal precedents do not seem to require that a defendant rely on properly

the August 9, 2006 affidavit and the testimony of Juror #5 regarding that document, the Court found that Siegelman and Scrushy had made colorable showing of extrinsic influence on the jury sufficient to warrant a further inquiry by the Court into certain aspects of the jury's conduct during the trial. For that reason, the Court conducted the November 17, 2006 evidentiary hearing at which all twelve jurors were called upon to answer the Court's detailed questions[27] about possible exposure to extraneous information or outside influence.

Having heard testimony from all twelve jurors who deliberated to a verdict in this case, the Court has found that there was credible evidence which establishes that during deliberations some of the jurors were exposed to the following extrinsic or extraneous evidence: (1) a copy of the Second Superseding Indictment obtained from the website of the United States District Court for the Middle District of Alabama and (2) juror information from the website of the United States District Court for the Middle District of Alabama concerning the foreperson's obligation to preside over the jury's deliberations and to give every juror a fair opportunity to express his or her views.[28] In light of this evidence of juror

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notarized affidavits or other sworn testimony to satisfy the burden of making a colorable showing of extrinsic influence on the jury, the Court could not disregard the August 9, 2006 Affidavit due to the defects inherent in it.

[27] Interestingly, the Government objected that the Court's questions and the scope of the hearing was too broad and the Defendants objected that the Court's questions and the scope of the hearing was too narrow.

[28] The Court finds that the testimony concerning the inadvertent exposure of certain jurors to an extremely limited amount of news reporting on this case is insufficient to constitute exposure to extrinsic or extraneous evidence within the meaning of the Sixth Amendment.

exposure to extraneous information, this Court must, pursuant to *Remmer v. United States*, 347 U.S. 227 (1954)[29] and its progeny, presume that the exposure to the extraneous information was prejudicial to the Defendants. Accordingly, the burden shifts to the Government to rebut this presumption of prejudice.

Not every case in which a jury has been exposed to extrinsic evidence results in finding that a new trial must be granted. *See, e.g., United States v. Ronda*, 455 F.3d 1273, 1299 (11th Cir. 2006); *United States v. Bolinger*, 837 F.2d 436, 440-41 (11th Cir.), *cert. denied sub nom De La Fuente v. United States*, 486 U.S. 1009 (1988). To rebut the presumption of prejudice, the Government must show that the jurors' consideration of the extrinsic evidence was harmless to the defendants. *See, e.g., United States v. Ronda*, 455 F.3d at 1299.

> To evaluate whether the government has rebutted that presumption, [a circuit court reviewing the issue will] consider the totality of the circumstances surrounding the introduction of the extrinsic evidence to the jury. The factors [to be considered] include: (1) the nature of the extrinsic evidence; (2) the manner in which the information reached the jury; (3) the factual findings in the district court and the manner of the court's inquiry into the juror issues; and (4) the strength of the government's case.

Ronda, 455 F.3d at 1299-1300 (internal citations omitted).

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[29] While it appears that the United States Circuit Court of Appeals for the Eleventh Circuit has been somewhat inconstant in its adherence to *Remmer* as binding precedent, this Court feels constrained to follow *Remmer* and the decisions from the Eleventh Circuit Court of Appeals which have recognized the presumption of prejudice from *Remmer*.

Given the strictures of Federal Rule of Evidence 606(b) and the common law rule, the standard the Court applies necessarily must focus on the probable effect of the exposure on an average juror or jury, rather than the actual effect the exposure had on the actual juror or the jury's deliberation.

> The evidentiary inquiry before the district court on remand must be limited to objective demonstration of extrinsic factual matter disclosed in the jury room. Having determined the precise quality of the jury breach, if any, the district court must then determine whether there was a reasonable possibility that the breach was prejudicial to the defendant. [internal citations omitted.] Again, the district court is precluded from investigating the subjective effects of any breach on any jurors, whether such effects might be shown to affirm or negate the conclusion of actual prejudice.

United States v. Howard, 506 F.2d 865, 869 (5th Cir. 1975).[30]

Thus, a juror's own testimony that the exposure to the extrinsic evidence did not effect the deliberations or was harmless is not controlling. *Bolinger*, 837 F.2d at 440. The district court can consider that testimony, but it also must consider the other factors such as the nature of the extrinsic evidence and the strength of the evidence properly presented by the government against the defendant. *Id.* The key is for the court to ascertain whether there was an objectively reasonable possibility of prejudice. *Id.*

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[30] Much of Siegelman's argument mistakes the nature of the inquiry. He focuses too much on arguments about the actual effect of events on the deliberations of the jurors in this case rather than properly arguing about the probable effect on a hypothetical average juror.

1. Exposure to Extrinsic Information About the Role of the Foreperson

The totality of the relevant circumstances establishes that Defendants were not harmed by the exposure of some of the jurors to information from the Court's website about the role of the foreperson. The juror information from this Court's website accessed by Juror # 7 and mentioned in jury deliberations was extrinsic evidence improperly consulted during deliberations. Whether viewed in its entirety, or specifically with reference to the portion that Juror # 7 focused on, the juror information from the Court's website did not pertain to any substantive issue in the Defendants' trial. It concerned only the process of deliberation. Moreover, it did not contradict any instruction that this Court gave the jurors. It was consulted and discussed for only a few moments at the beginning of what turned out to be rather lengthy deliberations. It was consulted and discussed to facilitate full participation by all members of the jury. The jury's exposure to the extraneous information did not result from the actions of anyone other than a member of the jury.

Courts have held that analogous actions by jurors in other cases were not prejudicial to defendants. *See generally*, *De La Vega*, 913 F.2d 861. After deliberations began in *De La Vega*, the jury foreperson went to the library and checked out a book entitled *What You Need to Know for Jury Duty*. *Id.* at 869. The foreperson read the book, implemented suggestions for procedures outlined in the book, brought the book to the jury room, showed some other jurors a page in the book which outlined organizational steps. *Id.* at 869-70. Relying on a case from another circuit in which a juror had used information from a library

book on Roberts' Rules of Order to direct discussions in the jury room, the Eleventh Circuit held that the introduction of this extrinsic evidence created no reasonable possibility of prejudice warranting a new trial. *Id.* at 870-71.

Given the strength of the Government's case on the counts of conviction[31] and the other relevant circumstances relating to the exposure of the jury to this extrinsic information, the Court finds that the introduction of this material was indeed harmless beyond a reasonable doubt, and the Government has satisfied its burden of rebutting the presumption of prejudice. In this Court's view, there is simply no reasonable possibility of prejudice arising out of the exposure to this information in this case. Accordingly, to the extent that Defendants' joint motion for new trial seeks relief on the basis of the exposure to this extrinsic information, it is due to be DENIED.

2. Exposure to Unredacted Second Superseding Indictment

As explained in this Memorandum Opinion and Order, on the thirtieth day of the trial, the Government elected to cure what the Court had determined to be multiplicity in the Second Superseding Indictment by removing reference to Siegelman in Count 4 and to Scrushy in Count 3. Prior to this time, all parties had referred to the Second Superseding Indictment as it was initially drafted. Nevertheless, after the Government's election, a copy

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[31] This Court has previously held that the Government presented substantial evidence of Defendants' guilt on the counts of conviction. (Doc. # 468 at 7). In reaching its holding on the instant motion, the Court reiterates that the properly admitted evidence of the guilt of Siegelman and Scrushy on the counts of conviction is substantial.

of the redacted version of the Second Superseding Indictment was provided to the jury on the first day of its deliberations. On the second day of its deliberations, additional copies of the redacted version of the Second Superseding indictment were provided to the jury so that each member of the jury could have his or her own copy.

This Court has found that credible evidence exists that Juror # 7 and Juror # 40 did access a copy of the unredacted Second Superseding Indictment early during the jury's lengthy deliberations.[32] They each obtained this document from this Court's website in order to be able to review the allegations outside of the jury deliberation room. Additionally, some other members of the jury became aware that Juror # 7 and Juror # 40 had spent time outside of the jury room reviewing the content of the Second Superseding Indictment. While the jury did not discuss this fact at length, it did discuss it. Nevertheless, there is no evidence that any members of the jury other than Juror # 7 and Juror # 40 actually read the unredacted Second Superseding Indictment.

The Court has found that the unredacted Second Superseding Indictment necessarily constitutes extrinsic information. The Government correctly points out that the difference between the unredacted Second Superseding Indictment and the version provided to the jury is a matter of only a few words, but it is nonetheless a different document obtained from outside of the court proceedings in this case. The Court is satisfied, however, that the

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[32] The Court does not mean to suggest that there exists any evidence that either Juror # 7 or Juror # 40 ever realized that there was any difference between the copy of the indictment given to them by the Court and the one they obtained. There is no such evidence.

exposure of two jurors to the unredacted Second Superseding Indictment and the exposure of some of the other members of the jury to the fact that those jurors had obtained a copy of the document from the internet does not create a reasonable possibility of prejudice to the Defendants in the circumstances of this case. Accordingly, the Defendants' joint motion for new trial on the grounds of this exposure to extrinsic information is due to be DENIED.

Prior to the redaction of the Second Superseding Indictment on the thirtieth day of trial, the jurors were repeatedly exposed to comment on the contents of the document by both the Court and the parties during voir dire and opening statements and otherwise. The fact that the extrinsic evidence to which certain jurors were exposed during deliberations was innocuous and cumulative of information properly before the jury, such as the remaining allegations of the redacted Second Superseding Indictment, the Court's instructions, or the arguments of counsel, supports the Government's contention that the exposure to the information was harmless and the possession by some jurors during deliberations of an unredacted copy of the Second Superseding Indictment did not create a reasonable possibility of prejudice. *See, e.g., United States v. Pessefall*, 27 F.3d 511, 515-16 (11th Cir. 1994), *cert. denied sub nom Rickman v. United States*, 513 U.S. 1174 (1995); *United States v. Guida*, 792 F.2d 1087, 1093-94 (11th Cir. 1986); *Llewellyn v. Stynchcombe*, 609 F.2d 194, 195-96 (5th Cir.), *reh'g denied,* 613 F.2d 314 (5th Cir. 1980).

This conclusion is bolstered by the fact that the extrinsic information at issue here is the charging document itself. From the beginning of the case, the jurors were all clearly

instructed that the indictment was not evidence of guilt. It is well-settled that the Court must presume that the jury follows its instructions. *See, e.g., United States v. Shenberg*, 89 F.3d 1461, 1472 (11th Cir. 1996), *cert. denied sub nom Sepe v. United States*, 519 .S. 1117 (1997). Where, as here, the Court has properly instructed the jury as to the purpose and contents of the indictment, the exposure of some or all jurors to an unredacted copy of the indictment is harmless beyond a reasonable doubt. *See, e.g., United States v. Klein*, 93 F.3d 698, 704 (10th Cir.), *cert. denied*, 519 U.S. 1048 (1996); *United States v. Haynes,* 573 F.2d 236, 241-42 (5th Cir.), *cert. denied*, 439 U.S. 850 (1978).

The Court cannot find, especially in light of the substantial evidence of guilt on the counts of conviction, that any reasonable juror would have been prejudiced by reading the unredacted indictment during the jury deliberations. Moreover, the fact of the exposure to this document by Juror # 7 and Juror # 40 was discussed only for a relatively brief time during the lengthy deliberations. This Court cannot find that the exposure of any juror to the unredacted Second Superseding Indictment would have provided that juror with factual information to which the juror did not already properly have access. Similarly, the exposure could not have caused a juror to have legal knowledge different from that provided to the jury as a whole by the Court. Finally, the Court repeatedly made clear to the jury through its instructions that it must decide the case solely on the evidence properly admitted during the trial. Having considered all of the relevant factors, the Court finds that the exposure to the unredacted Second Superseding Indictment was harmless beyond a reasonable doubt and that

it created no reasonable possibility of prejudice to Defendants.

3. Incidental, Inadvertent Exposure to Limited Portions of Media Coverage

When questioned by the Court at the November 17, 2006 hearing, Jurors # 7, 22, and 40 revealed that they had inadvertently experienced limited exposure to some media coverage during the trial.[33] Given the intense media scrutiny to which the trial was subjected, this admission was not surprising. Based on the credible evidence before it, the Court is satisfied that these jurors did not intentionally seek information about the case from media sources and that these jurors avoided obtaining the content of the media reports once they realized that the case was being discussed. For example, Juror # 22 would leave the room or mute the television sound when a news report on the trial came on and Jurors # 7 and # 40 saw headlines in newspapers or online, but did not read the stories prior to the verdict. None of these jurors can remember the specific content of any media report or headline to which they were exposed. There is no credible evidence before this Court that the content of any media reports were discussed by the jury. Given these facts and the strength of the Government's case, the Court is persuaded that a new trial is not warranted on the basis of this limited and incidental exposure by these jurors to media reports about the trial. There is simply no reasonable possibility of prejudice to Defendants. *See, e.g., United States v. Ronda*, 455 F.3d

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[33] In this Court's view, the fact that these jurors disclosed this information makes the entirety of their testimony more credible. These jurors felt compelled to disclose even the most incidental and inadvertent exposure to extraneous information. This shows how conscientiously forthcoming they were in responding to the Court's inquiries.

at 1300-01. Accordingly, to the extent that Defendants' joint motion for new trial is predicated on juror exposure to media coverage,[34] it is due to be DENIED.

B. Alleged Juror Misconduct

Throughout the course of the argument of the joint motion for new trial, the Defendants have relief heavily on certain exhibits, which purport to be copies of emails between jurors for certain, of their arguments in support of new trial. Specifically, Defendants contend that Exhibits 10, 11, 12, 13 and 15 to their joint motion for new trial (Doc. # 467-13, Doc. # 467-14, Doc. # 467-15, Doc. # 467-16, & Doc. # 473-1) are evidence that some of the jurors improperly deliberated prior to the submission of the case to them for deliberation and that certain members of the jury improperly deliberated over certain aspects of the case outside of the presence of all members of the jury. Defendants contend that the evidence of premature deliberations or deliberations by fewer than all members of the jury requires this Court to grant them a new trial. The Court has several problems with this contention.

First, while it is true that the legal precedents cited to this Court by Defendants in support of their motion make it clear that premature deliberations or deliberations by fewer than all members of the jury are disfavored, the Court does not find that the cited cases actually hold that evidence of either type of juror misconduct warrants the grant of a new

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[34] Defendants spend much of their argument on *supposed* exposure to media coverage rather than on the *actual limited* exposure established by the evidence. The Court will not grant relief on this entirely speculative basis.

trial. Indeed, this Court, through its own research, was unable to locate any authority which holds that to be the case. As the movants, the Defendants are charged with informing this Court of the legal precedent for the relief requested and, if it does not exist, with candidly stating that they are in good faith seeking an extension of the law. In this Court's view, its role is to follow the law, rather than to create it. The absence of clear legal support for Defendants' argument from either the United States Supreme Court or the Eleventh Circuit Court of Appeals makes this Court very skeptical about the legal predicate for the relief sought from the verdict on the basis of alleged juror misconduct.

In addition to this Court's concerns about the legal precedent for this portion of the motion, the Court also has serious concerns about the factual predicate for the argument. The "evidence" of premature deliberations or deliberations by fewer than all members of the jury in this case is problematic. The documents on which defendants rely are photocopies of documents which were sent anonymously to counsel for Defendants after trial. Because of Local Rule 47.1 of the Local Rules for the United States District Court for the Middle District of Alabama for Civil and Criminal Cases, the Defendants cannot contact the jurors to try to establish the authenticity of these documents. Federal Rule of Evidence 606(b) prohibits this Court from asking the jurors about their deliberations or influences on their deliberations. Except for allowing juror testimony on the question of whether extraneous prejudicial information was brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror, Federal Rule of Evidence 606(b) and the

common law on which it is based bars this Court from seeking information from the jurors about these documents. Of course, Defendants urged the Court to obtain discovery from third parties which might have been able to authenticate these documents such as juror emails, but Defendants provided no legal precedent for such an unusual and intrusive investigation of jurors.

In this Court's view, the relevant precedents did not support an evidentiary hearing into the circumstances involving alleged juror misconduct unrelated to the extraneous evidence or outside influence on the jury. *See, e.g.*, Fed. R. Evid. 606(b); *United States v. Cuthel*, 903 F.2d 1381 (11th Cir.), *reh'g denied,* 920 F.2d 13 (11th Cir. 1990) (no evidentiary hearing required despite evidence of premature deliberations by jury and evidence of intrajury pressure to reach a verdict.); *United States v. Barshov*, 733 F.2d 842, 852 (11th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985) (No per se rule requires the trial court to investigate the internal workings of the jury whenever a defendant asserts juror misconduct; the duty to investigate arises only when the party alleging misconduct makes an adequate showing of extrinsic influence.); *United States v. Camacho*, 865 F. Supp. 1527 (S.D. Fla. 1994), *aff'd sub nom United States v. Veal*, 153 F.3d 1233 (11th Cir. 1998), *cert. denied*, 526 U.S. 1147 (1999) (denying both defendant's requests to interview the jury members and motion for new trial based on evidence of premature deliberations, deliberations with fewer than all members of jury present, and improper consideration of the penalty not based on extraneous information).

The evidentiary hearings conducted by this Court leave no doubt whatsoever that the documents purporting to be juror emails on which the Defendants rely are wholly unrelated to any evidence of jury exposure to extraneous information or outside influence.[35] Even if the Court were to assume *arguendo* the authenticity of these documents, the documents only establish very limited evidence of premature deliberation in that some of the emails might relate to discussions of the case prior to the submission of the case to the jury, limited evidence of deliberation by fewer than all members of the jury, and very limited juror misconduct in the form of consideration of the possible penalty Defendants would face if convicted. While it is unquestionably clear that such discussions constitute juror misconduct, it is not juror misconduct of the sort into which this Court can or should directly inquire by interrogating jurors, nor is it in this Court's view grounds for granting a new trial. When all of the relevant circumstances of the case are considered, including the strength of the Government's evidence on the counts of conviction, the length of the jury deliberations, the

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[35] Initially, the Court had some concerns that the alleged email which included a statement that the penalty was too severe might arguably present some evidence that some or all members of the jury had been exposed to extraneous information on the penalty. No evidence, argument or instruction concerning the penalties that any defendant might face had been discussed during the trial. To the contrary, the jury was instructed not to concern itself with matters of penalty. While the Court believed it possible that either this email was not authentic or that jurors might have been speculating about possible penalties and that either explanation would explain the comment regarding the penalty, out of an abundance of caution, the Court did ask all members of the jury about any exposure to extraneous information about penalties any defendant might face if convicted. The jurors credibly and unanimously denied any such exposure. Accordingly, the Court is satisfied that none of the documents purporting to be juror emails relate in any way to any exposure to outside influence or information.

Court's instructions to the jury, including its instructions not to decide or discuss the case prematurely and its repeated instructions regarding the presumption of innocence, as well as the split verdict reached by the jurors, the Court finds that Defendants suffered no prejudice from any premature deliberations, discussion of penalty, or deliberation with fewer than all members of the jury present.

The Eleventh Circuit Court of Appeals has held that if the jury reaches a split verdict, this fact demonstrates that the jury carefully weighed the evidence and reached a reasoned conclusion free of undue influence and did not decide the case before the close of the evidence. *See, e.g., United States v. Dominguez*, 226 F.3d 1235, 1248 (11th Cir. 2000), *cert. denied,* 532 U.S. 1039 (2001); *Cuthel*, 903 F.2d at 1383.

> That split verdict evidences that the jury necessarily must have considered the charges individually and assessed the strength of the evidence as to each charge. The careful weighing of the evidence inherent in a split verdict makes the verdict itself evidence that the jury reached a reasoned conclusion free of undue influence and did not decide the case before the close of the evidence.

Dominguez, 226 F.3d at 1248.

It is undisputed that the jury convicted only two of four defendants and that Siegelman was acquitted on some of the charges against him and convicted on other charges against him. Because he was convicted on all charges against him, Scrushy argues that there was not a split verdict in this case. The Court disagrees. A split verdict is one in which the jury finds "guilt as to some defendants or charges but not as to others." *United States v. Baker,* 432

F.3d 1189, 1237 (11th Cir. 2005), *cert. denied sub nom Pless v. United States*, 126 S. Ct. 1809 (2006). This is certainly a case in which the jury, after long deliberations, found guilt as to some defendants, but not as to others; thus, it meets the Eleventh Circuit's definition of a split verdict. This Court is therefore entitled to consider the fact of the split verdict as evidence demonstrating that the jury carefully weighed the evidence and reached a reasoned conclusion free of undue influence and that the jury did not decide the case before the close of the evidence. Thus, to the extent that the joint motion for new trial is predicated on Defendants' arguments that the jury engaged in misconduct by prematurely deliberating, deliberating with fewer than all members present, or improperly considering the penalty, it is due to be DENIED.

CONCLUSION

For the foregoing reasons, it is hereby ORDERED that any request for relief contained in Defendants Don Eugene Siegelman's and Richard M. Scrushy's Motion for New Trial Pursuant to Rule 33(a) of the Federal Rules of Criminal Procedure (Doc. # 467) not previously addressed by this Court, including any remaining request for a new trial, is DENIED. It is further ORDERED that any pending objections to this Court's approach to *any aspect*[36] of the inquiry into the merits of the issues relating to Defendants Don Eugene

[36] The Court intends this statement to extend to objections made relating to: the page limitations on briefs, the requirement of the simultaneous submission of final briefs, the questioning of witnesses at any hearing, the Court's factual findings, and the Court's rulings regarding the scope of the evidence to be admitted.

Siegelman's and Richard M. Scrushy's Motion for New Trial Pursuant to Rule 33(a) of the Federal Rules of Criminal Procedure (Doc. # 467) are OVERRULED.

Due to the pendency of several motions relating to Defendants' challenges to the composition of the jury pool, this Court will not set a date for sentencing of the Defendants at this time.

The Court appreciates the service of each and every juror and alternate juror in this case. This was a very lengthy trial with complex legal and factual issues. Trial days were frequently very long, yet the jurors remained conscientiously engaged in the process. The jurors had to have been aware to some extent that the entire trial was in the spotlight and that their decisions would be important to not only the parties and counsel, but to members of the public. They handled admirably this additional pressure.

When the trial ended, the focus on the jurors increased rather than decreased. Despite the Court's efforts to shield them, many jurors were bombarded with requests for interviews. To the extent that interviews were given by some jurors, those interviews became part of the basis for more controversy and for Defendants' joint motion for new trial. As events unfolded, this Court was required to take the rather uncommon step of holding additional hearings at which jurors were called as witnesses.

While it is true that certain members of this jury have been criticized for a lack of perfection regarding their service in this matter, there can be no question that this jury has sacrificed a great deal of their time and energy in the interest of justice. They have fulfilled

their obligations to their country and to this Court. For that, this Court will forever be grateful.

DONE this the 13th day of December, 2006.

CHIEF UNITED STATES DISTRICT JUDGE

Appendix A

JUROR INFORMATION

Home
Court Directory
Rules & Procedures
Civil Case Information
Criminal Case Information
News
Frequently Asked Questions
Forms
Research Links

INFORMATION FOR TRIAL JURORS SERVING IN THE FEDERAL COURTS

The Jury Questionnaire (PDF Format) As a part of your service you will be asked to complete this questionnaire. This information will be kept strictly confidential. Providing this information will expedite the selection of juries to try cases before the court.

Jury Plan (PDF Format) **Plan for the random selection of Grand and Petit Jurors**

Importance of Jury Service

Jurors perform a vital role in the American system of justice. The protection of our rights and liberties is largely achieved through the teamwork of judge and jury who, working together in a common effort, put into practice the principles of our great heritage of freedom. The judge determines the law to be applied in the case while the jury decides the facts. Thus, in a very important way, jurors become a part of the court itself.

Jurors must be men and women possessed of sound judgment, absolute honesty, and a complete sense of fairness. Jury service is a high duty of citizenship. Jurors aid in the maintenance of law and order and uphold justice among their fellow citizens. Their greatest reward is the knowledge that they have discharged this duty faithfully, honorably, and well. In addition to determining and adjusting property rights, jurors may also be asked to decide questions involving a crime for which a person may

be fined, placed on probation, or confined in prison. In a very real sense, therefore, the people must rely upon jurors for the protection of life, liberty and the pursuit of happiness.

Service in the Middle District

In the Middle District of Alabama juries for every case to be tried during a term of court are selected on the first day of the term on which jurors report for jury service. Except in very rare instances no person will serve on more than one jury. If a person is not selected to sit on any juries on the first day of a term he or she will not have to return to the court for further service during that term. Subject to approval by the Clerk of the Court, jurors receive $99.00 per diem when circumstances require that they must stay overnight. Beginning 1/01/04, jurors receive a mileage allowance of 37.5 cents per mile. Parking information for the juror will be sent with the summons.

The Courts

In this country, there are two systems of courts. They are the courts of the individual 50 States and the District of Columbia and the courts of the

Federal Government. The trial court of the Federal Government is the United States District Court. The types of cases which can be brought in this court have been fixed by the United States Congress according to our Federal Constitution.

Cases in the United States District Courts are divided into two general classes. These are called criminal cases and civil cases.

Criminal cases are those in which individuals or organizations are charged with breaking the criminal laws. Typical criminal charges in a federal court are those involving violation of the federal income tax and narcotics laws, mail theft, and counterfeiting.

Civil cases are suits in which persons who disagree over their rights and duties come into court to settle the matter. A typical example of a civil case is one involving a broken contract. One party may claim that it should be paid under the terms of the contract, while the other side may assert a defense to the claim, such as the lack of a binding contract. The court is asked to decide who is right. This depends on the law as laid down by the judge and the facts as decided by the jury.

The Voir Dire Examination

To begin a jury trial, a panel of prospective jurors is called into the courtroom. This panel will include a number of persons from whom a jury will be selected to try the case. Alternate jurors may be chosen to take the place of jurors who become ill during the trial.

The panel members are sworn to answer questions about their qualifications to sit as jurors in the case. Before you came to court to begin your jury service, you were asked to fill out a short questionnaire. This helps the parties learn about you and will reduce the amount of time you must spend in court answering questions in person. This questioning process is called the voir dire. This is an examination conducted by the judge and sometimes by counsel or both. A deliberately untruthful answer to any fair question could result in serious punishment to the person making it.

The voir dire examination opens with a short statement about the case to inform the jurors of what the case is about and to identify the parties and their lawyers. Questions are then asked to find out whether any individuals on the panel have any

personal interest in the case or know of any reason why they cannot render an impartial verdict. The court also wants to know whether any member of the panel is related to or personally acquainted with the parties, their lawyers, or the witnesses who will appear during trial. Other questions will determine whether any panel members have a prejudice or a feeling that might influence them in rendering a verdict. Any juror having knowledge of the case should explain this to the judge.

Parties on either side may ask that a member of the panel be excused or exempted from service on a particular jury. These requests, or demands, are called challenges.

A person may be challenged for cause if the examination shows he or she might be prejudiced. The judge will excuse an individual from the panel if the cause raised in the challenge is sufficient. There is no limit to the number of challenges for cause which either party may make.

The parties also have a right to a certain number of challenges for which no cause is necessary. These are called peremptory challenges. Each side usually has a predetermined number of peremptory

challenges. The peremptory challenge is a legal right long recognized by law as a means of giving both sides some choice in the make-up of a jury. Jurors should clearly understand that being eliminated from the jury panel by a peremptory challenge is no reflection upon their ability or integrity.

In the Middle District of Alabama once the voir dire is completed, the lawyers will leave the courtroom with the judge's courtroom deputy to complete the process of selecting the jury.

The Jurors' Solemn Oath

After the voir dire is completed, the jurors selected to try the case will be sworn in by the judge or the clerk who is to administer the oath. That official slowly, solemnly, and clearly repeats the oath. The jurors indicate by their responses and upraised hands that they take this solemn oath.

Jurors not wishing to take an oath may request to affirm instead of swear.

The Eight Stages of Trial

The trial proceeds when the jury has been sworn.

There are usually eight stages of trial in civil cases. They are:

1. The judge gives the jury some preliminary instructions and then the lawyers present opening statements. Sometimes the opening statements on behalf of one or more parties are omitted.

2. Plaintiff calls witnesses and produces evidence to prove its case.

3. Defendant may call witnesses and produce evidence to disprove the plaintiff's case and to prove the defendant's claims.

4. Plaintiff may call rebuttal witnesses to disprove what was said by the defendant's witnesses.

5. Closing arguments are made by the lawyer on each side.

6. The judge instructs or charges the jury as to the law.

7. The jury retires to deliberate.

8. The jury reaches its verdict and returns to the courtroom where the verdict is announced.

Who Are the People in the Courtroom?

The Judge

The judge presides over the trial from a desk, called a bench, on an elevated platform. The judge has five basic tasks. The first is simply to preside over the proceedings and see that order is maintained. The second is to determine whether any of the evidence that the parties want to use is illegal or improper. Third, before the jury begins its deliberations about the facts in the case, the judge gives the jury **instructions** about the law that apply to the case and the standards it must use in deciding the case. Fourth, in bench trials, the judge must also determine the facts and decide the case. The fifth is to sentence convicted criminal defendants.

The Lawyers

The lawyers for each party will either be sitting at the **counsel** tables facing the bench or be speaking to the judge, a witness, or the jury. Each lawyer's task is to bring out the facts that put his or her client's case in the most favorable light, but do so using approved legal procedures. In criminal cases, one of the lawyers works for the executive branch

of the government, which is the branch that prosecutes cases on behalf of society. In federal criminal cases, that lawyer is the **U.S. Attorney** or an assistant U.S. attorney. On relatively rare occasions, defendants in criminal cases or parties in civil cases attempt to present their cases themselves, without using a lawyer. Parties who act on their own behalf are said to act **pro se,** a Latin phrase meaning "on one's own behalf."

The Parties

The parties may or may not be present at the counsel tables with their lawyers. Defendants in criminal cases have a constitutional right to be present. Parties in civil cases may be present if they wish, but are often absent.

The Witnesses

Witnesses give testimony about the facts in the case that are in dispute. During their testimony, they sit on the witness stand, facing the courtroom. Because the witnesses are asked to testify by one party or the other, they are often referred to as **plaintiff's** witnesses, **government's** witnesses, or defense witnesses.

The Courtroom Deputy

The courtroom deputy, who is usually seated near the judge, administers the oaths to the witnesses, marks the exhibits, and generally helps the judge keep the trial running smoothly.

The Court Reporter

The court reporter sits near the witness stand and usually types the official record of the trial (everything that is said or introduced into evidence) on a stenographic machine. Federal law requires that a word-for-word record be made of every trial. The court reporter also produces a written **transcript** of the proceedings if either party **appeals** the case or requests a transcript to review. However, transcripts will not be available to jurors because there is not enough time to create a transcription.

Courtroom Etiquette

A court session begins when the judge takes his or her place on the bench, and the court official announces the opening of court. A similar procedure is used when court adjourns.

Common courtesy and politeness are safe guides as to the way jurors should act. Jurors will be treated with consideration. Their comfort and convenience will be served whenever possible. They should bring to the attention of the judge any matter affecting their service and should notify the court of any emergencies. In the event of a personal emergency a juror may send word to the judge through any court personnel, or may ask to see the judge privately.

Conduct of the Jury During the Trial

Jurors should give close attention to the testimony. They are sworn to disregard their prejudices and follow the court's instructions. They must render a verdict according to their best judgment.

Each juror should keep an open mind. Human experience shows that, once persons come to a preliminary conclusion as to a set of facts, they hesitate to change their views. Therefore, it is wise for jurors not to even attempt to make up their mind on the facts of a case until all the evidence has been presented to them, and they have been instructed on the law applicable to the case. Similarly, jurors must not discuss the case even among themselves until it

is finally concluded.

Jurors are expected to use all the experience, common sense and common knowledge they possess. But they are not to rely on any private source of information. Thus they should be careful, during the trial, not to discuss the case at home or elsewhere. Information that a juror gets from a private source may be only half true, or biased or inaccurate. It may be irrelevant to the case at hand. At any rate, it is only fair that the parties have a chance to know and comment upon all the facts that matter in the case.

If it develops during the trial that a juror learns elsewhere of some fact about the case, he or she should inform the court. The juror should not mention any such matter in the jury room.

Individual jurors should never inspect the scene of an accident or of any event in the case. If an inspection is necessary, the judge will have the jurors go as a group to the scene.

Jurors must not talk about the case with others not on the jury, even their spouses or families, and must not read about the case in the newspapers. They

should avoid radio and television broadcasts that might mention the case. The jury's verdict must be based on nothing else but the evidence and law presented to them in court.

Jurors should not loiter in the corridors or vestibules of the courthouse. Embarrassing contacts may occur there with persons interested in the case. Juror identification badges will be provided, and they should be worn in the courthouse at all times.

If any outsider attempts to talk with a juror about a case in which he or she is sitting, the juror should do the following:

1. Tell the person it is improper for a juror to discuss the case or receive any information except in the courtroom.
2. Refuse to listen if the outsider persists.
3. Report the incident at once to the judge.

Jurors have the duty to report to the judge any improper behavior by any juror. They also have the duty to inform the judge of any outside communication or improper conduct directed at the jury by any person.

Jurors on a case should refrain from talking on any subject--even if it is not related to the matter being tried--with any lawyer, witness, or party in the case. Such contact may make a new trial necessary.

In the Jury Room

In this district, jurors elect a foreperson. The foreperson presides over the jury's deliberations and must give every juror a fair opportunity to express his or her views.

Jurors must enter deliberation with open minds. They should freely exchange views. They should not hesitate to change their opinions if the deliberations have convinced them they were wrong initially. However, a juror should never change his or her mind merely because others disagree or just to finish the trial.

In a criminal case all jurors must agree on the verdict. This is also required in a civil case, unless the jury is otherwise instructed by the court.

The jurors have a duty to give full consideration to the opinion of their fellow jurors. They have an obligation to reach a verdict whenever possible. However, no juror is required to give up any

opinion which he or she is convinced is correct.

The members of the jury are sworn to pass judgment on the facts in a particular case. They have no concern beyond that case. They violate their oath if they render their decision on the basis of the effect their verdict may have on other situations.

After the Trial

After the jurors return their verdict and are dismissed by the judge, they are free to go about their normal affairs. Jurors are under no obligation to speak to any person about the case and may refuse all requests for interviews or comments. Payment to jurors for their service will be sent to them by mail within a few days of their service.

Conclusion

To decide cases correctly, jurors must be honest and intelligent. They must have both integrity and good judgment. The jury system is based on these attributes. The continued vitality of the jury system depends on them.

To meet their responsibility, jurors must decide the

facts and apply the law impartially. They must not favor the rich or the poor. They must treat alike all men and women, corporations and individuals. Justice should be rendered to all persons without regard to race, color, religion or sex.

The performance of jury service is the fulfillment of a high civic obligation. Conscientious service brings its own reward in the satisfaction of an important task well done. There is no more valuable work that the average citizen can perform in support of our Government than the full and honest discharge of jury duty.

The effectiveness of the democratic system itself is largely measured by the integrity, the intelligence, and the general quality of citizenship of the jurors who serve in our courts.

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

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	CASE NO.: 2:05-cr-119-MEF-CSC
	)	
DON EUGENE SIEGELMAN and	)	
RICHARD M. SCRUSHY	)	

MEMORANDUM OPINION AND ORDER

This cause is before the Court on several motions filed by Don Eugene Siegelman ("Siegelman") and Richard M. Scrushy ("Scrushy")[1] many months after a jury convicted them of various felony charges.[2] As will be set out in further detail below, the pending motions all generally relate to the issue of whether Defendants are entitled to a new trial due to alleged juror misconduct or improper extraneous influence on juror deliberations. The motions currently pending before the Court are: Defendant Richard M. Scrushy's Motion to Reconsider Order Denying New Trial and to Supplement Record, or in the Alternative, Motion for New Trial Based on Newly Discovered Evidence (Doc. # 519 and Doc. # 521)[3];

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[1] When the Court refers to Siegelman and Scrushy collectively in this Opinion, it will refer to them as "Defendants."

[2] The jury found Scrushy guilty on Counts Four, Five, Six, Seven, Eight, and Nine. The jury found Siegelman guilty on Counts Three, Five, Six, Seven, Eight, Nine, and Seventeen.

[3] These motions are substantially identical. One is filed under seal because it contains information that could be used to identify jurors and is not redacted, *see* Doc. #521, and the other is the redacted version, *see* Doc. # 519.

Defendant Governor Don Eugene Siegelman's Consolidated Motions to Reconsider the Court's November 20, 2006 and December 13, 2006 Orders, Supplement the Record, and for New Trial Pursuant to Rule 33(b)(1) of the Federal Rules of Criminal Procedure (Doc. # 520); and Defendant Richard M. Scrushy's Motion to Supplement Previously Filed Motion to Reconsider Order Denying New Trial and to Supplement Record, or in the Alternative, Motion for New Trial Based on Newly Discovered Evidence (Doc. # 532).[4]

The currently pending motions are not Defendants' first attempt to raise these issues.[5] On December 13, 2006, this Court denied the Defendants Don Eugene Siegelman's and Richard M. Scrushy's Motion for New Trial Pursuant to Rule 33(a) of the Federal Rules of Criminal Procedure (Doc. # 467).[6] After the Court denied the Joint Motion, an unknown person mailed three documents purporting to be email messages between jurors in this case[7]

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[4] Siegelman joins in this motion and adopts it by reference. *See* Doc. # 533 & Doc. # 572.

[5] Defendants have filed numerous motions relating to this issue. Moreover, they have also raised a number of other issues in a variety of motions. Defendants unquestionably have the right, and their counsel have the obligation, to insure that the statutory and constitutional rights of these Defendants are respected. Nevertheless, the central inquiry in this, and every other criminal case, ought to be whether the defendant committed the crime charged. Moreover, there are costs to searching for defects in the criminal justice system during proceedings initiated to determine whether a particular individual committed a particular crime. These costs are not limited to the time and money for the search itself, but also the corrosion of public respect for a judicial system that loses its focus on the ultimate question of guilty or innocence.

[6] This motion is referred to in this Opinion as "the Joint Motion."

[7] The documents purporting to be email messages are marked Exhibits 23, 24 and 26 for identification and can be found in the record at Doc. # 521-2, Doc. # 521-3 and Doc. #

to counsel for Defendants. Defendants both ask this Court to supplement the record with copies of these documents, which are marked Exhibit 23, 24, 25, 26, and 27 for identification. Additionally, Defendants each ask the Court to reconsider its decision denying the Joint Motion, or in the alternative, they ask the Court to expand the evidentiary record on issues relating to the new trial motion by conducting a more extensive investigation into the conduct of the jurors prior to the verdict in this case and to grant a new trial on the basis of the previously submitted evidence, the newly submitted evidence (Exs. 23 to 27), and the fruits of the investigation they request. The Government opposes these motions. After careful consideration of the arguments advanced and the applicable legal precedents, it is the conclusion of this Court that all relief requested, other than the supplementation of the record with exhibits 23 through 27, is due to be DENIED.

A. Motion to Reconsider

Nothing in the argument submitted by either Siegelman or Scrushy has persuaded this Court that its prior rulings on issues relating to the Joint Motion should be changed. This Court is convinced that it acted appropriately with respect to the nature and scope of the investigation into alleged juror misconduct and alleged improper extraneous influence on juror deliberations. Moreover, the Court is satisfied that the applicable legal precedents

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532-2. Exhibits 25 and 27 are photocopies of the envelopes in which the purported email messages were mailed to counsel for Defendants, which presumably were included in the record to show the date of the postmark on each envelope. *See* Doc. # 521-4 and Doc. # 532-3. The envelope which delivered Exhibits 23 and 24 was post-marked December 20, 2006. The envelope which delivered Exhibit 26 was post-marked February 20, 2007.

compel the decision the Court reached on the Joint Motion, namely the denial of the request for new trial.[8] Thus, to the extent that the pending motions ask this Court to reconsider its prior decisions, the motions are due to be DENIED.[9]

B. Motion to Supplement with Exhibits 23, 24, 25, 26, and 27

Defendants ask this Court to make Exhibits 23, 24, 25, 26, and 27 a part of the evidentiary record to be considered by the Court in deciding their other requests for relief. The Court finds that the motions to supplement with these exhibits are due to be GRANTED. Nothing in this ruling is intended as any indication of whether the Court finds the documents to be authentic. They are being included in the record because they must be for the sake of

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[8] A complete explanation of the factual and legal predicate for this Court's ruling can be found in its December 13, 2006 Memorandum Opinion and Order (Doc. # 518).

[9] The Court will take this opportunity to clarify one point regarding its December 13, 2006 Memorandum Opinion and Order. Defendants appear to argue that this Court based its December 13, 2006 ruling on skepticism regarding the authenticity of the emails submitted as exhibits in support of the Joint Motion or specifically ruled that the documents were not authentic. This Court did not so find. The language to which Defendants point is merely language which correctly reflects the fact that there is no certain evidence before this Court that those exhibits are authentic email communications between jurors. While this Court found that one ambiguous email which was capable of various interpretations (Doc. # 467-15) did not constitute credible information that could cast doubt on the unanimous sworn testimony of the jurors that they were not exposed to extraneous information relating to the penalty, the Court's actual holding relating to these documents assumed *arguendo* that they are authentic. *See* Doc. # 518 at p. 53. While the Court has not based any ruling on a finding that these emails are not authentic, the Court does have some concerns about these documents. Not only is there no information before the Court on how they came to be anonymously mailed to Defendants' counsel, but there are also odd irregularities in the documents such as misspelled words in headings outside of the text fields (e.g. "Report As Seem" instead of "Report As Spam"). The Government further argues that the timing of the appearance of the emails is suspect as well. Whatever concerns or doubts the Court has about these documents, it has not influenced its ruling on the matters before it.

the appellate court's review of this matter should Defendants take an appeal of this Court's other rulings relating to the relief Defendants have requested.

C. Motion to Supplement Record Through Further Investigation of Jurors

By their motions, Defendants renew their prior request that this Court to conduct an independent investigation into the authenticity of Exhibits 10, 11, 12, 13, and 15 and add that it should also investigate the authenticity of Exhibits 23, 24, and 26.[10] As part of that investigation, Defendants would have this Court review data contained on the computer hard drives of computers used by the jurors and records of internet service providers for the jurors. Siegelman requests this Court to order Juror 7 and Juror 40 to produce all hard drives, Blackberries, cell phones, or any other device capable of sending email or text messages that they used during the course of this trial irrespective of whether Juror 7 or Juror 40 owned the device. Siegelman requests this Court to order Juror 7 and Juror 40 to immediately disclose to the Court all internet service providers, email providers, and cell phone companies that provided email, text messaging or cell phone services to them during the trial. Siegelman further requests that this Court subpoena records from all internet service providers, email providers, and cell phone companies that provided email, text messaging or cell phone services to Juror 7 and Juror 40 from jury selection through verdict. Scrushy asks the Court to conduct a slightly different investigation. In addition to communications between the

[10] Exhibits 10, 11, 12, 13, and 15 can be found in the record at Doc. # 462-13, Doc. # 462-14, Doc. # 462-15, Doc. # 462-16 and Doc. # 473-1.

jurors by email or text messaging, Scrushy would have this Court also investigate the internet research that Juror 7 and Juror 40 may have conducted during the trial. To do this, Scrushy would have this Court seize the computers of Juror 7 and Juror 40[11], obtain records from their internet service and network providers, review all materials harvested from these sources (apparently after hiring an expert to ascertain the information on the seized computers), and then conduct another evidentiary hearing at which the jurors would testify.

Were the Court to be inclined to conduct the extensive search that Defendants demand, it would necessarily have to interrogate Juror 7 and Juror 40 under oath at least two more times. Additionally, it would have to conduct another evidentiary hearing at which four or more jurors would have to testify again about their service in this case. Moreover, neither Scrushy, nor Siegelman, appear to grapple with the fact that all of this investigating would not definitively establish anything other than whether the exhibits are actually unaltered copies of emails sent by machines to which jurors had access. Even if the computer records showed that email messages were exchanged between computers owned or used on occasion by jurors, that would not prove who actually authored the messages using these machines.

To say that the extensive investigations that Defendants ask this Court to conduct in this case is unprecedented is an incredible understatement. The case law on this issue establishes precedent for Court investigation of alleged juror misconduct or alleged juror

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[11] Scrushy appears to assume months after a jury trial concludes that this Court has carte blanche to seize property belonging to former jurors or to others so long as a former juror used that property during the period of their jury service.

exposure to extraneous information by interviewing jurors. Usually this investigation amounts to the court interviewing one of more members of a jury about the issue. Often Courts conduct such interviews *in camera*. In this case, the Court opted instead to conduct a full blown public hearing at which all twelve jurors testified under oath. There is simply no legal precedent for Defendants' current requests that this Court bring the jurors back to testify a *second* time so that their prior testimony can possibly be impeached by documents which were mysteriously delivered to counsel for Defendants after the Court denied the Joint Motion. To be clear that is precisely what Defendants are asking this Court to do. They cannot and do not contend that the very broad inquiries that these jurors answered under oath were not broad enough to prompt jurors to testify about internet searches or other possible exposure to extraneous information referred to in Exhibits 10, 11, 12, 13, 15, 23, 24, and 26. Given the scope of the Court's prior inquiry, the only reason for a further inquiry would be to attempt to impeach the jurors' prior testimony. No court has ever held that a court's obligation to investigate extends that far. The Court does not believe that the absence of such legal holdings has anything at all to do with the law having failed to develop as quickly as technology has evolved. The Court believes that sound policy considerations are the reason that the law has not required such fishing expeditions. Such a holding would potentially destroy the entire jury system in this nation.[12]

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[12] Were our country to allow every person who serves as a juror in a criminal case to be subject to scrutiny of the type Defendants propose, who among us would remain willing to serve on a jury? We already have asked a great deal of the members of this jury. This was

This Court has already conducted an extensive investigation of the jurors' conduct in this case. While the Defendants have not been satisfied by its scope, this Court has held two evidentiary hearings. All the jurors who sat on this case to verdict have been called to give testimony before this Court. This Court had a first hand opportunity to view their demeanor during their testimony and to assess their credibility. Over the Government's objection, each of the jurors was called upon to answer numerous questions. After providing the jurors with definitions of the terms "extraneous information"[13] and "outside influence,"[14] the Court asked the jurors as series of questions, including the following:

> 1. Did anyone, other than another juror, try to influence your thinking about this case or your vote on the substantive counts against any defendant?
>
> 2. Do you have any reason to believe that any other juror was subjected to attempts to influence his or her thinking about the case by anyone other than another juror?

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

[13] The Court told the jurors that any information *other than* the information they received from the following sources -- (1) Court's instructions on the law, (2) the factual evidence presented in the case through witness testimony from the witness stand, and (3) the factual evidence presented in the case through the exhibits admitted in evidence at trial -- was "extraneous information."

[14] The Court told the jurors that "outside influence" referred to any attempts to influence a juror's thoughts about the case or the outcome of the jury's deliberations by anyone other than another juror.

3. Did anyone, other than another juror, attempt to discuss the case with you during the time you were a juror in this case? If yes, then get the who, what, where, when and why details.

4. During the time that you were serving as a juror, did you view any news reports or other information relating to this case or any defendant from sources such as newspapers, magazine, radio, or television broadcasts, or internet sites?

5. During the time that you were serving as a juror, did you view any material from any books, newspapers, internet sites, or any other source relating to any witness, any legal issue, or any factual issue related to this case?

6. During the time that you were serving as a juror, did you *in any way* attempt to independently investigate any facts or law relating to this case?

7. During the time that you were serving as a juror, did you overhear any conversations between persons not on the jury or between non-jurors and any member of the jury relating to this case?

8. During the time that you were serving as a juror, did you view or hear any extraneous information about the penalty that might be applicable to any defendant if he was convicted of the charges in this case?

9. During the time that you were serving as a juror, did you obtain extraneous information from any source about your role as a juror, jury service generally, or the role of a foreperson?

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

11. During the time that you were serving as a juror, did you view or hear any extraneous information about either the law applicable to this case or any factual material relating to this

case?

12. Did you bring any documents in response to the subpoena relating to the extraneous information?

In addition to the aforementioned questions, each juror was asked specific follow-up questions relating to any affirmative answers. Importantly, Juror 5, Juror 7, and Juror 40 were all asked additional questions. The Court made specific credibility determinations about the testimony it heard and addressed the legal ramifications of the information provided by the jurors at this hearing in its December 13, 2006 Memorandum Opinion and Order.

In many respects, Exhibits 23, 24, and 26 are merely cumulative of the exhibits before the Court prior to its December 13, 2006 ruling. Like the exhibits in evidence then, if authentic, Exhibits 23, 24, and 26 show communications between two jurors about the case during the period when the jury was only meant to be discussing the case as a whole. Exhibits 23, 24, and 26 do contain references to "links," "articles," and "surfing." If authentic, these references could suggest possible juror exposure to extraneous information. If the Court had not already conducted a very thorough investigation of any possible juror exposure to extraneous information, these exhibits would warrant further investigation. Because the issue of possible juror exposure to extraneous information has already been extensively explored during an evidentiary hearing in this case in November of 2006, Exhibits 23, 24, and 26, if authenticated, are merely impeaching and do not warrant further investigation.

It is well established that this Court has broad discretion as to how to proceed when confronted with an allegation of jury misconduct. In this matter, the Court conducted a very broad inquiry when that allegation was first raised in this case. That inquiry was broad enough to satisfy the requirements of the law with respect to this issue despite the fact that additional evidence of the same general type of juror misconduct has now surfaced.[15] In the circumstances of this case, the Court finds that further investigation of alleged juror misconduct or alleged exposure of jurors to improper extraneous influences or information is not warranted. For this reason, Defendants' requests for additional investigation of these matters are due to be DENIED.

D. Motion for New Trial Based on Exhibits 23, 24, 25, 26, and 27

To the extent that the currently pending motions ask this Court to grant a new trial, they constitute motions pursuant to Federal Rule of Criminal Procedure 33(b)(1), which provides that "any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty." Fed. R. Crim. P. 33(b)(1). It is true that motions pursuant to Rule 33(b)(1) can be based on questions of law, including those

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[15] The evidentiary record before the Court prior to the November 2006 investigatory hearing contained information that suggested it was possible that jurors were discussing the case with fewer than all of the members of the jury present and that some members of the jury may have been exposed to information about the case from sources on the internet.. That evidence is what persuaded this Court to conduct the broad hearing into those types of misconduct. Exhibits 23, 23, and 26 do nothing more than raise a question as to whether jurors were discussing the case with fewer than all of the members of the jury present or accessing information about the case from sources on the internet. Juror testimony at the November 2006 hearing answered the Court's questions about those matters.

relating to the fairness or impartiality of the jury. *See, e.g., United States v. Campa,* 459 F.3d 1121, 1151 (11th Cir. 2006); *United States v. Beasley,* 582 F.2d 337, 339 (5th Cir. 1978).[16] Motions for new trial based on newly discovered evidence are, however, "highly disfavored" and must be regarded with "great caution." *United States v. Campa,* 459 F.2d at 1151; *United States v. Hall*, 854 F.2d 1269, 1271 (11th Cir. 1988).[17] The Eleventh Circuit Court of Appeals has established a five part test which must be satisfied before a court may grant a motion for new trial in a criminal case based on newly discovered evidence:

> (1) the evidence must be discovered following the trial; (2) the movant must show due diligence to discover the evidence; (3) the evidence must not be merely cumulative or impeaching; (4) the evidence must be material to issues before the Court; and (5) the evidence must be of such a nature that a new trial would probably produce a new result.

United States v. DiBernardo, 880 F.2d 1216, 1224 (11th Cir. 1989); *United States v. Hall*, 854 at 1271. "The failure to satisfy any one of these elements is fatal to a motion for new trial." *United States v. Thompson*, 422 F.3d 1285, 1294 (11th Cir. 2005); *United States v. Lee*, 68 F.3d 1267, 1274 (11th Cir. 1995). While Defendants contend that the five prerequisites are met in this case, the Court cannot agree. In light of the fact that all of the jurors already testified under oath about any possible contacts with extraneous information during the period of their jury service, the "newly discovered evidence" set forth in the

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[16] In *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1209 (11th Cir. Nov. 3, 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

[17] Indeed, the very cases Defendants cite make this plain.

motions is "merely cumulative or impeaching." For this reason, the Court finds that the motions for new trial on the basis of the newly discovered evidence are due to be DENIED.

CONCLUSION

For the reasons set forth above, it is hereby ORDERED as follows:

(1) Defendant Richard M. Scrushy's Motion to Reconsider Order Denying New Trial and to Supplement Record, or in the Alternative, Motion for New Trial Based on Newly Discovered Evidence (Doc. # 519 and Doc. # 521) is GRANTED in part and DENIED in part. To the extent that these motions seek to supplement the record with the addition of Exhibits 23, 24, and 25, the motions are GRANTED. All other relief requested by these motions is DENIED.

(2) Defendant Governor Don Eugene Siegelman's Consolidated Motions to Reconsider the Court's November 20, 2006 and December 13, 2006 Orders, Supplement the Record, and for New Trial Pursuant to Rule 33(b)(1) of the Federal Rules of Criminal Procedure (Doc. # 520) is GRANTED in part and DENIED in part. To the extent that this motion seeks to supplement the record with the addition of Exhibits 23, 24, and 25, the motion is GRANTED. All other relief requested by this motion is DENIED.

(3) Defendant Richard M. Scrushy's Motion to Supplement Previously Filed Motion to Reconsider Order Denying New Trial and to Supplement Record, or in the Alternative, Motion for New Trial Based on Newly Discovered Evidence (Doc. # 532) is GRANTED in part and DENIED in part. To the extent that this motion seeks to supplement the record with

the addition of Exhibits 26 and 27, the motion is GRANTED. All other relief requested by this motion is DENIED.

DONE this the 22nd day of June, 2007.

/s/ Mark E. Fuller
CHIEF UNITED STATES DISTRICT JUDGE

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

UNITED STATES OF AMERICA *

*

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

*

DON EUGENE SIEGELMAN *

Notice is hereby given that Don Eugene Siegelman, defendant in the above named case hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the final judgment of conviction and sentence entered in this action on the 28th day of June, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of June, 2007, a copy of the foregoing electronically filed instrument was served on the parties listed below by first-class mail, postage prepaid, unless said party is a registered CM/ECF participant who has consented to electronic notice and the Notice of Electronic Filing indicates that Notice was electronically mailed to said party:

Louis Franklin
United States Attorney's Office
Middle District of Alabama
One Court Square, Suite 201
Montgomery, AL 36104

Vince Kilborn

UNITED STATES DISTRICT COURT

MIDDLE District of **ALABAMA**

UNITED STATES OF AMERICA
V.
DON EUGENE SIEGELMAN

Date of Original Judgment: 7/3/2007
(Or Date of Last Amended Judgment)

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: **2:05CR119-MEF-001**
USM Number: **24775-001**
Vincent F. Kilborn, III.
Defendant's Attorney

Reason for Amendment:

- ☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
- ☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- X Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
- ☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)
- ☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☐ Direct Motion to District Court Pursuant ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)
- ☐ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

- ☐ pleaded guilty to count(s) _____
- ☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.
- X was found guilty on count(s) **3ss, 5ss, 6ss-9ss and 17ss by a jury on 6/29/2006** after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18:666(a)(1)(B) & 2	Federal Funds Bribery and Aiding and Abetting	5/23/2000	3ss
18:371	Conspiracy to Commit Mail Fraud	1/29/2003	5ss
18:1341, 1346 & 2	Honest Services Mail Fraud and Aiding and Abetting	1/20/2003	6ss-9ss
18:1512(b)(3) & 2	Obstruction of Justice and Aiding and Abetting	6/05/2001	17ss

The defendant is sentenced as provided in pages 2 **6** of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984. **The Court orally dismissed Ct. 4ss.**

X The defendant has been found not guilty on count(s) **1ss, 2ss, 10ss-14ss, 16ss, and 18ss-34ss by a jury on 6/29/2006**

X Count(s) **1, 2, 3, 1s-10s, 12s-30s** ☐ is X are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

June 28, 2007
Date of Imposition of Judgment

Signature of Judge
MARK E. FULLER, CHIEF U.S. DISTRICT JUDGE
Name and Title of Judge

10 July 2007
Date

DEFENDANT: **DON EUGENE SIEGELMAN**
CASE NUMBER: **2:05CR119-MEF-001**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term

Eighty eight (88) months. This term consists of 88 months on Ct. 3ss, 60 months on Ct. 5ss, 88 months on Cts. 6ss-9ss and 88 months on Ct. 17ss, all such terms to run concurrently.

X The court makes the following recommendations to the Bureau of Prisons:

Defendant shall be evaluated by the Federal Bureau of Prisons to determine if defendant should be placed in a Residential Substance Abuse Treatment program.

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

a _____ with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **DON EUGENE SIEGELMAN**
CASE NUMBER: **2:05CR119-MEF-001**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of

Three (3) years. This term consists of 3 years on each Count to run concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

X The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

X The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record, personal history, or characteristics and shall permit the probation officer to make such notifications and confirm the

DEFENDANT: **DON EUGENE SIEGELMAN**
CASE NUMBER: **2:05CR119-MEF-001**

SPECIAL CONDITIONS OF SUPERVISION

Defendant shall provide the probation officer any requested financial information.

Defendant shall not obtain new credit without approval of the Court unless in compliance with the payment schedule.

Defendant shall complete 500 hours community service at a time and location approved by the United States Probation Office.

DEFENDANT: **DON EUGENE SIEGELMAN**
CASE NUMBER: **2:05CR119-MEF-001**

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	**$ 700.00**	**$ 50,000.00**	**$ (*) 0**

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS $_____ $_____

☐ Restitution amount ordered pursuant to plea agreement $_____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

X The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

X the interest requirement is waived for X fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: **DON EUGENE SIEGELMAN**
CASE NUMBER: **2:05CR119-MEF-001**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A X Lump sum payment of $ **50,700.00** due immediately, balance due

☐ not later than _____ , or
X in accordance with ☐ C, ☐ D, ☐ E, or X F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F X Special instructions regarding the payment of criminal monetary penalties:

Criminal monetary payments shall be made payable to the Clerk, U.S. District Court, Middle District of Alabama, P.O. Box 711, Montgomery, AL 36101.

Any balance remaining at the start of supervision on the amount of the fine shall be paid at the rate of not less than $1,000.00 per month.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

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

UNITED STATES OF AMERICA,	
v.	Case No. 2:05cr119-MEF
RICHARD M. SCRUSHY, Defendant.	

DEFENDANT RICHARD M. SCRUSHY'S NOTICE OF APPEAL

Notice is hereby given that Richard M. Scrushy, Defendant in the above-styled action, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from his judgment of conviction and sentence entered in this case on July 3, 2007. (Doc. 627.)

This 11th day of July, 2007.

Respectfully submitted,

/s/Arthur W. Leach
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Attorneys for Richard M. Scrushy

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of July, 2007, I personally filed the foregoing "Defendant Richard M. Scrushy's Notice of Appeal" with the Clerk of the Court using the CM/ECF system which will send notification of such to counsel of record.

/s/ Leslie V. Moore
Suite 3
3501 Lorna Road
Hoover, Alabama 35216
205-403-9116

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

UNITED STATES OF AMERICA	*	
	*	
v.	*	**Case No. 2:05-cr-119-MEF**
	*	
DON EUGENE SIEGELMAN	*	

NOTICE OF APPEAL

Notice is hereby given that Don Eugene Siegelman, defendant in the above named case hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the amended final judgment of conviction and sentence entered in this action on the 10th day of July, 2007.

Redding Pitt
Attorney for Don Eugene Siegelman
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CERTIFICATE OF SERVICE

I hereby certify that on the 10TH day of July, 2007, a copy of the foregoing electronically filed instrument was served on the parties listed below by first-class mail, postage prepaid, unless said party is a registered CM/ECF participant who has consented to electronic notice and the Notice of Electronic Filing indicates that Notice was electronically mailed to said party:

Louis Franklin
United States Attorney's Office
Middle District of Alabama
One Court Square, Suite 201
Montgomery, AL 36104

Redding Pitt