Case No. 12-14373

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

DON EUGENE SIEGELMAN,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Alabama
No. 2:05-CR-119 MEF

OPENING BRIEF OF APPELLANT DON EUGENE SIEGELMAN

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Certificate of Interested Persons & Corporate Disclosure Statement

Pursuant to Eleventh Circuit Rule 26.1, Appellant Don Siegelman certifies that the following persons have an interest in the outcome of this case:

Coody, Charles S., United States Magistrate Judge

Craig, Gregory B., Attorney for Don Siegelman

Duffy, Jeffery Clyde, Attorney for Don Siegelman

Espy, Joseph Cleodus, III, Attorney for Don Siegelman

Feaga, Stephen, former Assistant U.S. Attorney

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

Fuller, Mark E., Chief Judge, Middle District of Alabama

Hinkle, Robert L., District Judge, Northern District of Florida

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Pilger, Richard C., Department of Justice, Criminal Division

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Sissman, Peter L., Attorney for Don Siegelman

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Statement Regarding Oral Argument

Given the sizeable record and complexity of the legal and factual issues, Appellant Don Siegelman believes that oral argument would assist this Court in determining the issues raised herein.

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STATEMENT OF JURISDICTION

This is an appeal of post-conviction rulings in a criminal case. On July 5, 2012, Judge Mark Fuller denied Siegelman's motion for a new trial and denied as moot his request for discovery. Doc. 1098. Siegelman was resentenced, and an amended final judgment was entered against him on August 9, 2012. Doc. 1114. Siegelman filed a notice of appeal and supplemental notice of appeal on July 18 and August 21, respectively. Docs. 1104, 1121. The district court had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the participation in Siegelman's prosecution by United States Attorney Leura Canary, after she had ostensibly disqualified herself from the case due to a conflict of interests, necessitates a new trial, or at least warrants an evidentiary hearing.

2. Whether the district court erred by dramatically enhancing Siegelman's sentence based on unrelated conduct.

STATEMENT OF THE CASE

I. Course of the Proceedings and Disposition Below

On June 29, 2006, a jury convicted Appellant Don Siegelman and co-defendant Richard Scrushy of federal funds bribery, honest services fraud, and conspiracy. The jury also convicted Siegelman of obstructing justice. Docs. 437, 438.

On June 28, 2007, the district court sentenced Siegelman to 88 months in prison. Doc. 626. This Court vacated two counts of Siegelman's conviction and remanded the case for resentencing. *United States v. Siegelman*, 561 F.3d 1215 (11th Cir. 2009) ("*Siegelman I*").

On June 29, 2009, Siegelman filed a motion for a new trial based on newly discovered evidence (Doc. 960) and two motions for discovery (Docs. 961, 984).

On June 29, 2010, the Supreme Court granted certiorari, vacated this Court's judgment in *Siegelman I,* and remanded the case for further consideration in light of *Skilling v. United States*, 130 S.Ct. 2896 (2010). *Siegelman v. United States*, 130 S.Ct. 3542 (2010). On May 10, 2011, this Court reissued its earlier ruling on Siegelman's conviction and remanded the case for resentencing. *United States v. Siegelman*, 640 F.3d 1159 (11th Cir. 2011) ("*Siegelman II*").

On June 27, 2012, the magistrate judge denied Siegelman's motion for discovery (Doc. 1096); and on July 5, 2012, the trial judge denied Siegelman's motion for a new trial and denied as moot his requests for discovery (Doc. 1098).

On August 3, 2012, the district court resentenced Siegelman to 78 months in prison. Doc 1114. Siegelman filed a notice and a supplemental notice of appeal to this Court on July 18, 2012, and August 22, 2012, respectively. Docs. 1104, 1121. Siegelman is presently incarcerated.

II. Statement of Facts

From the start, the prosecution of Don Siegelman was anything but routine. The investigation into Siegelman's fundraising activities began no later than February 2002, while he was still Alabama's Governor and was in the midst of a hotly disputed reelection campaign. Doc. 953-29 at 8. At the time, the head of the U.S. Attorney's Office—where the matter was referred to as "the Big Case"—was Leura Canary. Doc. 953-39 at 2. Canary's husband was a Republican political consultant who had been hired to advise several of Siegelman's opponents, including one who was then running against him for Governor. Doc. 953-29 at 4-6. In May 2002, months after Siegelman's attorney had brought these ties to the attention of the Department of Justice, Canary announced that she would disqualify herself from participation in the case "to avoid any question about [her]

impartiality." Doc. 953-30 at 3. Canary's failure to honor this pledge is at issue in this appeal.

A. The Trial

Siegelman's trial took place in May and June of 2006, while Siegelman was actively seeking his party's nomination for the 2006 Governor's election. Doc. 518 at 3. Then-Chief Judge Mark Fuller (herein referred to as "Judge Fuller") presided. As a prosecution of the State's highest-profile Democratic politician, the case attracted overwhelming media scrutiny. *Id.* As relevant here, the conduct at issue at trial can be divided into three groups: the Scrushy Charges, the Motorcycle Charges, and the RICO Charges.

The Scrushy Charges (Counts 3-9). The indictment accused Siegelman and co-defendant Richard Scrushy of engaging in bribery, mail fraud, and honest services fraud. Doc. 61-1 at 29-36. The government's theory was that Governor Siegelman had conspired with Scrushy to obtain $500,000 in donations for the Alabama Education Lottery Fund, an issue-referendum campaign that Siegelman had created to fund universal education in Alabama. In return for the donations, Siegelman appointed Scrushy in July 1999 to the Certificate of Need Review Board ("the CON Board"), a state licensing board to which Scrushy had been appointed by three previous governors. Scrushy used his position on the CON Board to effect decisions beneficial to his own company and detrimental to his

competitors. The jury convicted Siegelman on all of the Scrushy Charges. *Siegelman II*, 640 F.3d at 1165-68.

The Motorcycle Charges (Counts 16-17). The indictment alleged that Siegelman obstructed justice by engaging in a series of sham transactions to conceal a payment from businessman Lanny Young. Doc. 61-1 at 39-40. Young testified that Bailey asked him in January 2000 for $9200 to cover the costs of purchasing a motorcycle for Siegelman, which Young provided. Eighteen months later, after a public corruption investigation had been initiated, Siegelman participated in a scheme to hide the source of the funds: Siegelman adviser Nick Bailey wrote a check to Young for $10,503 with the notation "repayment of loan plus interest." Then, Bailey wrote a check to Siegelman for $2973.35 with the notation that it was "the balance due on m/c." The idea was to make it look like Bailey had borrowed the money for the motorcycle from Young. *Siegelman II*, 640 F.3d at 1177-79.

The jury convicted Siegelman of Count 17, which alleged that he had corruptly persuaded Bailey to write the $2973.35 check and had misled Bailey's attorney about the transaction, in order to hinder or prevent the attorney from disclosing relevant information about these transactions to the FBI. However, the jury acquitted Siegelman of Count 16, which alleged that Siegelman persuaded Bailey to write the $10,503 check to Young. *Id.* at 1177-78. As this Court has

explained, the Motorcycle Charges "involved conduct unrelated to the Siegelman-Scrushy bribery, mail fraud and conspiracy charges [*i.e.*, the Scrushy Charges]." *Id.* at 1164 n.1.

The RICO Charges (Counts 1-2). Counts 1 and 2 of the indictment charged Siegelman and his co-defendant Paul Hamrick with conspiring to engage in a "pattern of racketeering activity" between August 1997 and January 2003, in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Doc. 61-1 at 2-29. The object of the alleged conspiracy was to exchange government action and influence for money and property. *Id.* at 4. The jury acquitted Siegelman and Hamrick of both RICO Charges. Nevertheless, three of the alleged acts of racketeering underlying these charges were later used by Judge Fuller to dramatically increase Siegelman's sentence, and so they are briefly described here.

Cherokee County Landfill. In late 1997 or early 1998, businessman Lanny Young signed a letter of intent for the sale of his landfill company, which included a landfill located within Cherokee County. Trial Tr. at 3161-62. To finalize the transaction, the parties needed the Cherokee County Commission to approve the transfer of stock. *Id.* at 3262. Young testified that Phillip Jordan, Chairman of the Commission, solicited him for a bribe in exchange for favorable action by the Commission on the stock-transfer. *Id.* at 3162-63. Young paid several bribes to

Jordan over the course of the next two years, *id.* at 2867, 2880-82, an arrangement in which Siegelman was not involved, *id.* at 3285-86.

Sometime in 1998, Siegelman (then Lieutenant Governor) contacted Jordan, at Young's request, and asked him to help if he could. *Id.* at 2865-66, 3264-65. Young also enlisted the help of his friend Paul Hamrick, who had been Siegelman's campaign manager. *Id.* at 2866-67. In December 1998, the Cherokee County Commission gave Young the permission he wanted, enabling construction of the landfill, from which Young ultimately benefitted $3,000,000. *Id.* at 2869-70.

Waste Management. In June 1999, Young was hired by Chemical Waste Management, Inc. to obtain a favorable tax ruling from the Alabama Department of Revenue. If successful, Young would be paid $500,000—a lobbying arrangement of which Siegelman was unaware. *Id.* at 2886. Young enlisted the help of Nick Bailey, then the Alabama Department of Finance's budget officer, who arranged a meeting with the Revenue Department Commissioner and lobbied on Young's behalf. *Id.* at 2893-94. At a cabinet meeting, at which both the Commissioner and Bailey were present, Siegelman also asked the Commissioner to "help" Young if possible. Young testified that Siegelman later told him that a favorable revenue ruling would be forthcoming, but "those bastards are going to pay for it." *Id.* at 2895.

On July 15, 1999, the Department of Revenue issued the ruling that Chemical Waste Management had sought. Six days later, the company paid $500,000 to Young. *Id.* at 2905-08. In September 1999, the company wrote a $50,000 check to the Alabama Education Lottery Fund. *Id.* at 2909-10.

Goat Hill Construction Project. In the fall of 2000, Young met with Nick Bailey, who at the time was acting Director of the Alabama Department of Economic and Community Affairs. Bailey and Young discussed construction of a multi-million dollar warehouse complex for the State, which came to be known as the Goat Hill Construction Project. In return for a variety of payments and bribes, Bailey arranged for Young to be named as project manager, allowing him to dole out lucrative contracts. *Id.* at 2949-52. According to Bailey, Siegelman was aware of Young's appointment and was one of a "multitude" of people who approved it. *Id.* at 431-32.

In December 2000, at Bailey's request, Young purchased a four-wheel ATV and trailer, which he titled in Siegelman's name and delivered to the Governor's mansion. *Id.* 468-69. In February 2001, the State paid Young's company almost a half-million dollars in connection with the Goat Hill Construction Project, $181,325 of which was later determined to be illegitimate. Doc. 596-2 at 2. Following public disclosure of Young's involvement in the project in 2001, a joint

state/federal investigation was initiated, and the project never progressed beyond the planning and survey stages. Trial Tr. at 453.

The Verdict. The jury deliberated for nine days and ultimately convicted Siegelman of the Scrushy Charges (Counts 3-9) and one of the Motorcycle Charges (Count 17) but acquitted him of all twenty-two other counts, including the RICO Charges. Doc. 518 at 14-15; Doc. 437.

B. The 2007 Sentencing

Siegelman was sentenced at proceedings held June 26-28, 2007.[1] Siegelman and the government clashed about several aspects of the applicable Sentencing Guidelines range and the appropriate sentence.

Obstruction of Justice Enhancement. The government argued that Siegelman's conviction on the Scrushy Charges should be grouped with the Motorcycle Charges, claiming that they were "related to" one another for sentencing purposes. ST2007, Vol. I, at 80-84. Grouping the two sets of charges in this way would enable a two-point "obstruction of justice" enhancement in Siegelman's offense level. *Id.* at 83. According to the government, the grouping was warranted because both sets of crimes involved the same victim ("the citizens

[1] The minute entry for those proceedings appears as Doc. 622 on the district court's docket. The sentencing transcript comprises three volumes and is cited herein as "ST2007," followed by the volume and page number. Appropriate portions of the transcript are included in the record excerpts pursuant to Eleventh Circuit Rule 30-1.

of Alabama"), *id.* at 81; the same objective ("to line his pockets"), *id.* at 82; and some of the same perpetrators ("Nick Bailey is a link between count seventeen and the other counts of corruption"), *id.* at 83.

Calculation of Benefit Value. For purposes of calculating the "benefit received" by Siegelman for the bribery charges, *see* USSG § 2C1.1(b)(2), the government also sought to tie the Scrushy Charges, not only to the Motorcycle Charges, but also to *all* of the conduct underlying the RICO Charges—including conduct related to the Cherokee County landfill permit, the Waste Management revenue ruling, and the Goat Hill construction project. ST2007, Vol. I, at 95. Adding the dollar amounts from all of this conduct would dramatically increase Siegelman's offense level. *See* USSG § 2B1.1(b)(1) (table setting offense level by reference to dollar value). Although the government conceded that Siegelman had been *acquitted* of the RICO Charges related to this conduct, the government nevertheless argued that it had been proven at trial by a preponderance of the evidence. ST2007, Vol. I, at 86-93. The government also maintained that all of the conduct underlying the RICO Charges was foreseeable to Siegelman and was related to the offenses for which he had been convicted. *Id.* at 93-94 ("[The conduct occurred] [d]uring the same time period, when he's governor of the state of Alabama, for the same criminal purposes, to increase his money, wealth, power

and status by abusing his position of trust he owed the people of Alabama. Same criminal objective.").

Systematic and Pervasive Corruption. The government also sought a four-level upward departure for "systematic and pervasive Government corruption." ST2007, Vol. III, at 99; *see* USSG § 2C1.1 cmt. 5. In making its argument, the government again relied on *all* of the conduct that had been at issue in the trial, including the RICO Charges of which Siegelman had been acquitted. ST2007, Vol. III, at 99-103. The government also pointed to a supposed "loss of public confidence" that had resulted from Siegelman's continued insistence on his innocence. *Id.* at 107; *see id.* at 106 (asking Judge Fuller to note that Siegelman had "steadfastly declared his innocence, and publicly argued that his indictment was politically motivated" (quotation marks omitted)).

Over Siegelman's objections, Judge Fuller agreed with the government on all three of these points:

(1) Judge Fuller granted the two-level enhancement for obstruction of justice. ST2007, Vol. II, at 148. Judge Fuller did not explain why he believed the Scrushy Charges and the Motorcycle Charges were sufficiently related.

(2) In calculating Siegelman's offense level, Judge Fuller included the conduct underlying the RICO Charges when valuing the bribes:

> (a) $3,000,000 for what Lanny Young was paid as a result of the Cherokee County landfill revenue ruling;

(b) $500,000 for the payment to Young from Chemical Waste Management;

(c) $50,000 for the check from Chemical Waste Management to the Alabama Lottery Fund;

(d) $181,325 for the amount that the State erroneously paid Young for the Goat Hill construction project; and

(e) $9200 for the cost of the motorcycle.

Judge Fuller thus calculated total benefit received as $3,740,525. *Id.* at 150-151.[2] The result was a whopping 18-level increase in Siegelman's offense level. *Id.* at 151; *see* USSG § 2B1.1(b)(1)(J). Judge Fuller did not explain why he thought the RICO Charges were sufficiently related to the Scrushy Charges to permit a "benefit received" calculation that included conduct from the RICO Charges.

(3) Judge Fuller granted the government's motion for a four-level upward departure for systematic and pervasive corruption. ST2007, Vol. III, at 127. Although Judge Fuller did not make any specific findings in support of his decision, he made clear that it was based on a broad understanding of Siegelman's misconduct "as set forth in the Government's motion." *Id.*

As a result of these rulings, Siegelman's total offense level was determined to be 36; since he had no criminal history, that created a Guidelines range of 188 months to 235 months. *Id.* In view of the Guidelines range and the other § 3553

[2] Because the benefit received ($3,740,525 in total) was larger than the size of the bribe ($500,000 in payments from Scrushy), and also larger than the loss to the State ($181,325 in improper payments to Young), Judge Fuller calculated the offense level using the size of the benefit. *Id.* at 155 ("I took the greatest of those three categories.").

factors, Judge Fuller determined that a variance was warranted and sentenced Siegelman to 88 months' imprisonment. *Id.* at 289. Judge Fuller also ordered restitution to the State in the amount of $181,325—the amount erroneously paid to Young for the Goat Hill project. *Id.* at 290. However, following a motion by Siegelman, Judge Fuller vacated the restitution order, acknowledging that "the relationship between [the Goat Hill] conduct and the count of conviction is too attenuated when it comes to the order of restitution." Doc. 631 at 3 n.3.

C. The First Appeal (*Siegelman I & II*)

On direct appeal, this Court threw out two of the Scrushy Charges (Counts 8 & 9), which had sought to hold Siegelman responsible for Scrushy's self-dealing while on the CON Board. After examining the record, the Court found an "absolute lack of any evidence whatsoever" that Siegelman knew about or should have anticipated Scrushy's misconduct. *Siegelman I*, 561 F.3d at 1231-32. The Court upheld Siegelman's conviction on the other counts and upheld his sentence. *Id.* at 1224-29, 1232-36.

Following this first appeal, Siegelman sought a petition for a writ of certiorari to the Supreme Court, which vacated the judgment in *Siegelman I* and remanded the case for further consideration in light of *Skilling v. United States*, 130 S. Ct. 2896 (2010). *See Siegelman v. United States*, 130 S. Ct. 3542 (2010). On remand, this Court reversed co-defendant Scrushy's conviction on two counts,

Siegelman II, 640 F.3d at 1177, and remanded to the district court for both defendants to be resentenced, *id.* at 1190.

D. The New-Trial Motion

Back in the district court prior to resentencing, Siegelman filed a motion for new trial based on improprieties in the way that his case had been prosecuted and tried. Doc. 960 Relevant here, Siegelman's motion pointed to newly discovered evidence that U.S. Attorney Canary had not honored her May 2002 disqualification—and had in fact continued to participate in the prosecution well beyond that date. *See id.* at 2 n.2 (incorporating by reference Scrushy's new-trial exhibits).

Among other things, Siegelman noted that in November 2008, two members of the Judiciary Committee of the U.S. House of Representatives wrote to the U.S. Attorney General, transmitting information from a whistleblower regarding the "failure of United States Attorney Leura Canary to fully honor her recusal." Doc. 953-35 at 2. The whistleblower was Tamarah Grimes, an employee of the Middle District of Alabama who had been assigned to work on the Siegelman prosecution.

Grimes provided several emails indicating that Canary's involvement in the case had continued after her May 2002 disqualification. Most notable was a September 19, 2005, email from Canary to several members of the prosecution team. In the email, which was sent as the government was preparing to issue a

superseding indictment against Siegelman, Canary forwarded a "Siegelman for Governor" campaign email and wrote: "Y'all need to read because he refers to a 'survey' which allegedly shows that 67% of Alabamians believe the investigation of him to be politically motivated. (Perhaps grounds not to let him discuss court activities in the media?)" Doc. 953-36 at 2. Following this email, the prosecution sought—as its very first *in limine* motion—an order precluding Siegelman from presenting evidence, testimony, or argument "that politics was a motivating factor in the government's decision to prosecute" him. Doc. 348 at 1. In support, the government asserted that "[f]or months Defendant Siegelman has inundated the media with accusations that this public corruption prosecution is the result of a political witch hunt," and the government pointed to articles in which Siegelman was quoted as saying that his prosecution was politically motivated. *Id.* at 2.

The Judiciary Committee letter to the Attorney General also pointed to other emails indicating Canary's continued involvement in the case. For instance, an April 6, 2005, email between members of the prosecution team discussed Grimes's assignment to work on the "big case," noting that "Leura . . . liked the concept" and "Leura asked me to pass this information on to you." Doc. 953-38 at 2. *See also* Doc. 953-37 (email from Canary to four members of the prosecution team on Sept. 27, 2005). The Judiciary Committee letter urged the Attorney General to

investigate Canary's post-disqualification involvement in the case and the "serious concerns" it raised. Doc. 953-35 at 8.

Siegelman's new-trial motion also referenced a June 1, 2009, letter from Grimes to the U.S. Attorney General that elaborated on Canary's continued involvement. As Grimes explained:

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

Doc. 953-39 at 3. Grimes elaborated:

> Every milestone in The Big Case was rewarded with a personal acknowledgement from U.S. Attorney Canary. When the superseding indictment was unsealed [on October 26, 2005], Mrs. Canary hosted a party at the Marina to celebrate. Mrs. Canary hosted a similar celebration when the convictions were handed down.
>
> This pattern of special recognition by Mrs. Canary was repeated throughout the case. Mrs. Canary and Mrs. Watson wrote all the press releases released under the signature of [Acting U.S. Attorney] Franklin.
>
> . . .
>
> Mrs. Watson told me that she and Debbie Shaw kept Mrs. Canary up to date on the progress of the B[ig] Case. Mrs. Watson also told me that she and Debbie Shaw communicated Mrs. Canary's suggestions to Louis Franklin.

Id. at 6, 9. Grimes also recounted how, after she filed whistleblower complaints with the Office of the Inspector General at the Department of Justice, she was subjected to retaliation by Canary and others. *Id.* at 7.

In light of this new information, Siegelman moved the court to permit discovery relating to Canary's failure to honor her disqualification, asking for the government to turn over all post-disqualification communications between Canary and members of the prosecution team relating to the Siegelman investigation or "the Big Case." Doc. 961 at 6. Siegelman also pointed to a Freedom of Information Act ("FOIA") suit that had been filed against the Department of Justice seeking documents related to Canary's disqualification. Doc. 984 at 3-4. In response to the suit, the government had identified more than 500 pages of responsive documents, which it withheld under various FOIA exemptions and privileges. *Id.*; *see also* Mem. Opinion & Order at pp. 1-4, *Aaron v. U.S. Dep't of Justice*, No. 09-cv-831 (D.D.C. July 15, 2011) (describing the withheld documents). In his discovery request, Siegelman noted that the withheld documents from the FOIA suit would be "easily obtainable . . . by discovery ordered by this Court." Doc. 984 at 4.

The Magistrate Judge, however, did not order any Canary-related discovery. Instead, he entered two discovery orders, neither of which asked the government to turn over *any* documents related to Canary's continued involvement in the prosecution. The two discovery orders required the government to turn over notes and documents "related to or developed from interviews of or meetings with Nick Bailey by any agent of the government." Doc. 1042; *see also* Doc. 1040 (ordering

production of "the binder provided to [an attorney] by his former client Nick Bailey"). Bailey had been a government witness who claimed that prosecutors had improperly shaped and scripted his testimony; his claims of testimony-shaping had nothing to do with Canary's continued involvement in the Siegelman prosecution. Doc. 1096 at 5.

Having granted only Bailey-related discovery, the Magistrate Judge denied Siegelman's request for materials relevant to Canary's disqualification. First, he rejected Siegelman's argument that denial of an interested prosecutor was a structural error under *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987). According to the Magistrate Judge, the continuing vitality of that case had been undermined by the Supreme Court's failure to cite *Young* when listing examples of structural error in a later case, *Neder v. United States*, 527 U.S. 1 (1999). Doc. 1096 at 16-17. The Magistrate Judge accordingly concluded that Siegelman was required "to demonstrate prejudice," *id.* at 16, which he could not do: "There is no evidence that the 'wall' erected between the United States Attorney and the prosecution team was breached in any significant or material manner." *Id.* at 18. The Magistrate Judge did not acknowledge that no Canary-related discovery had been ordered.[3] Nor did he refer to the hundreds of pages of

[3] In denying co-defendant Scrushy's similar discovery request, the magistrate judge wrote that "the court has laboriously reviewed the documents provided to it by the government related to this issue. . . . This is not a matter of withholding any

documents from the FOIA suit. Nor did he acknowledge the prosecution's *in limine* motion to prevent Siegelman from arguing political bias, which had followed Canary's suggestion that the prosecution seek a bias-related "gag order." Nor did he mention Grimes's claims that Canary had "maintained communication" with the prosecution team about the case, had "directed some action in the case," had rewarded the team for favorable developments in the case, and had written press releases related to the case.

On July 5, 2012, Judge Fuller denied Siegelman's motion for new trial, including his claims based on Canary's post-disqualification involvement in the prosecution. Doc. 1098. Like the Magistrate Judge, Judge Fuller concluded that *Neder*'s failure to mention *Young* meant that Siegelman was required to show prejudice. Judge Fuller stated simply: "His failure to do so dooms his claim, and his motion for new trial on this basis will be denied." *Id.* at 17. Having rejected Siegelman's claim on the merits, Judge Fuller denied his request for discovery as moot. *Id.* at 31. Like the Magistrate Judge, Judge Fuller did not discuss the lack of court-ordered discovery, the FOIA suit, the *in limine* motion, or Grimes's letter to

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documents; there are no documents." Doc. 1070 at 19-20. Yet the magistrate judge failed to acknowledge that the "documents provided to it by the government" included *nothing* related Canary's ongoing involvement. Indeed, the government was not ordered to turn over any Canary-related documents.

the Attorney General. Indeed, Judge Fuller made no mention whatsoever of Siegelman's evidentiary showing.

E. The 2012 Resentencing

The second sentencing hearing was held on August 3, 2012.[4] At the hearing, Judge Fuller undertook to resentence Siegelman in light of the fact that this Court had vacated his conviction on Counts 8 and 9 (related to Scrushy's self-dealing while on the CON Board). Both Siegelman and the government reasserted the arguments and objections they had raised at the first sentencing. ST2012 at 4-5. In response, Judge Fuller again made the same three rulings at issue here:

(1) He granted a two-level enhancement for obstruction of justice, indicating that he was basing his decision on "all of the conduct that we've heard about at trial" (specifically mentioning the Goat Hill construction project), as well as the delayed reporting by the Alabama Education Lottery Fund of Scrushy's $500,000 donation. *Id.* at 12-14.

(2) He again calculated the total benefit received at $3,740,525, as per his original assessment. *Id.* at 35-36. Since that figure did not reflect any conduct from the now-vacated Counts 8 and 9, there was no need to adjust it. *Id.* at 36.

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[4] The minute entry for the 2012 resentencing appears as Doc. 1113 on the district court's docket. The transcript comprises one volume and is cited herein as "ST2012," followed by the page number. Appropriate portions of the transcript are included in the record excerpts pursuant to Eleventh Circuit Rule 30-1.

(3) He again imposed a four-level upward departure for systematic and pervasive government corruption, relying on his prior ruling. *Id.* at 44-45.

Judge Fuller adopted the factual findings of the Presentence Report and set Siegelman's offense level at 34, indicating a Guidelines range of 151 to 188 months' imprisonment. *Id.* at 46. In view of this range and the other § 3553 factors, he again determined that a variance was warranted and imposed a sentence of 78 months in prison. *Id.* at 128. Siegelman is presently incarcerated.

III. Standard of Review

A district court's denial of discovery on a new-trial motion is reviewed for abuse of discretion. *United States v. Espinosa-Hernandez*, 918 F.2d 911, 914 (11th Cir. 1990). Denial of a new-trial motion is also reviewed for abuse of discretion, but legal questions and mixed questions of law and fact are reviewed *de novo*. *United States v. Noriega*, 117 F.3d 1206, 1217-18 (11th Cir. 1997).

A district court's factual findings in support of a sentence are accepted unless clearly erroneous, but the court's interpretation of the Sentencing Guidelines is reviewed *de novo*. *United States v. Pompey*, 17 F.3d 351, 353 (11th Cir. 1994). The district court's application of the Guidelines to the facts is also reviewed *de novo*. *United States v. Massey*, 443 F.3d 814, 818 (11th Cir. 2006).

SUMMARY OF THE ARGUMENT

As the Court observed regarding Siegelman's prior appeal, this "extraordinary case" arrives here "with the 'sword and buckler' of a jury verdict." *Siegelman II*, 640 F.3d at 1164. Although Siegelman respectfully disagrees with the verdict, he does not contest it here. Nor does he seek to rehash arguments that this Court has already rejected.[5] Rather, he asks for review of two issues that go to the heart of his prosecution, conviction, and sentence.

First, U.S. Attorney Leura Canary's failure to honor her disqualification violated Siegelman's right to a disinterested prosecutor. While Siegelman was being criminally investigated by the U.S. Attorney's Office, Canary's husband was a hired consultant for Siegelman's political opponent; Canary had a direct financial interest in the success of her husband's client and in Siegelman's defeat. Unlike Siegelman's co-defendant, Richard Scrushy, there was a clear conflict of interest as to Siegelman that prevented Canary's participation in his prosecution.

[5] Out of respect for this Court's time, Siegelman hereby incorporates and preserves co-defendant Richard Scrushy's arguments regarding selective prosecution, premature jury deliberations, and Judge Fuller's recusal. *See United States v. Scrushy*, -- F.3d ----, 2013 WL 3491344, at *7 (11th Cir. July 15, 2013). Siegelman also hereby preserves the arguments addressed in his last appeal, including that a defendant may be convicted of federal funds bribery only if there is proof of an "express" quid pro quo agreement. *See Siegelman II*, 640 F.3d at 1169-72.

Despite this conflict of interest, evidence shows that Canary's involvement in the case lasted long after her May 2002 disqualification. She communicated with members of the prosecution team, made staffing decisions, and celebrated their successes. According to evidence from whistleblower Tamarah Grimes, Canary even wrote press releases related to the case. This level of involvement from a prosecutor with a personal financial stake in seeing Siegelman defeated and convicted was constitutionally unacceptable.

At a minimum, Siegelman was entitled to limited discovery regarding Canary's continued involvement in his case. The Magistrate Judge denied Siegelman's request for Canary-related discovery based on the mistaken premise that Siegelman was required to prove prejudice before discovery was allowed. Neither he nor Judge Fuller acknowledged the substantial showing that Siegelman had made—a showing that provided ample reason to believe that targeted discovery (which has never been conducted) would develop significant new facts substantiating his claim.

Second, in calculating Siegelman's sentence under the Guidelines, Judge Fuller dramatically increased his offense level by relying on conduct unrelated to the offenses for which Siegelman was convicted. Without explanation, Judge Fuller lumped together all the charges against Siegelman—the Scrushy Charges, the Motorcycle Charges, and the RICO Charges—treating them as a single,

undifferentiated block. The consequence of this grouping was to dramatically increase Siegelman's offense level by imposing: (1) a *two-level* increase for obstruction of justice; (2) an *eighteen-level* increase based on a $3,740,525 "total benefit" calculation; and (3) a *four-level* upward departure for systematic and pervasive Government corruption. As a result, a Guidelines range of 51 to 63 months' imprisonment was suddenly transformed into a range of 151-188 months' imprisonment.

Judge Fuller's decision to group together all of the charges was erroneous. As an initial matter, he failed to explain or justify the decision, which in itself constitutes reversible error. Moreover, the conduct underlying the various charges—which were indicted separately—involved disparate acts and aims, took place at different times over a six-year period, and involved different participants. For instance, Lanny Young had nothing to do with the Scrushy Charges; yet Judge Fuller calculated the "value" of the Scrushy bribe by adding in the substantial payments Young received on the Cherokee County landfill, Waste Management, and Goat Hill schemes. Much of the RICO misconduct was also unknown and unforeseeable to Siegelman, and there is *no* evidence that he received anything of value in return for his interventions on Young's behalf (other than perhaps a $50,000 donation to the Alabama Lottery Education fund). In sum, Judge Fuller's "kitchen sink" approach to sentencing is as unjustifiable as it was unexplained.

Finally, Judge Fuller's error was compounded by his reliance on acquitted conduct from the RICO Charges. Even if use of acquitted conduct is generally permissible, it should be evaluated under a "clear and convincing evidence" standard where here, as here, its use has such a profound effect on the sentence. Judge Fuller's heavy reliance on acquitted conduct at least raises serious constitutional concerns—concerns that would disappear if this Court agrees that the RICO charges should not be grouped with the Scrushy Charges.

ARGUMENT

I. CANARY'S FAILURE TO HONOR HER DISQUALIFICATION VIOLATED SIEGELMAN'S RIGHT TO A DISINTERESTED PROSECUTOR

As the Supreme Court has repeatedly recognized, the right to a disinterested prosecutor is a core component of due process:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935); *see also Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249 (1980) ("Prosecutors are also public officials; they too must serve the public interest."). Indeed, the right to a disinterested prosecutor is so important—such a "fundamental premise of our society"—that failure to honor the

right requires automatic reversal, without requiring the defendant to show that the error caused prejudice. *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810 (1987) (plurality); *see id.* at 814 (plurality) ("In this case, however, we establish a categorical rule against the appointment of an interested prosecutor, adherence to which requires no subtle calculations of judgment."); *id.* at 825 (Scalia, J., concurring) (agreeing with the four-justice plurality that the error was structural and required automatic reversal).[6]

In this case, Canary was disqualified from participation in the Siegelman case in May 2002, but she continued to communicate with and influence the prosecution team long after that. Given her direct, personal financial interest in prosecuting Siegelman, her continued involvement in the case violated Siegelman's right to a disinterested prosecutor. At a minimum, Siegelman has established sufficient reason to believe that targeted discovery—which has never been conducted—would develop significant new facts substantiating his claim.

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[6] Both the Magistrate Judge and Judge Fuller denied that the appointment of an interested prosecutor would constitute structural error, claiming that *Young* was no longer good law because "the United States Supreme Court did not cite *Young* as one of those 'very limited class of [cases]' when discussing structural errors in criminal cases." Doc. 1096 at 17 (quoting *Neder*, 527 U.S. at 8); Doc. 1098 at 17 (same). *Neder* held that the failure to submit an element of the offense to a jury is not structural error. Nothing said in *Neder* calls *Young* into question; indeed, any discussion of *Young* would have been dicta. And the Supreme Court obviously does not overrule an earlier opinion *sub silentio* by failing to cite it in a later case.

A. Canary Participated in the Siegelman Prosecution Despite a Clear Conflict of Interest

Appellant Siegelman acknowledges that this Court held that Canary's failure to disqualify did not result in a "clear conflict of interest" as to co-defendant Richard Scrushy. *See United States v. Scrushy*, -- F.3d ----, 2013 WL 3491344, at *15 (11th Cir. July 15, 2013). However, Appellant respectfully submits that his circumstances differ from Scrushy's in several crucial respects. At the time that the investigation began, Siegelman was the sitting Governor and was in the midst of a hotly contested reelection campaign. Canary's husband was a political consultant who had been hired by several of Siegelman's opponents, including one who was running against him for Governor *at that very time*. Doc. 953-29 at 4-6. As a result, Canary had a direct financial interest in the success of her husband's client and in Siegelman's defeat. Just as in *Young*, Canary's involvement plainly created "the *potential* for private interest to influence the discharge of public duty." 481 U.S. at 805 (majority) (emphasis in original). Indeed, the conflict of interest was far worse here: In *Young*, the private prosecutor would not have benefited unless a conviction was actually obtained, which could happen only after the defendant received a fair trial. Here, Canary would benefit financially from any

decline in Siegelman's political standing—including through damaging leaks from the prosecution.[7]

Moreover, Appellant notes the following indications that Canary's involvement in the Siegelman prosecution did not end with her May 2002 disqualification:

- Canary emailed the prosecution team in September 2005 suggesting they obtain a gag order against Siegelman. The prosecution's first *in limine* motion sought to preclude Siegelman from arguing that the case was politically motivated. Doc. 953-36 at 2; Doc. 348 at 1-2.
- Canary approved of staffing decisions on "the Big Case," as confirmed by an April 2005 email. Doc. 953-38 at 2.
- Canary hosted a party to celebrate the unsealing of the superseding indictment in October 2005 and rewarded the prosecution team for other case "milestone[s]." Doc. 953-39 at 6.
- Canary wrote press releases issued under the signature of Acting U.S. Attorney Franklin. *Id.*
- Canary "directed some action in the case" and made "suggestions" that were communicated to Franklin. *Id.* at 6, 9.

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[7] This is not a hypothetical concern. Repeated grand jury leaks leading up to the November 2002 election did tremendous damage to Siegelman's candidacy. *See* Doc. 953-29 at 7-8 (describing some of the leaks); *see also* Congressional Testimony of G. Douglas Jones, former U.S. Attorney for the Northern District of Alabama at 6 (Oct. 23, 2007) ("Governor Siegelman narrowly lost the 2002 elections to his Republican opponent Bob Riley. Less tha[n] 7 or 8000 votes separated the 2 candidates and I frankly believe that the investigative leaks leading up to November cost Governor Siegelman his re-election bid."), available at http://judiciary.house.gov/hearings/pdf/Jones071023.pdf.

It is no answer to claim, as Judge Fuller did in his new-trial ruling, that Siegelman has not identified any specific decision that Canary made. Doc. 1098 at 17. For as *Young* explained:

> Regardless of whether the appointment of [an interested prosecutor] in this case resulted in any prosecutorial impropriety (an issue on which we express no opinion), that appointment illustrates the *potential* for private interest to influence the discharge of public duty.

481 U.S. at 805 (majority) (emphasis in original). That potential for improper influence was sufficient to render use of the private prosecutor in *Young* reversible error, without requiring the defendant to identify any particular trial decision that had been affected. In any event, the *in limine* motion is a specific decision that can be linked to Canary's continued involvement, and Grimes's letter to the Attorney General indicates that there were others as well. Doc. 953-39 at 6, 9.

B. At a Minimum, Siegelman Was Entitled to Discovery on this Issue

Even if these manifestations of Canary's continuing involvement were not, by themselves, sufficient to warrant reversal, the district court erred by refusing to order further discovery. When discovery is sought in support of a motion for a new trial, discovery should be ordered "where specific allegations show reason to believe that the [defendant] may, if the facts are fully developed, be able to demonstrate that he is entitled to relief." *Arthur v. Allen*, 459 F.3d 1310, 1310-11

(11th Cir. 2006) (quoting *Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997)).[8] A district court's failure to order discovery is an abuse of discretion if it is "too soon to declare out of hand that the new evidence" might support the defendant's new-trial claim. *United States v. Espinosa-Hernandez*, 918 F.2d 911, 914 (11th Cir. 1990); *see id.* at 913 ("The District Court abused its discretion in denying [the defendant's] motion for discovery into [the government's] alleged misconduct and in denying the motion for a new trial without first conducting an evidentiary hearing.").

Here, Siegelman not only provided specific allegations, but also actual evidence, which the Magistrate Judge and Judge Fuller ignored, that discovery would have yielded facts supporting his new-trial claim. In addition to the emails showing Canary's ongoing involvement, Siegelman's discovery request was supported by Grimes's letter to the Attorney General, in which she wrote that Canary "directed some action" in the case, made "suggestions" to Franklin, and wrote "all the press releases" issued under Franklin's signature.[9] Doc. 953-39 at 6,

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[8] This standard for post-conviction discovery was first enunciated in the habeas context. As the Magistrate Judge explained, it applies as well to discovery requested in support of a new-trial motion. Doc. 1096 at 2-3 (citing *United States v. Velarde*, 485 F.3d 553, 560 (10th Cir. 2007)).

[9] In the district court, the government submitted a carefully worded affidavit from Franklin stating that Canary's "role in th[e] case" did not continue after her disqualification, and that she "made no decisions as to its investigation or

9. The district court could have sought testimony or evidence from Grimes—but did not. Siegelman also pointed to the FOIA suit, which turned up more than 500 pages of responsive documents relating to Canary's disqualification. Doc. 984 at 3-4. The district court could have ordered the government to turn over these documents—but did not.

Most importantly, the district court could have ordered the government to disclose post-disqualification communications between Canary and the prosecution team regarding the Siegelman case—but did not. Doc. 961 at 6. A simple, targeted email search using terms such as "Leura" and "Canary" with "Siegelman" and "the Big Case" would have quickly answered whether Canary's ongoing involvement was as extensive as Grimes claimed; if necessary, any responsive emails could have been reviewed *in camera*. Instead, the Magistrate Judge ordered *no* Canary-related discovery, based on his conclusion that Siegelman had "pointed to no prejudice he suffered as a result of Canary's" involvement. Doc. 1096 at 20;

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prosecution." Doc. 975-4 at ¶2. As the Magistrate Judge observed, Franklin never denied that Canary made suggestions to or communicated with him about the case:

> Well all I have from Mr. Franklin and other prosecutors is we directed this litigation. But what if Ms. Canary was constantly feeding information? What if Ms. Canary was constantly making suggestions to them? Whether they ignored them or not, at some point she is their boss.

Doc. 1086 at 46. Moreover, Canary herself never denied most of what Grimes alleged: that Canary continued to communicate with Franklin and other members of the prosecution, that she made strategy suggestions, that she rewarded favorable developments in the case, and that she wrote press releases related to the case.

see also Doc. 1098 at 17 ("Siegelman points to no prejudice"). But a showing of prejudice is not required for a discovery request, which is proper if the defendant can provide "reason to believe" that his new-trial claim would be substantiated "*if the facts are fully developed*." *Arthur*, 452 F.3d at 1247 (emphasis added). This error alone requires reversal, so that Siegelman's discovery request can be evaluated under the proper standard. *See Koon v. United States*, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law.").

II. JUDGE FULLER ERRED BY USING UNRELATED CONDUCT TO DRAMATICALLY ENHANCE SIEGELMAN'S SENTENCE

Siegelman was convicted of the Scrushy Charges and the Motorcycle Charges and was acquitted of all other counts, including the RICO Charges. However, in calculating the appropriate Guidelines range for the counts of conviction, Judge Fuller grouped together *all* of the conduct with which Siegelman had been charged. This allowed Judge Fuller to hold Siegelman accountable for conduct underlying the RICO Charges on which he was acquitted—most notably, the Cherokee County landfill, Waste Management, and Goat Hill conduct.

The result of grouping all of this conduct was to dramatically increase Siegelman's offense level by imposing: (1) a *two-level* increase for obstruction of justice; (2) an *eighteen-level* increase based on a $3,740,525 "total benefit"

calculation; and (3) a *four-level* upward departure for systematic and pervasive Government corruption. Had Judge Fuller not grouped all of the conduct together, Siegelman's total offense level would have been *ten levels* lower. *See* USSG § 2B1.1(b)(1)(H). Given Siegelman's lack of criminal history, the resulting offense level (24 rather than 34) would have produced a Guidelines range of 51 to 63 months' imprisonment, rather than 151-188 months' imprisonment.

Grouping all of the conduct together was thus the most significant sentencing decision that Judge Fuller made. Yet he failed to explain or justify the decision in any way. Nor was a justification possible: The conduct underlying the Scrushy Charges, the Motorcycle Charges, and the RICO Charges involved disparate acts and aims, took place at different times over a six-year period, and involved different participants. Much of the conduct that Judge Fuller held Siegelman accountable for was also unknown and unforeseeable to him. Therefore, Judge Fuller erred in calculating Siegelman's Guideline range by treating everything the government sought to prove at trial as a single, undifferentiated unit.

A. Judge Fuller Failed to Provide a Reasoned Explanation for Grouping All Conduct Together

All sentencing proceedings must begin "by correctly calculating the applicable Guidelines range," and the sentencing court must "remain cognizant of [the Guidelines] throughout the sentencing process." *Gall v. United States*, 552 U.S. 38, 49-50 & n.6 (2007). Given the centrality of the Guidelines, a sentencing

court must articulate the basis for its Guidelines calculations, a process that "allows for meaningful appellate review and promotes the perception of fair sentencing." *United States v. Livesay*, 525 F.3d 1081, 1093 (11th Cir. 2008). Failure to provide a sufficient explanation is reversible error. *See id.* at 1087 (reversal required where the "record fails to provide the minimum indicia required to allow us to review" the district court's application of the Guidelines). Indeed, this Court routinely sends cases back to the district court for resentencing under such circumstances. *See, e.g.*, *United States v. Johnson*, --- Fed. Appx. ----, 2013 WL 2347693 (11th Cir. May 30, 2013) (reversing where "we must conclude that the district court failed to adequately explain its reasons for Johnson's sentence"); *United States v. Mattox*, 459 Fed. Appx. 877, 879-80 (11th Cir. 2012) ("Due to the limited explanation of the district court, we vacate Mattox's sentence and remand this case for further proceedings consistent with this opinion.").

In this case, Judge Fuller's decision to group the Scrushy Charges with all the other alleged conduct was both highly contested and momentous, leading to a ten-level increase in Siegelman's Guidelines range. Yet Judge Fuller never articulated any basis for this choice. Instead, although he adopted the "factual findings" of the Presentence Report—which provided a general description of the conduct—he never explained *why* the conduct described in those findings was sufficiently related. *See Massey*, 443 F.3d at 818 (district court's application of the

Guidelines to the facts is reviewed *de novo*). Siegelman's sentence must be reversed on this basis alone, so that a reasoned explanation can be provided and he can receive "meaningful appellate review." *Livesay*, 525 F.3d at 1093.

B. Judge Fuller Relied Upon Conduct That Should Not Have Been Grouped Together Under the Sentencing Guidelines

Under the Sentencing Guidelines, a defendant is punished not merely based on the counts of conviction, but on the "relevant conduct" underlying those counts. *See* USSG § 1B1.3. Conduct qualifies as "relevant"—and hence punishable—if it is sufficiently related to the offense of conviction; where joint activity is alleged, the conduct must also be "foreseeable" to the defendant. *Id.* § 1B1.3(a)(1)(B); *see United States v. Valarezo-Orobio*, 635 F.3d 1261, 1264 (11th Cir. 2011) ("Relevant conduct includes not only the defendant's own acts in perpetration of the offense, but also all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." (quotation marks omitted)). The idea is that some crimes involve a tight cluster of conduct that "cannot readily be broken into discrete, identifiable units that are meaningful for purposes of sentencing." USSG § 1B1.3 cmt., background. For instance, the Guidelines Manual gives the example of "a pattern of embezzlement" that consists of "several acts of taking that cannot separately be identified." *Id.*

To determine whether conduct should be grouped together, "a court must look to the similarity, regularity, and temporal proximity between the offense of

conviction and the" conduct sought to be grouped. *United States v. Maxwell*, 34 F.3d 1006, 1011 (11th Cir. 1994) (quotation marks omitted). But this Court has admonished sentencing courts not to paint with too broad a brush:

> [W]hen illegal conduct does exist in discrete, identifiable units apart from the offense of conviction, the Guidelines anticipate a separate charge for such conduct.

Id. at 1010-11 (quotation marks omitted); *see United States v. Blanc*, 146 F.3d 847, 853 (11th Cir. 1998) (grouping of frauds together was unwarranted "because the conduct is subject to meaningful subdivision into wholly discrete and identifiable units"). Where conduct has *in fact* been divided into separate counts of an indictment, this provides strong evidence that grouping for sentencing purposes is improper. *See United States v. Amedeo*, 370 F.3d 1305, 1315-16 (11th Cir. 2004) ("While we do not hold categorically that such separately charged conduct cannot be deemed 'relevant conduct' for sentencing purposes under U.S.S.G. § 1B1.3, it does suggest, in these circumstances, that [the separately charged conduct] was sufficiently distinct from the offense of conviction that it warranted a separate charge.").

Judge Fuller ignored these principles in choosing to group together the Scrushy Charges, the Motorcycle Charges, and the RICO Charges. The conduct underlying these separately indicted counts was unrelated, and much of it was unknown and unforeseeable to Siegelman.

1. Obstruction of Justice Enhancement

The Sentencing Guidelines permit a sentencing judge to impose a two-level increase in the defendant's offense level for obstruction of justice if:

> (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense . . . .

USSG §3C1.1. Where, as here, the defendant was convicted of obstruction of justice in addition to a separate offense (here, the Scrushy Charges), the Guidelines authorize both offenses to be "grouped," but only if they are "closely related." *Id.* § 3C1.1, cmt. 8 (cross-referencing §3D1.2(c), "Groups of Closely Related Counts").

Judge Fuller was vague about his reasons for imposing an obstruction of justice enhancement against Siegelman. He started by indicating that his decision relied on *all* the conduct with which Siegelman had been charged:

> Now, what I am basing my decision on [the obstruction of justice enhance], in part, is what the government has argued about, and that is the conduct involving Lanny Young dealing with contributions in and about Goat Hill Construction, all of the conduct that we've heard about at trial, but also the conduct involving the relationship between Governor Siegelman and Mr. Scrushy and the handling of those two checks that were given by Mr. Scrushy to Governor Siegelman for the purpose of appointing Richard Scrushy to the CON board, and further appointing him chairman cochairman of the CON board per the agreement that was negotiated between the two of them.

ST2012 at 12. He went on to identify, as a "specific" example of obstruction, the delayed reporting of the $500,000 donations from Scrushy to the Alabama Education Lottery Fund. *Id.* at 13 (the money was not "reported as it should have been until after people started asking questions"). And he finished by again referring to all of the accusations: "[n]ot just the motorcycle, but the overall scheme in the conspiracy." *Id.* at 14. In other words, Judge Fuller lumped everything Siegelman was accused of doing under the same "obstruction" banner.

Judge Fuller's application of the obstruction enhancement was erroneous for several reasons. First, Judge Fuller erroneously relied upon conduct underlying the RICO Charges, specifically mentioning the Goat Hill construction project. As explained at length below, the RICO Charges are not sufficiently related to—and therefore cannot be grouped with—the Scrushy Charges or the Motorcycle Charges. But even if grouping were permissible, nothing Siegelman was accused of doing in the RICO Charges amounts to "obstruction." His alleged involvement in the Goat Hill project consisted of ratifying Young's appointment as project manager and receiving a four-wheel ATV and trailer. This obviously does not constitute "willfully obstruct[ing] or imped[ing] . . . the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense." USSG § 3C1.1. Neither does Siegelman's alleged involvement in the Cherokee County landfill scheme (asking the Commission Chairman to help Young to obtain

a stock-transfer permit) or his involvement in the Waste Management scheme (asking the Revenue Department Commissioner to help Young perhaps in return for a donation to the Alabama Education Lottery Fund). Simply labeling the defendant's behavior a "scheme," as Judge Fuller did, does not transform it into willful obstruction of an investigation.

Second, to the extent that Judge Fuller relied on the Motorcycle Charges, this was also error, because they were not sufficiently "related to" the Scrushy Charges. This Court has said as much:

> The obstruction of justice allegations [*i.e.*, the Motorcycle Charges] involved conduct unrelated to the Siegelman-Scrushy bribery, mail fraud and conspiracy charges [*i.e.*, the Scrushy Charges].

Siegelman II, 640 F.3d at 1164 n.1. The evidence at trial indicated that Siegelman took steps to cover up or disguise the fact that the motorcycle was a gift from Lanny Young. Neither Nick Bailey nor Young—the other participants in the motorcycle scheme—testified that the reasons for doing this was to prevent investigators from discovering Scrushy's $500,000 donation to the Alabama Education Lottery Fund. Nor would such a purpose have made sense. Indeed, there is no evidence that Young was even *aware* of the Scrushy donation. Siegelman's involvement in the motorcycle cover-up, however unseemly, cannot justify an obstruction enhancement without some evidentiary link "to the

investigation . . . *of the instant offense of conviction*," in this case the Scrushy donation.

Third, to the extent that Judge Fuller relied on Siegelman's delayed reporting of the Scrushy donation, the Guidelines are clear that this does not qualify as "obstruction." The Guidelines do not treat as obstructive all behavior calculated to help the defendant avoid detection. *See United States v. Stroud*, 893 F.2d 504, 507 (2d Cir. 1990) ("[T]he district court's conclusion that 'obstruct,' in this context, 'relates to anything that can make it more difficult to carry out a just result in a criminal case' was erroneous as a matter of law."). Rather, the Guidelines carefully limit the scope of this enhancement to significant, affirmative acts that involve fraud, perjury, violence, or direct defiance of judicial authority. Application Note 3 instructs a sentencing court to compare the defendant's conduct to the examples of "covered conduct" listed in Application Note 4:

> (A) threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so;
>
> (B) committing, suborning, or attempting to suborn perjury . . .;
>
> (C) producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding;
>
> (D) destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (e.g., shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence) . . . ;
>
> (E) escaping or attempting to escape from custody before trial or sentencing; or willfully failing to appear, as ordered, for a judicial proceeding;

> (F) providing materially false information to a judge or magistrate judge;
>
> (G) providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense;
>
> (H) providing materially false information to a probation officer in respect to a presentence or other investigation for the court;
>
> (I) other conduct prohibited by obstruction of justice provisions under Title 18, United States Code (e.g., 18 U.S.C. §§ 1510, 1511);
>
> (J) failing to comply with a restraining order or injunction issued pursuant to 21 U.S.C. § 853(e) or with an order to repatriate property issued pursuant to 21 U.S.C. § 853(p);
>
> (K) threatening the victim of the offense in an attempt to prevent the victim from reporting the conduct constituting the offense of conviction.

These examples all involve some affirmative act—the falsification or destruction of evidence, threats against witnesses, violation of a court order. And indeed, even many affirmative acts do not qualify. *See* USSG §3C1.1, cmt. 4(D) (no enhancement for destroying evidence "contemporaneously with arrest . . . unless it resulted in a material hindrance to the official investigation or prosecution"); *id.* §3C1.1 cmt. 5(D) (no enhancement for "fleeing from arrest").

Here, Siegelman was accused of delaying his reporting of the Scrushy donations. This sin of omission—which was committed against the Alabama Secretary of State, not federal investigators—bears no resemblance to the extreme acts of fabrication and violence that the Guidelines contemplate. And even where deceptive conduct is specifically directed at criminal investigators (unlike in this case), the Guidelines typically require proof that "such conduct actually resulted in

a significant hindrance to the investigation or prosecution." *See id.* § 3C1.1 cmt. 5(A) (no enhancement for providing a false name or identification upon arrest unless "such conduct actually resulted in a significant hindrance to the investigation or prosecution"); *id.* § 3C1.1 cmt. 5(B) (no enhancement for lying to law enforcement unless the lie significantly obstructed or impeded the official investigation or prosecution). In this case, there was no proof that the delayed reporting had such an actual effect. Finally, even if the delayed reporting of the Scrushy donation could in theory support an enhancement for obstruction (and it cannot), there is no indication that Judge Fuller would have imposed the enhancement on this basis alone. Therefore, at a minimum, the case must be remanded so that Judge Fuller may reconsider the applicability of the obstruction enhancement without regard to the unrelated conduct on which he had previously relied.

2. Calculation of Benefit Value

In determining the offense level for a bribery crime, the Guidelines require a sentencing court to calculate:

> the value of the payment, the benefit received or to be received in return for the payment, the value of anything obtained or to be obtained by a public official or others acting with a public official, or the loss to the government from the offense, whichever is greatest

USSG § 2C1.1(b)(2). The resulting figure is cross-referenced with a table that specifies level-increases for different dollar amounts. *See* USSG § 2B1.1. Judge

Fuller calculated the benefit value for the Scrushy Charges to be $3,740,525, which included:

> (a) $3,000,000 for what Lanny Young was paid as a result of the Cherokee County landfill revenue ruling;
>
> (b) $500,000 for the payment to Young from Chemical Waste Management;
>
> (c) $50,000 for the check from Chemical Waste Management to the Alabama Lottery Fund;
>
> (d) $181,325 for the amount that the State erroneously paid Young for the Goat Hill construction project; and
>
> (e) $9200 for the cost of the motorcycle.

ST2007, Vol. II, at 150-151; *see* ST2012 at 35-36 (relying on his 2007 calculation). In other words, to arrive at a total figure of more than $3.7 million—which resulted in an 18-level increase in Siegelman's offense level—Judge Fuller lumped in the RICO Charges and the Motorcycle Charges and treated them as part and parcel of the Scrushy bribe. For two basic reasons, this was error.

First, the Guidelines do not endorse such a "kitchen sink" approach to sentencing. Rather, the Guidelines contemplate that separate acts will be punished together only where they "cannot readily be broken into discrete, identifiable units that are meaningful for purposes of sentencing." USSG § 1B1.3 cmt., background. By contrast, "when illegal conduct does exist in discrete, identifiable units apart from the offense of conviction, the Guidelines anticipate a separate charge for such conduct." *Maxwell*, 34 F.3d at 1010-11 (quotation marks omitted).

Here, it is clear that the Scrushy Charges can meaningfully be divided from the Motorcycle Charges and the RICO Charges, such that a "separate charge" was proper for each.[10] Indeed, they *were* indicted separately. *See Amedeo*, 370 F.3d 1305 at 1315-16 (separate indictment shows that the conduct was "sufficiently distinct from the offense of conviction that it warranted a separate charge"). And the fact that the jury could, without any logical inconsistency, acquit Siegelman of the RICO Charges but convict him of the other charges further confirms that they are easily separable. *Cf. Blanc*, 146 F.3d at 853 ("Fuentes's Porsche-chopping activity could not be reduced to smaller, identifiable, discrete units of criminal conduct. . . . In other words, the conduct at issue in *Fuentes* was basically fungible; one incident of Fuentes's Porsche stealing and chopping was more or less identical to any other occurrence.").

Moreover, the offenses at issue were not linked in terms of "similarity" or "temporal proximity." *Maxwell*, 34 F.3d at 1011. They involved different government agencies: the CON Board (the Scrushy Charges); the Cherokee County Commission (Cherokee County landfill); the Revenue Department (Waste Management); the Department of Economic and Community Affairs (Goat Hill). *See Blanc*, 146 F.3d at 854 ("the two crimes at issue did not involve the same

[10] Siegelman acknowledges that the Scrushy Charges (Counts 3-6) were properly combined with one another for sentencing purposes.

subject matter"). They involved different personnel, with Scrushy participating in the Scrushy Charges but not the others, and with Hamrick participating in the Cherokee County landfill scheme but not the others; no one, besides Siegelman, participated in all of them. *See id.* ("except for defendant himself, the two crimes did not involve any of the same parties"). The offenses were also divided from one another temporally over a six-year period: the Cherokee County landfill scheme (late 1997 and 1998); the Waste Management scheme (summer and fall of 1999); the Scrushy donation and appointment (July 1999); the Goat Hill scheme (late 2000); the motorcycle scheme (2002 and 2003). *See id.* (the frauds "were separated temporally . . . by a few years"). Even the fact that the charges can be easily identified by separate nicknames—the Scrushy Charges, the RICO Charges, the Motorcycle Charges—shows that meaningful subdivision is possible. *See id.* ("Indeed, our ability to refer to the different frauds merely as 'CCC' or 'NNI' and yet convey to the reader precisely to which conduct we refer, along with all of the attendant facts relating to that particular swindle, illustrates the wholly distinct nature of each of the frauds involved."). This Court correctly observed that the Motorcycle Charges "involved conduct unrelated" to the Scrushy Charges. *Siegelman II*, 640 F.3d at 1164 n.1. The same is true as to the RICO Charges.

At sentencing, the government argued that the grouping of all charges was appropriate because all of Siegelman's conduct affected "the citizens of Alabama"

and had the common goal "to line his pockets." ST2007, Vol. I, at 81-82. Even if this high-level generalization were accurate (despite the fact that the landfill scheme was directed at Cherokee County only), the Guidelines do not permit a sentencing court to "paint with so broad and undiscriminating a brushstroke." *Blanc*, 146 F.3d at 854. To the contrary, as this Court has explained in a related context, relying on such high-level generalities would undermine the Guidelines' careful procedures:

> We do not think that two offenses constitute a single course of conduct simply because they both involve drug distribution. To so conclude would be to describe the defendant's conduct at such a level of generality as to eviscerate the evaluation of whether uncharged criminal activity is part of the 'same course of conduct or common scheme or plan as the offense of conviction.' With a brushstroke that broad, almost any uncharged criminal activity can be painted as similar in at least one respect to the charged criminal conduct.

Maxwell, 34 F.3d at 1011 (quotation marks, ellipsis, brackets omitted). In calculating the proper offense level for the Scrushy bribe, Judge Fuller's job was to assess the dollar value of *that* conduct—not to lump together everything that Siegelman might have done wrong while in office.

Second, even if the RICO Charges were sufficiently related (which they were not), no evidence supports Judge Fuller's (unstated) assumption that corrupt conduct was foreseeable to Siegelman. *See* USSG § 1B1.3(a)(1)(B). Although testimony does support the notion that Siegelman intervened on Young's behalf, there was *no* evidence indicating that Siegelman did so in order to receive anything

of value from Young, nor any evidence that Young's bribery of other participants was known to him.

Cherokee County Landfill. Young testified at trial that Siegelman intervened on his behalf with members of the Cherokee County Commission. Trial Tr. at 2865-67. But Young did not say—nor is there evidence suggesting—that Siegelman had reason to believe this intervention was improper or that he did it in return for compensation by Young. To the contrary, testimony showed that Young did *not* pay anything to Siegelman at this time. *Id.* at 758-59. (Although Young admitted to paying a number of bribes to Phillip Jordan, the Chairman of the County Commission, he did not claim that Siegelman knew about these bribes or was involved in them. *Id.* at 2879-83.) Therefore, there is no evidence supporting the notion that Young's $3,000,000 profit on the landfill resulted from a bribe to Siegelman.

Waste Management. The evidence indicates that Siegelman and Young discussed Siegelman's intervention on behalf of Chemical Waste Management, helping to obtain a favorable tax ruling from the Alabama Department of Revenue. Siegelman allegedly told Young that "those bastards [*i.e.*, Chemical Waste Management] are going to have to pay for it [*i.e.*, the favorable ruling]." *Id.* at 2895. Months later, after the favorable ruling was obtained, the company wrote a $50,000 check to the Alabama Education Lottery Fund. *Id.* at 2909-10.

However, even if this were sufficient evidence of a quid pro quo between Siegelman and Waste Management as to the $50,000 donation, it does not indicate that Siegelman knew that Young would be paid $500,000 for a favorable revenue ruling. Indeed, in describing his meeting with Siegelman, Young never suggested that he made Siegelman aware that he stood to benefit personally. *Id.* at 2894-95. To the contrary, Young said he never told Siegelman about his lobbying activities. *Id.* at 2886. Therefore, only the $50,000 donation was foreseeable to Siegelman, not Young's $500,000 lobbying fee.

Goat Hill Construction. Bailey testified that Siegelman was one of a "multitude of people" who signed off on Young's appointment as Goat Hill project manager. *Id.* at 431-33. But Bailey did *not* say that Siegelman agreed to Young's appointment in return for anything of value. Although Bailey testified generally that Young gave Bailey a number of gifts over the years in return for intervention (though not mentioning Goat Hill), he did not say that these gifts were known by Siegelman, much less known by Siegelman to be quid pro quos. *Id.* at 437-38. Bailey also testified that it was *his* idea for Young to purchase a four-wheel ATV and trailer for Siegelman's son; again, Bailey never claimed that Siegelman viewed the gift as payment for intervention on Young's behalf—whether for Goat Hill or anything else. *Id.* at 468-69.

Unable to identify any specific quid pro quo, the government points to testimony that Siegelman, Bailey, and Young had a general "agreement," formed in approximately 1994, that they would help one another when they were in a position to do so. *See id.* at 643-44 ("[W]e had an agreement in regards to Lanny Young that when Lanny needed something, we would produce; and when we needed something, Lanny would produce."); *id.* at 2834 ("The agreement would be that I would give whatever money was needed for campaign, personal use or whatever; and if he came into a position to help me further my business or personal interests, he would do so."). The law could not be clearer that this sort of aspiration or intention does not amount to bribery:

> [T]he acceptance of the campaign donation [must] be in return for a *specific* official action—a quid pro quo. *No generalized expectation of some future favorable action will do*. The official must agree to take or forego some specific action in order for the doing of it to be criminal under [the federal bribery statute]. In the absence of such an agreement on a specific action, even a close-in-time relationship between the donation and the act will not suffice.

Siegelman II, 640 F.3d at 1171 (first emphasis in original; footnote omitted). None of Siegelman's efforts on behalf of Young can be tied with any specificity to a payment (except perhaps for the $50,000 donation from Chemical Waste Management). Any conversation Siegelman may have had with Young in 1994 does not justify holding Siegelman responsible—as Judge Fuller did—for amounts

Young received many years later ($3,000,000 in 1998; $500,000 in 1999; and $181,325 in 2001).

3. Systematic and Pervasive Corruption

Judge Fuller imposed a four-level upward departure for systematic and pervasive government corruption, again relying on the RICO Charges. ST2007, Vol. III, at 127; *see also* ST2012 at 44-45 (relying on 2007 ruling). This was error for the reasons described above: Conduct underlying the RICO Charges was not sufficiently related to the Scrushy Charges; and even if it were, most of the corruption was not foreseeable to Siegelman. Stripped of the RICO conduct, any remaining "corruption" was neither pervasive nor systematic.

C. The Use of Acquitted Conduct to Increase Siegelman's Sentence Was Improper, or at Least Constitutionally Questionable

Judge Fuller's reliance on conduct underlying the RICO Charges was also improper because Siegelman was acquitted of those charges. Siegelman acknowledges that this Court has authorized reliance at sentencing on acquitted conduct proven by a preponderance of the evidence, *see United States v. Faust*, 456 F.3d 1342, 1347-48 (11th Cir. 2006), and raises the issue in order to preserve it. Siegelman also respectfully submits that where, as here, reliance on acquitted conduct has such a profound effect on the sentence, such conduct must be proven by clear and convincing evidence—an issue on which this Court has not yet ruled. *See United States v. Kikumura*, 918 F.2d 1084, 1102 (3d Cir. 1990) (requiring clear

and convincing evidence in a so-called "tail wags the dog" scenario); *see also United States v. Watts*, 519 U.S. 148, 156 (1997) ("acknowledg[ing] a divergence of opinion among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence"); *United States v. Valdes*, 319 Fed. Appx. 810, 814 (11th Cir. 2009) (noting the circuit split but not resolving the issue on plain error review); *United States v. Lewis*, 115 F.3d 1531, 1537 (11th Cir. 1997) (similar). At a minimum, Judge Fuller's heavy reliance on acquitted conduct in the RICO Charges raises serious constitutional concerns—concerns that would disappear if this Court agrees that those charges should not be grouped with the Scrushy Charges. This, too, counsels in favor of strict adherence to the definition of "related conduct" under the Guidelines. *See Jones v. United States*, 526 U.S. 227, 239 (1999).

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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Certificate of Compliance

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the type-volume limitation in Rule 32(a)(7)(B). The foregoing brief is presented in proportionally spaced font typeface using Microsoft Word 2010 in 14-point Times New Roman font. The brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), contains XXX words as counted by Microsoft Word 2010.

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Certificate of Service

I hereby certify that on August 26, 2013, I electronically filed the foregoing Brief with the Clerk of the Court for the U.S. Court of Appeals for the Eleventh Circuit using the CM/ECF system, which will send notification of such filing to the following counsel for plaintiff-appellee United States, who are registered CM/ECF users:

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