No. 07-13163-B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA, Appellee

vs.

DON EUGENE SIEGELMAN, et al., Appellants

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

BRIEF OF *AMICI CURIAE* FORMER ATTORNEYS GENERAL IN SUPPORT OF APPELLANT DON EUGENE SIEGELMAN, URGING REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

Counsel for *Amici Curiae*, Former Attorneys General, certifies pursuant to 11th Cir. R. 28-1(b) that in addition to the persons listed in Appellant's brief, the following persons, all of whom are former state Attorneys General and on whose behalf this *Amici Curiae* Brief is being filed, may have an interest in the outcome of this case:

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STATEMENT OF THE ISSUES

Does an indictment and prosecution under a charge of "honest services" mail fraud, conspiracy to commit that offense, or bribery, without an explicit *quid pro quo* connection between the official act and the campaign contribution, place an undue chilling effect on the First Amendment right to contribute to issue campaigns? Does enhancing a sentence based on privileged speech abridge the First Amendment?

INTEREST OF THE AMICI

The undersigned former state Attorneys General of the United States have all at one time served as the chief legal officer and/or law enforcement officer of their respective states. This nonpartisan group of former elected and appointed state officials remains concerned with the manner in which the laws of the United States are enforced throughout the country. This brief is filed in support of the Appellant, Don Eugene Siegelman, and all parties have consented to its filing.

SUMMARY OF THE ARGUMENT

The prosecution and sentencing of former Alabama Governor Don Siegelman raised serious First Amendment concerns. Based on the evidence used to prosecute Governor Siegelman, the Government contends that evidence that a public official was aware that a person from whom he desired a contribution to an issue campaign that the public official supported desired a political appointment,

and that after the contribution was received the public official appointed the contributor to the desired position, is enough for a conviction under 18 U.S.C. §§ 2, 1341 & 1346 (Honest Services Mail Fraud), 18 U.S.C. § 371 (Conspiracy to commit Honest Services Mail Fraud) and 18 U.S.C. § 666 (a)(1)(B) (Bribery).

Even viewing the evidence in the light most favorable to the Government, no evidence of an explicit *quid pro quo* was presented, linking the $500,000 total contributions made by Richard M. Scrushy to the Alabama Education (Lottery) Foundation (the organization behind a campaign to create a state lottery to fund public education) and Governor Siegelman's reappointment of Mr. Scrushy to the Certificate of Need Review (CON) Board, a state agency responsible for healthcare delivery in Alabama. To protect the First Amendment right to contribute to a campaign, an explicit *quid pro quo* must be read into statutes that criminalize activities. If there is no explicit *quid pro quo* requirement needed to criminalize the giving and receiving of contributions, every government official who acts to the benefit of a contributor, knowing that the contributor desired such an act to take place, is subject to prosecution. Similarly, every contributor who has ever been the beneficiary of sought-after political actions, runs the risk of being prosecuted. Assuming this would not destroy the political fundraising mechanisms inherent in our political system, it would nevertheless give unwarranted latitude to prosecutors

in selecting, for whatever reasons, those politicians and contributors whom they desire to silence.

We are similarly troubled by the enhancement of Governor Siegelman's sentence due to alleged statements the Governor made criticizing his prosecution. The District Court provided only the most minimal explanation of what evidence it relied on in enhancing Governor Siegelman's sentence by 25-37 months. However, if, as appears to be the situation, the District Court relied on privileged statements to increase Governor Siegelman's sentence, such reliance violates First Amendment freedoms. Any resulting sentencing enhancement must be overturned. To the extent the District Court failed to identify what evidence it was taking judicial notice of in enhancing Governor Siegelman's sentence, it has improperly insulated itself from judicial review, and the sentence enhancement ought to be rejected.

ARGUMENT

I. Viewing the Evidence in the Light Most Favorable to the Government, the Facts Fail to Establish an Explicit *Quid Pro Quo*

Assuming, *arguendo*, that the Government's recitation of the facts of this case is correct, there is insufficient evidence to establish an explicit *quid pro quo* between Governor Siegelman's reappointment of Mr. Scrushy to the CON Board and the contribution Mr. Scrushy made to an issue campaign, as detailed below.

A. The Government's Recitation of Facts

According to the Government, the alleged wrongdoing began when Governor Siegelman campaigned for governor on a platform that included establishing a lottery to raise money for education. Trial Transcripts (Tr.) 907. An assistant of Governor Siegelman's, Nick Bailey, testified that after the successful campaign, Mr. Bailey was present when Governor Siegelman had a conversation with Eric Hanson, a lobbyist for HealthSouth Corporation (HealthSouth) – the healthcare service provider of which Mr. Scrushy was Chairman and Chief Executive Officer. Governor Siegelman stated that due to a contribution Mr. Scrushy made to his competitor, Mr. Scrushy would need to contribute $500,000 to the lottery campaign to make things right. Tr. 500-02.

Mr. Bailey testified that after a meeting between Governor Siegelman and Mr. Scrushy, Governor Siegelman showed Mr. Bailey a check for $250,000 from Mr. Scrushy made out to the Alabama Education Lottery Foundation (AELF) and stated that Mr. Scrushy was "halfway there." Tr. 504-07, 509-510. When Mr. Bailey asked Governor Siegelman what Mr. Scrushy would want in return for the donation, Governor Siegelman replied "the CON Board." When Mr. Bailey asked, "I wouldn't think that would be a problem, would it?", Governor Siegelman replied, "I wouldn't think so." Tr. 507. Mr. Bailey testified that in May 2000 he traveled with Governor Siegelman to Birmingham, where the Governor picked up

another check for $250,000 from Mr. Scrushy at Mr. Scrushy's office. This check was made out to the Alabama Education Foundation (AEF), a successor in interest to the AELF. Tr. 538-39, 548, 1117-21. By this time the lottery referendum had been defeated. Tr. 539. Governor Siegelman reappointed Mr. Scrushy to the CON Board on July 26, 1999, a position that Mr. Scrushy previously held under past governors. Tr. 517-18, 1419.

B. The Necessary *Quid Pro Quo* as Established by *McCormick v. U.S.* Has Not Been Met

At best, the facts as outlined by the Government show that: (1) Governor Siegelman felt that Mr. Scrushy ought to donate more to his favored issue campaign than Mr. Scrushy donated to the campaign of his competitor; (2) Mr. Scrushy was aware that Governor Siegelman expected at least a $500,000 contribution to the lottery fund; (3) Governor Siegelman was aware that Mr. Scrushy wanted to be reappointed to the CON Board; (4) Governor Siegelman did not think such an appointment would raise any problems; and (5) Governor Siegelman did, in fact, reappoint Mr. Scrushy to the CON Board. Completely absent from the Trial Record is any evidence that Governor Siegelman and Mr. Scrushy entered into an explicit agreement whereby Mr. Scrushy's appointment to the CON Board was conditioned upon Mr. Scrushy's making the political

contributions in question. Two previous Governors had appointed Scrushy to the same position without incident.

The lack of such an explicit agreement formed the basis of the United States Supreme Court's reversal of a conviction in *McCormick v. United States*, 500 U.S. 257 (1991). In *McCormick*, a West Virginia state legislator, Robert McCormick, advocated a legislative program allowing foreign medical school graduates to practice under a temporary permit while studying for the state licensing exams. *Id* at 259. McCormick sponsored legislation extending the expiration date of the temporary permit program. *Id* A group of the temporarily licensed doctors hired a lobbyist who discussed with McCormick the possibility of introducing legislation that would grant the doctors a permanent medical license by virtue of their years of experience. *Id* at 260. McCormick advised the lobbyist that his campaign was expensive, that he had expended considerable sums out of his own pocket, and that he had heard nothing from the group of doctors. *Id* Thereafter, a series of cash payments were provided to McCormick by the lobbyist. McCormick did not list the payments as campaign contributions or report them on his federal income tax return for that year. *Id.* The payments were also not reflected in the books of the doctors' organization as campaign contributions; the books simply stated that the payments were for McCormick. *Id.*

The Court of Appeals for the Fourth Circuit rejected McCormick's contention that conviction of an elected official under the Hobbs Act[1] required proof of a promise of official action or inaction in exchange for any payment or property received, i.e., an explicit *quid pro quo*. *Id.* at 265-66. Instead, the Fourth Circuit concluded that no such showing was needed where the parties never intended the payments to be "legitimate" campaign contributions. *Id.* at 266.

However, the Supreme Court rejected the Fourth Circuit's analysis, requiring the finding of an explicit *quid pro quo* before a politician's accepting money can violate the Hobbs Act. The Supreme Court held:

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

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[1] The Hobbs Act, 18 U.S.C. § 1951, provides in relevant part: "(a) Whoever in any way or degree obstructs, delays, or affects commerce ... by robbery or extortion ... in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both. (b) As used in this section - .... (2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

> thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation. It would require statutory language more explicit than the Hobbs Act contains to justify a contrary conclusion.
>
> This is not to say that it is impossible for an elected official to commit extortion in the course of financing an election campaign. Political contributions are, of course, vulnerable if induced by the use of force, violence or fear. The receipt of such contributions is also vulnerable under the Act as having been taken under color of official right, *but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act.* In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking. This is the receipt of money by an elected official under color of official right within the meaning of the Hobbs Act.

Id. at 272-73 (citations omitted) (emphasis added).

In the instant matter, no evidence was shown to prove that Mr. Scrushy's donation to the education campaign was made in return for an explicit promise on the part of Governor Siegelman to reappoint him to the CON Board. At best, the evidence proves that Mr. Scrushy desired such an appointment, and Governor Siegelman was aware of this desire. A contributor's expectation of a linkage between the contribution and the action, even combined with the official's knowledge of that expectation, does not rise to the level of "explicit" under *McCormick*. The Court in *McCormick* made it clear that a mere expectation of a favorable action following a contribution does not give rise to criminal liability – in fact, it was just such an interpretation of the Hobbs Act that led to the flawed jury instructions in *McCormick*:

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

Id. at 274.

That *McCormick* involved the Hobbs Act, and not an "honest services" or "bribery" statute should not be controlling. Whether one solicits a bribe and it is called "extortion" or one initiates a bribe and it is called "bribery," is two sides of the same coin as the Seventh Circuit recognized in *U.S. v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993).

To be perfectly clear – *if* the Court finds that the indictment alleges there was an explicit agreement between Governor Siegelman and Mr. Scrushy, pursuant to which Governor Siegelman would appoint Mr. Scrushy to the CON Board in exchange for a financial contribution, and *if* the Court finds that there was sufficient admissible evidence to prove beyond a reasonable doubt that such an explicit agreement existed, and *if* the Court finds that the jury was properly instructed that it must find the existence of such an explicit agreement based upon the admissible evidence before it, we would have no qualms with the conviction. But conversely, *if* it appears that the jury was permitted to convict Governor Siegelman without having found the existence of an explicit agreement, but rather upon an "agreement" which might possibly be inferred (for example, based upon

the fact that Mr. Scrushy *wanted* to be reappointed to the CON Board, and that Mr. Scrushy *thought* a contribution would rehabilitate him in Governor Siegelman's eyes, and that Governor Siegelman was *aware* of Mr. Scrushy's desire), then we strongly urge the Court to reverse the conviction. To permit a conviction to stand in the absence of such an explicit *quid pro quo* would mean that a prosecutor has the power to indict and convict any politician and any donor whenever a donation was made and the politician took an action consistent with the donor's desire, while aware of said desire.

C. The Government's Interpretation of the Statutes Would Create an Undue Chilling Effect on a First Amendment Right

Allowing a conviction under either bribery or "honest services" statutes without an explicit *quid pro quo* requirement would have strong repercussions that go beyond the convictions of Governor Siegelman and Mr. Scrushy. Such an interpretation puts at risk every politician who accepts a campaign contribution in the knowledge that the donor hopes to influence that politician, and every donor who contributes to a campaign with the hope or expectation of receiving a benefit who goes on to receive that benefit. Such an interpretation of the statutes, criminalizing activities that fall far short of an explicit *quid pro quo* agreement, can only lead to an impermissible chilling effect on the First Amendment right to contribute to political campaigns.

The Supreme Court has recognized the important function of financial contributions and their role in expressing support for candidates and fueling political debate. *See e.g. Buckley v. Valeo*, 424 U.S. 1 (1976); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981). Thus, contributing to political campaigns is a constitutionally-protected activity. *See, e.g., Buckley, supra*, at 23; *Randall v. Sorrell*, 126 S.Ct. 2479, 2489 (2006). Such contributions are especially protected under the First Amendment when - as in this case - they are given to referendum or issue-advocacy campaigns, as opposed to candidate election campaigns, because of a reduced likelihood that such donations could lead to corruption. *See, e.g., First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *F.E.C. v. Wis. Right to Life*, 127 S.Ct. 2652, 2677 (2007) (Scalia, J., concurring). The First Amendment requires that statutes which could potentially criminalize campaign contributions be narrowly construed so as to require an explicit *quid pro quo* before finding that they have been violated. As in *McCormick*, had the legislature intended to criminalize political activity without an explicit *quid pro quo* requirement, it had to have done so explicitly.

Politicians and political donors must understand that they will not be indicted or convicted simply because there is evidence from which one may infer an agreement to use one's office to confer a political favor in exchange for a political contribution. Requiring an explicit *quid pro quo* for a conviction for these

activities, as done in *McCormick*, would avoid any First Amendment implications that would otherwise be raised. Prosecutorial discretion afforded by a statute whose broad language permits such indictments is one of the main reasons that vague or overbroad prohibitions are held to violate free speech. As the Supreme Court reasoned:

> [W]e have recognized recently that the more important aspect of vagueness doctrine is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections.

Kolender v. Lawson, 461 U.S. 352, 358 (1983) (citations omitted).

We respectfully submit that the Court must clearly state that prosecutors are required to prove the existence of an explicit agreement, and that jurors must be charged that the existence of an explicit agreement must be found, before criminal liability will attach for either: (a) making a political contribution with the hope or expectation of subsequent political action; or (b) taking a political action after receiving a political contribution from a known donor.

Each of the signatories to this brief is a former state Attorney General and, therefore, almost without exception, formerly the chief legal officer and/or law enforcement officer of his or her respective state. As such, we do not urge any action that might remove a valuable law enforcement tool in the battle to rid government of corruption. However, the tool used in the instant case (the bribery

and "honest services" statutes) must not be used in a way that runs afoul of the First Amendment's right of free speech. By failing to present evidence of an explicit *quid pro quo*, the federal government has crossed that sacred line in this case and set a dangerous precedent for all elected public officials of the states and for its citizens.

II. The Enhancement of Governor Siegelman's Sentence Based on Privileged Statements Punishes a Protected First Amendment Right

In sentencing Governor Siegelman, the District Court applied a Guidelines upward departure on the Government's motion that was based on taking judicial notice of out-of-court statements made by Governor Siegelman. According to the Government, these statements were to the effect that Governor Siegelman's prosecution was improperly motivated – however no specific statements were cited or even or quoted.[2] As a result, Governor Siegelman received an enhanced

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[2] The following exchange took place during sentencing:

THE COURT: Based upon all of that information that is before the Court, I am convinced that the conduct in which Governor Siegelman engaged in has damaged the function of the Executive Branch of Government in this case, and the public's confidence in the Executive Branch of the Government. I will grant the United States' motion for upward departure of four offense levels.

MR. FEAGA [for the Government]: Your Honor, for the record, would the Court state that it's taking judicial notice of those matters that occurred outside of the courtroom that it mentioned in its findings?

THE COURT: I certainly thought I made that clear.

sentence due to unknown statements, allegedly questioning the motives of a branch of government. In effect, he lost an additional 25-37 months of his life for merely speaking out.[3]

The sentencing factors of 18 U.S.C. § 3553 in no way sanction an increased punishment for out-of-court statements that are presumably protected by the First Amendment. Furthermore, it has been held that: "A sentence based to any degree on activity or beliefs protected by the first amendment is constitutionally invalid." *U.S. v. Lemon*, 723 F.2d 922, 938 (D.C. Cir. 1983). As to the relationship between speech critical of the government and the First Amendment, the Supreme Court held:

> Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized.

Rosenblatt v. Baer, 383 U.S. 75, 85 (1966).

To the extent that one can determine the basis for the Court's upward departure, Governor Siegelman is being punished for protected speech. An

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Sentencing Transcript Vol. 3, Doc. 654, pp. 126-28.

[3] Governor Siegelman received a sentence of 88 months, commensurate with an Offense Level of 28 according to the Federal Sentencing Guidelines. Without the upward departure of four offense levels, Governor Siegelman's sentence would have been within the 51-63 months allowed under an Offense Level of 24, or 25-37 months lower than the sentence he received. A link to the Federal Sentencing Guidelines can be found here: http://www.ussc.gov/2006guid/5a.html.

allegation of improper prosecutorial tactics is a matter of public concern; to punish an individual for such a statement plainly violates the First Amendment. Furthermore, to the extent that the trial court considered Governor Siegelman's criticism of the prosecutor to be worthy of sentence enhancement, we note that on May 5, 2008 the United States Department of Justice's Office of Professional Responsibility informed the U.S. House of Representatives' Committee on the Judiciary that, per the Committee's request, Governor Siegelman's prosecution was to be investigated due to allegations of it being a "selective, politically-motivated" prosecution.[4]

This Court has previously held that basing a sentence on impermissible factors is unreasonable, and that a sentence outside the range of reasonableness cannot be imposed by a District Court. *U.S. v. Pugh*, 515 F.3d 1179, 1191-92 (11th Cir. 2008); *U.S. v. Martin*, 455 F.3d 1227, 1237 (11th Cir. 2006). The situation before us is analogous to that in *Street v. New York*, 394 U.S. 576 (1979). In *Street* the Supreme Court held that a conviction based in whole or in part on protected speech must be set aside. *Id* at 586. Here, the District Court has apparently

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[4] A link to the letter can be found here: http://alt.cimedia.com/ajc/pdf/polinsider/050508%20response%20to%20report%20r.pdf. While a DOJ Office of Professional Responsibility investigation into the prosecution is not evidence that the criticisms of the prosecution were true, it is fair to say that Governor Siegelman's criticisms may very well have prompted the investigation, and he should not be "punished" for publicly speaking out against what he considered to be a politically improper prosecution.

justified an enhanced sentence on the same grounds for which the conviction in *Street* was set aside. The same core analysis should apply in reversing this result which otherwise would set a precedent for chilling any out-of-court speech by criminal defendants on the nature of their trials.

For these reasons, even if this Court were to choose to affirm the conviction, which the undersigned respectfully submit it should not, Governor Siegelman's sentence should be reversed and remanded for re-sentencing that does not take into consideration constitutionally-protected speech.

CONCLUSION

The conviction of government officials under a charge of "honest services" mail fraud, conspiracy to commit that offense, or bribery, based on an alleged connection between official action and a campaign contribution without the showing of an explicit *quid pro quo* linkage between the action and the contribution, will have an impermissible chilling effect on how campaigns are run throughout the country. Furthermore, allowing a person's sentence to be enhanced due to protected speech can only impermissibly restrict First Amendment activities. For the reasons set out above, the decision of the District Court should be reversed.

Respectfully submitted on behalf of the Fifty-four Former Attorneys General identified in the attached Certificate of Interested Persons,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,014 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word Version 2003 in Times New Roman 14 Font type.

Respectfully submitted,

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Certificate of Service

I certify that copies of the foregoing have been served by U.S. Mail on the following this 30th day of May, 2008, that on the same day the brief has been uploaded electronically to the Court, and that an original and six copies have been sent by U.S. Mail to the Clerk for filing.

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