



U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

November 26, 2008

Via Express Mail

Thomas K. Kahn, Clerk
U.S. Court of Appeals for the 11th Circuit
56 Forsyth Street, NW
Atlanta, GA 30303

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

Dear Mr. Kahn:

Enclosed please find an original and three copies of the government's Response to Defendant-Appellant Siegelman's Notice of Supplemental Information Relevant to Issues on Appeal and Motion for Leave to File Such Notice.

Sincerely,

A handwritten signature in black ink, appearing to read "John-Alex Romano", with a long horizontal flourish extending to the right.

John-Alex Romano
(202) 353-0249

cc: Counsel on Certificate of Service List

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPEAL NO. 07-13163-B

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

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

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

RESPONSE TO DEFENDANT-APPELLANT SIEGELMAN'S
NOTICE OF SUPPLEMENTAL INFORMATION RELEVANT TO ISSUES ON
APPEAL AND MOTION FOR LEAVE TO FILE SUCH NOTICE

LOUIS V. FRANKLIN, SR.
Acting United States Attorney
Middle District of Alabama

STEPHEN P. FEAGA
J.B. PERRINE
Assistant United States Attorneys
Middle District of Alabama

WILLIAM M. WELCH, II
Chief

RICHARD C. PILGER
Trial Attorney
Public Integrity Section
Criminal Division
Department of Justice

JOHN-ALEX ROMANO
Appellate Section, Criminal Division
Department of Justice
950 Pennsylvania Ave, NW
Room 1264
Washington, DC 20530
Phone: (202) 353-0249
Fax: (202) 305-2121

United States v. Don Eugene Siegelman, et al.

Appeal No. 07-13163-B

**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

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

1. Gunther, Cynthia E.
2. Hall, W. Perry
3. Morgan Stanley
4. Rogow, Bruce S.
5. Scrushy, Richard M.
6. Siegelman, Don Eugene
7. Stemler, Patty Merkamp
8. UBS AG

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA, :
Plaintiff-Appellee, :
 : APPEAL NO. 07-13163-B
v. :
 :
DON EUGENE SIEGELMAN, :
RICHARD M. SCRUSHY, :
Defendants-Appellants. :

**RESPONSE TO DEFENDANT-APPELLANT SIEGELMAN'S
NOTICE OF SUPPLEMENTAL INFORMATION RELEVANT TO ISSUES
ON APPEAL AND MOTION FOR LEAVE TO FILE SUCH NOTICE**

The United States of America, through the undersigned counsel, hereby opposes defendant Siegelman's "Notice of Supplemental Information Relevant to Issues on Appeal; And Motion for Leave to File Such Notice." Siegelman's motion is an improper attempt to supplement the record on appeal with material that was not before the district court. Siegelman cites no legal authority to support his request, misstates the existing record and exaggerates the material he seeks to add to it, and fails to establish that the new material is even relevant to the issues on appeal. Siegelman's motion should be denied.

1. Fed. R. App. P. 10(a) provides that the record on appeal consists of: "(1) the original papers and exhibits filed in the district court; (2) the transcript of proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk." Rule 10(e) authorizes the court of appeals to correct and

supplement the record “[i]f anything material to either party is omitted from or misstated in the record by error or accident.” Fed. R. App. P. 10(e)(2). “[T]he purpose of Rule 10(e),” however, “is to ensure that the record on appeal ‘truly discloses what occurred in the district court,’” *Hoover v. Blue Cross & Blue Shield of Alabama*, 855 F.2d 1538, 1543 n.5 (11th Cir. 1988) (quoting Fed. R. App. P. 10(e)), “not to introduce new evidence in the court of appeals,” *United States v. Smith*, 344 F.3d 479, 486-87 (6th Cir. 2003) (quoting *S&E Shipping Corp. v. Chesapeake & O. Ry. Co.*, 678 F.2d 636, 641 (6th Cir. 1982)). And while this Court has the inherent equitable power to supplement the record with material that was not before the district court, “[s]uch authority is rarely exercised.” *Ross v. Kemp*, 785 F.2d 1467, 1474 (11th Cir. 1986); accord *Kemlon Products & Development Co. v. United States*, 646 F.2d 223, 224 (5th Cir. May 29, 1981) (“A court of appeals will not ordinarily enlarge the record on appeal to include material not before the district court.”).¹ Where the material is not even relevant to the issues on appeal, the Court does not supplement the record. See *United States v. Sullivan*, 2005 WL 2090236, *1-2 (11th Cir. Aug. 31, 2005); *United States v. Etley*, 574 F.2d 850, 853 (5th Cir. 1978).

2. Siegelman’s current request does not present the “rare” circumstance

¹ In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

justifying this Court's supplementation of the record with material not before the district court. Siegelman provides notice of a November 7, 2008 letter to the Attorney General from two members of Congress about the prosecution of this case. *See* Mot., Ex. 1 (the "Conyers Letter"). The letter attaches internal emails of the U.S. Attorney's Office for the Middle District of Alabama that were submitted by an employee of that Office in connection with a whistleblower complaint.

According to Siegelman, the emails show that: (1) the U.S. Attorney continued to be involved in this prosecution despite having voluntarily recused herself from the case; and (2) "two jurors sent repeated messages to the prosecutorial team through the U.S. Marshalls [*sic*] about some jurors' flirtatious interest in an FBI agent who was a prominent member of the prosecutorial team at trial." Mot. 2-4, 8-9. As discussed below, these emails have no evidentiary significance. Indeed, some of the emails contain multiple levels of hearsay, and the allegation of notes being exchanged between jurors and members of the prosecution is simply not true.

Accordingly, Siegelman's motion should be denied.

3. a. The so-called "feigned recusal" material (Mot. 2) includes an email from U.S. Attorney Leura Canary to the prosecution team, dated September 19, 2005, in which she forwards with brief comments an email apparently sent by Siegelman to his political supporters; in that email, Siegelman refers to public opinion concerning the alleged political motivation for his prosecution. *See* Mot.,

Ex. 1 Attachment. The email does not remotely demonstrate the alleged political motivation for this prosecution that Siegelman claims to have existed. The email concerns a collateral matter and was sent over four months *after* the original indictment was returned in the case. R1-3.

Furthermore, the email chain does not indicate that the prosecutors ever replied to the September 19, 2005 email, and the prosecutors never filed a motion for any type of “gag” order. Indeed, the government let the February 14, 2006 deadline for pretrial motions pass without filing any motion pertaining to Siegelman’s public claims of a political prosecution. The only government pleading remotely touching on this issue was the government’s motion *in limine* filed on April 14, 2006, after Siegelman submitted proposed voir dire questions about the alleged political motivation for his prosecution (R3-276-1), seeking to bar the defense from presenting evidence on that subject (R3-347, R3-348).² But even in the motion *in limine*, the government did not seek to gag Siegelman from making any public statement. The September 19, 2005 email, therefore, does not prove the U.S. Attorney’s involvement in this case and is not probative of the alleged political motivation that Siegelman claims.

b. While there is no basis to interpret the U.S. Attorney’s email in the manner Siegelman suggests, even if the email is interpreted (as Siegelman would

² The government’s motion was denied as untimely. R3-351.

have it) to show that Ms. Canary was involved in the prosecution, it is irrelevant to this case because neither defendant moved to dismiss the charges or to vacate his conviction on selective prosecution grounds, and neither defendant has raised a claim of selective prosecution on appeal. The fact that Siegelman has never sought dismissal or a vacatur on selective prosecution grounds in court, where he would be held to a burden of proof and where his claim would be subject to the rigors of cross-examination and judicial scrutiny, renders the “feigned recusal” material irrelevant and alone should prompt the Court to deny Siegelman’s motion as to that material.

Siegelman is reduced to arguing (Mot. 5-7) that the September 19, 2005 email is relevant to his *McCormick* claim that the jury should have been instructed to find an explicit *quid pro quo* and to his sentencing claim, but neither theory of relevance stands up to scrutiny. As to the *McCormick* claim, Siegelman posits that the email “would underscore . . . that even a federal prosecution *can* be politically motivated,” which, in his view, underscores the need for a rigorous *quid pro quo* jury instruction. Mot. 5 (emphasis in original). But, as discussed, the material does not prove the alleged political motivation that Siegelman claims. In any event, Siegelman has already argued that the alleged risk of a politically-motivated prosecution supports his reading of the *McCormick* standard. *See, e.g.*, Siegelman

Opening Br. 32-33; Siegelman Reply Br. 8-9.³ Even if the September 19, 2005 email had any probative value (and it does not), Siegelman should not be allowed to use new, extra-record material in connection with an already-made argument on appeal. *Cf. Beaty v. United States*, 937 F.2d 288, 293 (6th Cir. 1991).

Siegelman's argument as to his sentencing claim is equally flawed. On appeal, Siegelman contends that the district court's four-level, upward departure for systematic and pervasive corruption of government improperly penalized him for making out-of-court statements critical of the prosecution. *See Siegelman Opening Br. 77-83; Gov't Br. 162-67.* Siegelman contends that the September 19, 2005 email is relevant to that claim because, in his view, it reveals an alleged government strategy from the outset to "punish Governor Siegelman for his protected speech"; he accuses the government, in its answering brief, of "tr[ying] to ignore, and to induce this Court to ignore, the fact that the prosecutors explicitly asked the District Court to do that very thing." Mot. 6.

Siegelman's argument has no merit. The government noted in its brief that, when arguing at sentencing for an upward departure based on Siegelman's systematic and pervasive corruption of state government, it had also referred to Siegelman's public attacks on the criminal justice system, including his

³ As the government discussed in its answering brief, the district court gave a *quid pro quo* instruction that satisfied *McCormick*. *See Gov't Br. 42-43.*

participation in a propaganda video, and his repeated claims that his prosecution was based on political considerations rather than the clear evidence of his guilt. *See* Gov't Br. 165 n.55. Siegelman, however, seems to miss the larger point, which is that his claim on appeal is that the *district court* erred at sentencing and it is the *district court's ruling* that this Court will review. Hence, the government properly focused in its brief on the basis for the district court's ruling, *i.e.*, the court's finding that Siegelman's corrupt conduct resulted in a loss of public confidence in the executive branch of *state* government. *See id.* at 162-65. Siegelman's decision to attack the prosecutors rather than to critique the district court's actual ruling betrays the weakness of his sentencing claim. But for present purposes, it simply bears noting that Siegelman has failed to establish that the September 19, 2005 email is relevant to that claim, let alone so critical as to warrant supplementing the record with it.

4. The Court should likewise reject Siegelman's attempt to supplement the record with an email chain concerning jurors' alleged sending of messages about an FBI agent through the Marshals. Not only is that material irrelevant to this appeal, but there is no evidence that any contacts occurred between jurors and the prosecution team.

a. To begin with, the allegation of improper contacts between jurors and the prosecution is not relevant to the claim of juror misconduct raised by the

defendants in their briefs. Their claim alleges that jurors were exposed to extrinsic material and that they engaged in premature deliberations and deliberations with fewer than all jury members present; it does not allege improper contacts between the prosecution and jurors during trial. *See, e.g.*, Scrushy Opening Br. 31-32; Scrushy Reply Br. 7. To the extent Siegelman seeks to raise a new claim of alleged juror misconduct, he must first raise that claim (or attempt to) in the district court, not this Court. The irrelevance of the material to defendants' existing claim in this Court itself compels that Siegelman's motion be denied.

b. In any event, the material relates to an allegation of juror misconduct that is unfounded. The email chain in question (Mot., Ex. 1 Attachment) consists of emails sent between then-First Assistant United States Attorney ("FAUSA") Patricia Watson and an employee on June 15, 2006, around the start of jury deliberations. FAUSA Watson was not a member of the prosecution team in this case, and there is no evidence that either she or the employee (who had worked on the case at an earlier stage) ever attended the trial. On their face, the emails contain vague hearsay statements concerning innocuous conduct by jurors (in Siegelman's words, a flirtatious interest in one of the case agents).

The emails surfaced in connection with a whistleblower complaint filed by the employee. After the Office of Special Counsel requested that the Department of Justice investigate the employee's allegations, the Department appointed two

senior Assistant United States Attorneys (“AUSAs”) – both Civil Chiefs in districts outside of Alabama – to investigate any improper contacts between the prosecution team and jurors in this case (and the non-disclosure of any such contacts). In the course of their investigation, the AUSAs interviewed the employee, FAUSA Watson, the prosecutors in this case, a supervisory legal assistant who worked on and was present for the entire trial, and the FBI case agent in question. The investigation found no evidence of any contacts between the prosecution team and jurors, either directly or through the Marshals. Indeed, had they occurred, any improper contacts would have come to light at the post-trial evidentiary hearing on November 17, 2006, where the district court thoroughly questioned all twelve jurors about exposure to extraneous information and outside influences. *See* Gov’t Br. 110, 115, 122-26. As noted in the Conyers Letter, the AUSAs concluded that the allegation of improper contacts “was little more than idle rumor that ‘grew from humble factual beginnings into unrecognizable detailed and distorted factual form.’” Mot., Ex. 1 at 4 (quoting report of investigation).

In his motion, Siegelman faults the prosecution (Mot. 8-9) for failing to disclose its alleged contacts with jurors, or even the fact that some jurors allegedly were interested in the FBI agent. But there was nothing to report. No contacts occurred between a juror and a member of the prosecution team.

Siegelman completely fails to mention that the government has undertaken an investigation into these allegations, even though the Conyers Letter (Mot., Ex. 1 at 4-5) – the very letter Siegelman now brings to the Court’s attention – discusses that investigation at length. Siegelman will likely fault the thoroughness and objectivity of the AUSAs’ investigation. But his failure to reference the investigation *at all* undermines the credibility of his request to supplement the record with the June 15, 2006 email chain.⁴

c. Siegelman cites an apparent statement by an employee in a complaint to the Department’s Office of Professional Responsibility, in which the employee quotes Acting U.S. Attorney Louis Franklin as stating that one of the jurors had told a member of the prosecution team after the trial that she was “just scared and afraid she [was] going to get in trouble.” Mot. 10 (quoting Conyers Letter, Ex. 1 at 3) (modification in motion). Mr. Franklin never made that statement, and neither he nor any of the prosecutors has knowledge of a statement by any juror expressing concern over getting “in trouble.” Siegelman’s arguments on this point, including his far-fetched claim that the vague alleged juror comment somehow proves past juror misconduct, should be rejected.

⁴ Out of an abundance of caution, the Department of Justice recently reopened the investigation into this matter in response to concerns raised about the completeness of the investigation. *See* Mot., Ex. 1 at 4-5. It remains the case that we are not aware of any improper contacts.

d. Siegelman mischaracterizes the July 8, 2008 letter by Patty Stemler of the Department of Justice about the Postal Inspector's investigation of post-verdict juror harassment. For example, according to Siegelman, in that letter, "[t]he Department of Justice admitted that even while the prosecutors were taking the litigation position that there must be no investigation into the [juror] emails' authenticity, the prosecutors and others in the Executive Branch were commencing and pursuing an investigation of their own; and the Justice Department communicated the results of that investigation to the trial judge *ex parte*." Mot. 7-8. Siegelman ignores that: (1) the focus of the Postal Inspector's investigation was on juror harassment, not the authenticity of the emails; (2) the investigation was undertaken in response to jurors' complaints, that is, after two jurors had contacted the Marshals Service about copies of emails purportedly sent from or to their email accounts that had been mailed to their coworkers; (3) the investigation was overseen by a prosecutor who was not involved in this case; and (4) it was the Marshals Service, not the prosecutors or the Postal Inspector, that reported the investigation to the trial judge (without solicitation by the judge). Gov't Resp. to Def. Scrushy's Mot. for Appointment of Special Master Pursuant to Rule 48, at 8-11.

e. In sum, because the June 15, 2006 email chain is irrelevant to defendants' claims on appeal, and because it concerns an unfounded allegation of

improper juror contacts, it should not be added to the record.

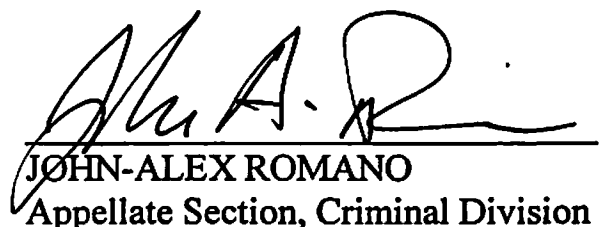
For all of the foregoing reasons, Siegelman's "Notice of Supplemental Information Relevant to Issues on Appeal; And Motion for Leave to File Such Notice" should be denied.

Respectfully submitted this 26th day of November 2008.

LOUIS V. FRANKLIN, SR.
Acting United States Attorney
Middle District of Alabama

STEPHEN P. FEAGA
J.B. PERRINE
Assistant United States Attorneys
Middle District of Alabama

WILLIAM M. WELCH, II
Chief
RICHARD C. PILGER
Trial Attorney
Public Integrity Section
Criminal Division
Department of Justice



JOHN-ALEX ROMANO
Appellate Section, Criminal Division
Department of Justice
950 Pennsylvania Ave, NW, Rm 1264
Washington, DC 20530
Phone: (202) 353-0249
Fax: (202) 305-2121
John-Alex.Romano@usdoj.gov

CERTIFICATE OF SERVICE

I, John-Alex Romano, do hereby certify that on November 26, 2008, I caused to be served via Federal Express, for delivery on the next business day, a copy of the foregoing Motion Response on each of the counsel listed below.

Counsel for Defendant Siegelman

Vincent F. Killborn, III
Kilborn, Roebuck & McDonald
1810 Old Government Street
Mobile, AL 36606
(251) 479-9010

Sam Heldman
The Gardner Firm
2805 31st Street, N.W.
Washington, DC 20008
(202) 965-8884

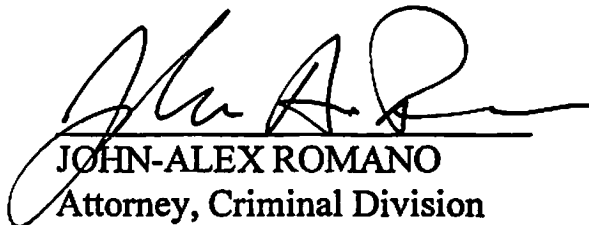
Hiram Eastland, Jr.
Eastland Law Offices, PLLC
107 Grant Boulevard
Greenwood, MS 38930
(662) 453-1227

Counsel for Defendant Scrushy

Arthur W. Leach
75 Fourteenth Street, NW, 25th Fl.
Atlanta, GA 30309
(404) 786-6443

James K. Jenkins
Maloy Jenkins Parker
75 Fourteenth Street, NW, 25th Fl.
Atlanta, GA 30309
(404) 875-2700

Bruce S. Rogow
Bruce S. Rogow, P.A.
500 East Broward Blvd., Suite 1930
Fort Lauderdale, FL 33394
(954) 767-8909



JOHN-ALEX ROMANO

Attorney, Criminal Division
U.S. Department of Justice
950 Pennsylvania Ave, NW
Washington, D.C. 20530
(202) 353-0249
John-Alex.Romano@usdoj.gov