UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA

UNITED STATES OF AMERICA	)	
	)	
v.	)	**CR. NO. 2:10cr186-MHT**
	)	
QUINTON T. ROSS, JR.	)	

QUINTON T. ROSS, JR.'S SUPPLEMENTAL BRIEF
REGARDING IMPACT OF *SIEGELMAN* DECISION

Quinton T. Ross, Jr., submits this supplemental brief addressing the impact on this action of the recent decision in *United States v. Siegelman*, no. 07-13163, 2011 U.S. App. LEXIS 9503 (11th Cir. May 10, 2011), as directed by the Court per Order entered May 10, 2011 (doc. no. 1088).

The Eleventh Circuit in *Siegelman* addressed defendants' appeal of their convictions for, *inter alia*, federal programs bribery, in violation of 18 U.S.C. §666, and honest services mail fraud, in violation of 18 U.S.C. §§ 1343 and 1346. As pertinent here:

1) The Court of Appeals, although not expressly so holding, approved applying the *McCormick*[1] *quid pro quo* standard to §666 and honest services fraud bribery prosecutions based on a campaign contribution.

Defendants' bribery convictions were based upon the contribution defendant Scrushy gave to Gov. Siegelman's education lottery campaign. "As such the convictions impact the First Amendment's core values – protection of free political speech and the rights to support issues of great public importance." *Siegelman*, 2011 U.S. App. LEXIS 9503, at *17.

[1] *McCormick v. United States*, 500 U.S. 257 (1991).

Noting the "particularly dangerous legal error" of "instruct[ing] a jury that they may convict a defendant for his exercise of either of these constitutionally protected activities," *id.*, at *18, the Court of Appeals explained that

> [t]he Supreme Court has guarded against this possibility by interpreting federal law to require more for conviction than merely proof of a campaign donation followed by an act favorable toward the donor.

Id., at *18-19 (citing generally *McCormick*, *supra*).

More specifically, following quotation of *McCormick's* lengthy discussion of the practical truths regarding a) campaign fundraising, b) seeking and claiming political and financial support based on past or future acts or positions, and c) acting for the benefit of constituents, (d) in a system of privately-financed election campaigns – and that such practices not only had "'long been thought to be well within the law but also … unavoidable,'" 2011 U.S. App. LEXIS 9503, at *19-20 (quoting *McCormick*, 500 U.S. at 272), the Court of Appeals acknowledged the *McCormick* Court allowed prosecution of campaign contributions "only if 'payments are made in return for an *explicit* promise or undertaking by the official to perform or not perform an official act.'" 2011 U.S. App. LEXIS 9503, at *20 (quoting *McCormick*, 500 U.S. at 273) (emphasis in *Siegelman*).

The *Siegelman* court noted the Supreme Court had not yet considered whether the *quid pro quo*[2] required to convict a public official for receipt of a campaign contribution

[2] The Court of Appeals, in its "honest services" discussion, variously referred to this *McCormick* "explicit promise," that "transforms the exchange from a First Amendment protected campaign contribution and a subsequent [specific official act] … into an unprotected crime," 2011 U.S. App. LEXIS 9503, at *28 n. 21, as "an explicit agreement to 'buy' [a specific official act]," a "corrupt agreement," "corruptly agree[ing] to a specific exchange," "an agreement to swap money for [specific official act]," "the agreement to exchange a campaign donation for [a specific official act],""an agreement to exchange [a specific official act] for a campaign donation" as "would amount to the official's 'selling' to the [campaign contributor] the official's duty and authority to [perform the specific official act]," *id.*, and "the corrupt agreement to make a specific exchange." *Id.*, at *41 n. 26.

under the Hobbs Act was likewise required under the federal funds bribery, conspiracy, or honest services mail fraud statutes. 2011 U.S. App. LEXIS 9503, at *20-21. And, the Court of Appeals found it unnecessary to decide that question for either federal programs bribery or honest services fraud. *Id.*, at *25 (federal programs bribery counts) ("even assuming a quid pro quo instruction is required …"), *28 (honest services counts 6 and 7) ("Without deciding whether a *qui pro quo* must be proved in an honest services bribery prosecution …"). In both instances the appellate court found that even if such a quid pro quo instruction were required, the jury was adequately instructed that an "agree[ment] that the official will take specific action in exchange for the thing of value" was required for conviction, as set forth by *McCormick*; and found no reversible error as to the

---

The court issued each such characterization of the required "explicit promise" or *quid pro quo* as part of acknowledging that "[s]ince a campaign donation – unlike bags of cash delivered to the official himself – is protected First Amendment activity and, *indeed the normal course of politics in this country*, due process requires that the potential campaign donor [and, Senator Ross would add, candidate or potential recipient] have notice of what sort of conduct is prohibited." *Id*. (emphasis added).

Even assuming *arguendo* that a campaign contribution, in some strictly limited circumstances, may as a matter of statutory interpretation be subject to prosecution as federal programs bribery or honest services fraud (as to which we have argued it may ***not***), Senator Ross respectfully submits that a standard based on an agreement being "corrupt" or entered into "corruptly" is too vague to provide the required advance (i.e., pre-prosecution and pre-conduct) fair warning or fair notice required by due process. Senator Ross further urges that a standard allowing conviction based on an "agreement," without requiring that the prohibited agreement be "explicit" in (what we believe to be) the *McCormick* sense of "express," as opposed to the *Siegelman* sense of merely capable of being "implied from the official's words and actions," 2011 U.S. App. LEXIS 9503, at *24 (quotations omitted), is both too vague as to satisfy due process and overly broad.

Indeed, the latter allows the official to be convicted – contrary to the *Siegelman* court's supposition – for engaging in protected core First Amendment activity (of soliciting and accepting campaign contributions, expressing political positions to educate and to seek support, and voting or taking other official action) based on a mere "close-in-time relationship between the donation and the act," *id.*, at *23; or worse, mere receipt "of a campaign donation followed by an act favorable toward the donor." *Id.*, at *19. This is so regardless of the lack of causal connection between the contribution and the official act, or the myriad other motives or factors that inform the official act.

instructions for either set of counts.[3] *Id.*, at *21, 25-26 (federal programs bribery), 28 (honest services).

But, the Court of Appeals did note that,

> as the defendants point out, … several district courts, in unpublished opinions, have extended the McCormick rationale to the bribery and honest services statutes. The government points to no contrary authority, relying instead on inapposite authority not involving campaign contributions.

Id., at *21 n. 14. And, as to the applicability of the *McCormick* "explicit promise" standard to federal programs bribery, honest services, and conspiracy charges, the appellate court cited with approval the Seventh Circuit's observation that "extortion and bribery are but 'different sides of the same coin.'"[4] *Id.*, at *21 (quoting *United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993)).

The *Siegelman* court properly agrees that *McCormick* uses the word 'explicit' when describing the sort of agreement that is required to convict a defendant for extorting campaign contributions." *Id.*, at *22; *see McCormick*, 500 U.S. at 273. We address below the *Siegelman* court's conclusions, which we believe to be erroneous (and, more important, contrary to earlier Eleventh Circuit precedent that cannot be harmonized or fairly distinguished), that "[e]xplicit, however, does not mean *express,*" 2011 U.S. App.

[3] The opinion suggests that the quoted instruction was given specifically as to the federal programs bribery counts (counts 3 and 4), but that the instructions (including the quoted language) "may be read in tandem" in determining their sufficiency for the honest services bribery counts based on the same "pay to play" scheme (counts 6 and 7). 2011 U.S. App. LEXIS 9503, at *28-29.

[4] Assuming arguendo that the honest services statute can properly be construed as extending to prosecutions based on campaign contributions, which we believe and have consistently argued it cannot, further support for the application of the *McCormick* standard to that statute in particular is found in the *Siegelman* court's later observation, also in dictum, that "[a]fter *Skilling [v. United States*, 561 U.S. ____, 130 S.Ct. 2896 (2010)], it may well be that the honest services statute, like the extortion statute in *McCormick*, requires a *quid pro quo* in a campaign donation case." We address the rationale of that aspect of *Siegelman* in greater detail in section 3, *infra*. We cite it here simply as further support for applying the *McCormick* standard to the honest services charges.

LEXIS 9503, at *22; and that an explicit agreement – even in the alleged bribery-by-campaign-contribution context – "may be 'implied from [the official's] words and actions.'" *Id.*, at *24-25 (quoting *Evans v. United States*, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring)).

In sum, regardless of its construction of "explicit," the *Siegelman* court does view *McCormick*, as assertedly construed by *Evans*[5], as requiring, at minimum, *some* type of *quid pro quo*[6] for a Hobbs Act extortion conviction. And, *Siegelman*, at least in dictum, supports applying the *McCormick* standard to campaign contribution-based prosecutions under the federal programs bribery, honest services, and conspiracy statutes, as we have consistently argued in this case.

As a general matter, (a) the failure of the indictment to allege a *quid pro quo* as to the charges against Senator Ross (or any other defendant) under *any* statute; (b) the Government's semi-consistent position that a *quid pro quo* is not required as to campaign contribution prosecutions under the federal programs bribery, honest services fraud, and conspiracy statutes; and (c) the absence of any evidence that the grand jury was instructed that some *quid pro quo* is required for campaign contribution bribery charges under all such statutes, together make it impossible for the Government to show the grand jury found probable cause that a *quid pro quo* existed between each contribution and one or more specific official acts as to each defendant. As shown above, such a *quid pro quo* is required for the indictment to adequately state, and sufficiently give notice of, each

[5] As we have argued previously, and again below, *Evans* is not properly considered a campaign contribution case (and thus did not construe *McCormick* as applied to that context); but instead is properly viewed only as modifying the *McCormick* explicit *quid pro quo* requirement for ***non***-campaign contribution extortion or bribery prosecutions. *See United States v. Martinez*, 14 F.3d 543, 553 (11th Cir. 1994).

[6] As variously defined by the appellate court. *See supra*, at n. 2

charged offense. These factors collectively require that the campaign contribution (including in-kind contribution) charges be dismissed as to Senator Ross (and the other defendants) under all statutes.

2) In order to convict based on a campaign contribution, the Government must prove a specific *quo*, i.e., a specific official act for which the contribution is exchanged.

Although it is unclear whether the *Siegelman* court views the Supreme Court's decision in *Evans* as modifying, or placing a gloss on, the Supreme Court's earlier decision in *McCormick*, the *Siegelman* court does address the issue of the level of specificity of the *quo*, or official action, 2011 U.S. App. LEXIS 9503, at *42 n. 26, required under the *McCormick* standard through the prism of the jury instruction held by the *Evans* Court to satisfy McCormick's quid pro quo requirement.

The Court of Appeals in Siegelman could not have been clearer in finding the *McCormick* standard, as (arguably) applied in *Evans*, required for conviction proof of a specific official action for which the contribution was exchanged. *Id.*, at *23 ("The instruction approved in *Evans* required that the acceptance of the campaign donation be in return for a *specific* official action") (emphasis in *Siegelman*). The Eleventh Circuit stressed that "[n]o generalized expectation of some future favorable action will do." *Id.* Instead, "[t]he official must *agree* to *take* or *forego* some *specific* action in order for the doing of it to be criminal under §666." *Id.* (emphasis added). Indeed, "[i]n 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." *Id.*

The Eleventh Circuit's holding that a specific official action is required, specifically refers to charges brought under §666.[7] For the reasons stated in the first section, the reasoning applies equally to bribery charges brought under the honest services statute, as well as charges of conspiracy to violate either statute (here, the only statute the Government alleges defendants conspired to violate is §666).

Siegelman makes clear that a campaign contribution that is not tied, when made, to a defendant's agreement to take or forego a specific future official action does not constitute bribery under these statutes. To the extent that the indictment has failed to allege that any particular payment was tied to an agreement concerning a specific such official action, charges based on such a payment must be dismissed.

3) *Siegelman* confirms that honest services fraud prosecutions must be limited to bribery and kickback claims.

Unsurprisingly, the Eleventh Circuit in *Siegelman* followed the clear holding in *Skilling v. United States*, 561 U.S. ___, 130 S.Ct. 2896, 2905 (2010), that Congress intended the honest services criminal statutes "to reach only those schemes to defraud the public that are based upon allegations of bribery and/or kickbacks." 2011 U.S. App. LEXIS 9503, at *26-27. The appellate court also noted that *Skilling's* limitation of §1346 "to bribery and kickback schemes" rested on the Court's "holding that, in the absence of

[7] The Eleventh Circuit's explicit application to charges under §666 of the *quo* part of the *McCormick quid pro quo* standard, is further support for the argument, as set forth in the *Siegelman* dictum, that the full *McCormick* standard properly applies to campaign contribution prosecutions under §666 and honest services bribery charges as well.

The Eleventh Circuit's holding in *McNair* that "a specific *quid pro quo* is not required for a §666 conviction," *United States v. McNair*, 605 F.3d 1152, 1187 (11th Cir. 2010), is not to the contrary. The convictions in *McNair* are not based on campaign contributions, and thus *McNair* does not apply here. *See Siegelman,* 2011 U.S. App. LEXIS 9503, at *21 n. 14 (referring to the Government's reliance on "inapposite authority not involving campaign contributions").

such narrowing, the statute would provide insufficient notice of what conduct is prohibited by it." *Id.*, at *28 n. 21.

Of greater interest here is the Eleventh Circuit's discussion of the application of honest services fraud to alleged bribery based on campaign contributions. Starting from *Skilling*'s "rationale … that even the narrowed honest services statute must provide constitutionally adequate *notice* of what conduct is prohibited," *id*., at *29 (emphasis in original), the Eleventh Circuit noted that "[s]ince a campaign donation … is protected First Amendment activity and, indeed, the normal course of politics in this country, due process requires that the potential campaign donor have notice of what sort of conduct is prohibited." *Id.*, at *29-30.

The appellate court then examined the First Amendment political speech and Fifth Amendment due process underpinnings of the *McCormick* standard. The Eleventh Circuit viewed *McCormick* as requiring "an explicit agreement to 'buy an appointment' … a quid pro quo … in order to prove that the official and a campaign contributor *corruptly agreed* to a *specific exchange*." *Id.*, at *30 (emphasis in original).

> In so doing, the Court protected both the First and the Fifth Amendments by reading the statute to require an agreement to swap money for office, thereby putting both government officials and potential contributors on notice that such an agreement would subject them to prosecution.

Id.

Echoing the argument made by defendants in this case, the Eleventh Circuit noted that "[a]lthough *Skilling* refers us to the pre-*McNally* bribery cases as examples of the fact patterns that would supply notice of what constitutes an honest services bribery violation, none of these cases was a campaign donation case." *Id*., at *30-31. Defendants in our case, including Senator Ross, take this absence of campaign contribution cases

from the pre-McNally bribery-and-kickback core as demonstrating that Congress did not intend and indeed never contemplated that the honest services criminal statutes would encompass prosecutions based on campaign contributions; and Senator Ross continues to believe that to be the correct conclusion, thereby requiring dismissal of all the honest services charges in this action.

Without deciding or addressing that particular issue, the Eleventh Circuit suggests that "[a]fter *Skilling*, it may well be that the honest services statute, like the extortion statute in McCormick, requires a quid pro quo in a campaign donation case." *Id.*, at *31. Under such a reading of the honest services statute, "§1346 would criminalize only the *agreement* to exchange a campaign donation for [a specific official act]." *Id.* (emphasis in original). Stated another way, "[t]he official's duty to provide honest services … would be violated only by an agreement to exchange [a specific official act] for a campaign donation." *Id.*

4) *Siegelman* affirms the need for, and the requirement of, proof in a honest services fraud charge that the defendant knew of the scheme to defraud, and knowingly participated in the scheme; and the scheme that is proved must be the same as the scheme alleged in the indictment.

The honest services charges in Counts 8 and 9 in the indictment against Governor Siegelman and co-defendant Scrushy alleged a self-dealing scheme by which Scrushy "would and did use his seat on the CON [Certificate of Need] Board to attempt to affect the interests of HealthSouth and its competitors," part of which involved Siegelman and Scrushy "orchestrat[ing] Scrushy's replacement on the Board by another person employed by HealthSouth." 2011 U.S. App. LEXIS 9503, at *32. The self-dealing

scheme alleged by the indictment, although incorporating the bribery scheme, was broader than the bribery scheme. Governor Siegelman argued he was unaware of and did not participate in any such broader scheme.

In upholding Governor Siegelman's challenge to the sufficiency of the evidence on these counts, and reversing his conviction as to those counts, the Eleventh Circuit rejected the Government's reliance on certain facts proved at trial, finding that the facts were not "remotely sufficient to permit a jury to infer" that Siegelman knew of a broader scheme, agreed to such a scheme, and knowingly participated in it. *Id.*

In our case, the Government regards the honest services scheme to defraud as identical or similar to the broad conspiracy to corrupt the Alabama Legislature in order to pass "pro-gambling legislation" alleged in Count One. Each of the remaining defendants can credibly argue that he or she did not know of any conspiracy of the scope alleged, and did not knowingly participate in a conspiracy of that scope. (Indeed, Senator Ross has argued repeatedly that the indictment alleges not a single overarching conspiracy, but instead at most a series of smaller, unrelated conspiracies.) The Eleventh Circuit's findings in *Siegelman* serve as a reminder of the need for proof of all elements relating to the alleged honest services scheme, as well as the need for the proof of the alleged scheme to match the scope of the scheme alleged in the indictment.

5) *Siegelman* suggests that the required causal connection or nexus between the quid (contribution) and the quo (specific official act) is proof that the contribution was the sole cause of the specific official act.

The jury instruction for the second bribery (i.e., ***not*** the campaign contribution defendant Scrushy made to Governor Siegelman's education lottery campaign) alleged in

the Scrushy self-dealing honest services counts, advised the jury it could convict if defendants "intended to alter their official actions as a result of the receipt of campaign contributions or other benefits." 2011 U.S. App. LEXIS 9503, at *41 n. 26.

The Eleventh Circuit found that instruction -- and specifically the language "as a result of" – legally deficient. In rejecting an instruction that allowed conviction based on the official "intend[ing] to alter" his official action "as a result of" the donation, the court held that expressing the requisite causal connection or nexus in terms of "as a result of," "fails adequately to require the *pro* – the corrupt agreement to make a specific exchange." *Id.* Rather than a "but for" or mixed-motive or other potential multiple cause standard being sufficient, this holding suggests instead that the required connection is one of "sole cause" or that the defendant performed or chose not to perform the specific official act "solely because of" the contribution.[8] This finding is particularly likely to apply in this case, where each legislator or legislative employee very plausibly may have multiple reasons for taking any given official action.

6) The Eleventh Circuit's earlier *Martinez*[9] decision requires proof of an explicit, in the *McCormick* sense of express as opposed to implied, *quid pro quo* to convict a public official for solicitation or receipt of a campaign contribution. The explicitness of the quid pro quo refers to the explicitness of the promise (the *quid*), as opposed to the specificity of the agreed-upon official act (the *quo*). Under the Circuit's prior precedent rule, *Siegelman* does not disturb that requirement.

[8] Alternatively the Eleventh Circuit's holding would support requiring, at minimum, a finding that the defendant "would not have performed the particular official act in the absence of the donation/ if the particular donation had not been made."

[9] *United States v. Martinez*, 14 F.3d 543 (11th Cir. 1994).

As noted in section 1 above, the Court of Appeals in *Siegelman* acknowledged the *McCormick* Court allowed prosecution of campaign contributions "only if 'payments are made in return for an *explicit* promise or undertaking by the official to perform or not perform an official act.'" 2011 U.S. App. LEXIS 9503, at *20 (quoting *McCormick*, 500 U.S. at 273) (emphasis in *Siegelman*). And, as also noted above, the *Siegelman* court further acknowledged that "McCormick uses the word 'explicit' when describing the sort of agreement that is required to convict a defendant for extorting campaign contributions." 2011 U.S. App. LEXIS 9503, at *22.

Nonetheless, in rejecting defendants' argument that "explicit" means "explicit" in the sense of requiring "express words of promise," the *Siegelman* court held that "explicit … does not mean *express*," *id.*, at *22; and found that the "explicit promise" required by *McCormick* (as necessary to satisfy First Amendment and due process concerns) "may be 'implied from [the official's] words and actions.'" *Id.*, at *24-25 (quoting *Evans*, 504 U.S. at 274 (Kennedy, J., concurring)). The Eleventh Circuit reached that conclusion by reading *McCormick*'s clear "explicit quid pro quo" and "explicit promise standard in light of the jury instruction the Supreme Court approved in *Evan*s. *See* 2011 U.S. App. LEXIS 9503, at *22-23.

The *Siegelman* court's holding in this regard is erroneous in various ways.[10] To be sure, to a district court bound by decisions of a court of appeals, these errors – or even whether such things were errors -- normally would be academic. But, to the extent the *Siegelman* court uses *Evans* to modify, or place an interpretive gloss on, *McCormick*'s explicit *quid pro quo* requirement, and accordingly allows conviction on proof of a *quid* that is less than explicit (or deems an explicit *quid* as being provable by circumstantial evidence, or at least as one that can be implied from facts & circumstances), *Siegelman* conflicts with the earlier Eleventh Circuit decision in *Martinez*.

In *Martinez*, the court addressed the interplay between the *McCormick* explicit *quid pro quo* standard and *Evans* as applied to a Hobbs Act prosecution *not* involving campaign contributions. The Eleventh Circuit first held that *McCormick's* explicit *quid pro quo* standard – i.e., that liability for receipt of contributions is made out "only if the payments are made in return for an explicit promise or undertaking by the official to

---

[10] Among other things, to the extent the Siegelman court viewed Evans as modifying the standard for a campaign contribution case, the *Evans* majority itself did not view Evans as a campaign contribution case. *See Evans*, 504 U.S. at 257-58 (viewing the jury as having found that defendant accepted cash (which he did not treat as a campaign contribution, having failed to report the cash on either his state campaign finance disclosure or his federal income tax) "knowing that it was intended to ensure that he would vote in favor of the rezoning application and that he would try to persuade his fellow commissioners to do likewise").

Moreover, in *Evans* the issue of the required explicitness of the quid pro quo was neither joined nor decided (as least as appears in the Supreme Court's opinion). The issue decided by the Court majority was whether the Hobbs Act required an affirmative act of inducement by the official, such as a demand, as an element of the offense. *Evans*, 504 U.S. at, *e.g.*, 256 (stating the issue in that way).

Furthermore, in holding that its own jury instruction satisfied the *McCormick* standard as to explicitness, the *Siegelman* court appears to confuse the issue of the explicitness of the *quid* with that of the specificity of the *quo*. The Eleventh Circuit approved an instruction requiring for conviction a finding that "the defendant and the official *agree* that the official will take specific action in exchange for the thing of value," 2011 U.S. App. LEXIS 9503, at *21, as "satisfy[ing] *McCormick*'s requirement for an explicit agreement involving a *quid pro quo*." *Id,.* at *25. Accordingly, the *Siegelman quid pro quo* instruction properly required that the *quo* be specific, i.e., requiring a specific official act; but implicitly and improperly allowed the explicit *quid* to be satisfied by an agreement that was either express *or* implied.

perform or not to perform an official act," 500 U.S. at 272 – applies to prosecutions based on campaign contributions, 14 F.3d at 553; *accord, e.g., United States v. Davis*, 967 F.2d 516, 521 (11th Cir. 1992), *reh'g granted & modified o.g.*, 30 F.3d 108 (11th Cir. 1994); but that the Supreme Court in *McCormick* "explicitly limited its holding to the context of campaign contributions." 14 F.3d at 553.

In turn, in addressing defendant's argument that the *McCormick* standard applied to a non-campaign contribution case, the *Martinez* court -- contrary to the *Siegelman* panel's reading of *Evans* -- viewed the Supreme Court in *Evans* as "consider[ing] whether a quid pro quo was required ***outside*** the context of campaign contributions." *Id.* (emphasis added). The *Martinez* court further read *Evans* "as adopting the *quid pro quo* requirement of *McCormick*" and "modif[ying] this [*McCormick*] standard for ***non***-campaign contribution cases …." *Id.* (emphasis added).

The *Siegelman* panel's application of *Evans* to modify the *McCormick* explicit *quid pro quo* standard for a campaign contribution case conflicts with the *Martinez* court's view that *Evans* applied only outside the campaign contribution context. *Siegelman* did not attempt to distinguish *Martinez*, and in fact did not even cite *Martinez*. The *Martinez* interpretation of *Evans* in fact cannot be distinguished from that in *Siegelman*, and the two cases cannot be harmonized on that point. Under the Eleventh Circuit's prior precedent rule, this Court is obligated to follow the earlier of the two conflicting panel decisions, *e.g., Cohen v. Office Depot*, 204 F.3d 1069, 1076 (11th Cir. 2000), here *Martinez*.

Under *Martinez*, the *McCormick* standard – without any purported modification by the ***non***-campaign contribution case of *Evans* (more specifically, Justice Kennedy's

single Justice concurrence, which was not part of the majority opinion) to allow the explicit promise of the explicit *quid pro quo* to be implied from the official's words and actions – applies to our campaign contribution case here. In fact, the *Siegelman* panel's view that the *quid pro quo* required in a campaign contribution case may be implied from the official's words and actions was urged by the dissent in *McCormick*, *see* 500 U.S. at 282 (Stevens, J., dissenting), but rejected by the *McCormick* majority.[11] 500 U.S. at 273.

In sum, in determining the proper standard for proof of the explicit quid pro quo required by *McCormick* in a campaign contribution extortion or bribery case, the *Siegelman* holdings that "explicit … does not mean express" and the required "explicit agreement may be implied from the official's words and actions" do ***not*** apply. The jury instead should be instructed as to all statutes in accordance with *McCormick*, as to require an explicit *quid pro quo* based on an explicit promise, which logically cannot be implied from a defendant's non-express words or actions.

Respectfully submitted,

H. LEWIS GILLIS (GIL001)
TYRONE C. MEANS (MEA003)

OF COUNSEL:

THOMAS, MEANS, GILLIS & SEAY, P.C.
3121 Zelda Court
Montgomery, Alabama 36103-5058
Telephone: (334) 270-1033
Facsimile: (334) 260-9396
hlgillis@tmgslaw.com
tcmeans@tmgslaw.com

[11] Indeed, Justice Scalia, a member of the six Justice majority, in a separate concurrence, explicitly (as in expressly) asserted that extortion under color of official right "should not [] be interpreted to cover campaign contributions with *anticipation* of favorable future action, as opposed to campaign contributions *in exchange for an explicit promise* of favorable future action." 500 U.S. at 276 (Scalia, J., concurring) (emphasis added).

/s/ Mark Englehart
MARK ENGLEHART (ENG007)

OF COUNSEL:

ENGLEHART LAW OFFICES
9457 Alysbury Place
Montgomery, Alabama 36117-6005
Telephone: (334) 782-5258
Facsimile: (334) 270-8390
jmenglehart@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of May, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Louis V. Franklin, Sr. Assistant U. S. Attorney 131 Clayton Street Montgomery, Alabama 36104 Louis.franklin@usdoj.gov Stephen P. Feaga U.S. Attorney's Office P.O. Box 197 Montgomery, AL 36101-0197 Steve.feaga@usdoj.gov Justin V. Shur Peter J. Ainsworth Brenda Morris Eric Olshan Barak Cohen Emily Rae Woods Edward T. Kang U.S. Department of Justice Public Integrity Section 1400 New York Avenue-NW 12th Floor Washington, DC 20005 Justin.Shur@usdoj.gov Peter.Ainsworth@usdoj.gov	Joe C. Espy, III William M. Espy Benjamin J. Espy MELTON, ESPY & WILLIAMS, PC P.O. Box Drawer 5130 Montgomery, AL 36103 jespy@mewlegal.com wespy@mewlegal.com bespy@mewlegal.com Fred D. Gray Walter E. McGowan GRAY, LANGFORD, SAPP, McGOWAN, GRAY, GRAY & NATHANSON, P.C. P.O. Box 830239 Tuskegee, AL 36083-0239 fgray@glsmgn.com wem@glsmgn.com David McKnight William J. Baxley Joel E. Dillard Baxley, Dillard, Dauphin, McKnight & Barclift

Brenda.Morris@usdoj.gov Eric.olshan@usdoj.gov Barak.cohen@usdoj.gov Rae.woods@usdoj.gov Edward.kang3@usdoj.gov Robert D. Segall David Martin Shannon Holliday Clayton R. Tartt Ashley N. Penhale COPELAND, FRANCO, SCREWS & GILL, P.A. P.O. Box 347 Montgomery, Alabama 3610 1-0347 segall@copelandfranco.com martin@copelandfranco.com holliday@copelandfranco.com tartt@copelandfranco.com penhale@copelandfranco.com Sam Heldman THE GARDNER FIRM, P.C. 2805 31st Street NW Washington, DC 20008 sam@heldman.net James W. Parkman, III Richard Martin Adams William C. White, II Parkman, Adams & White 505 20th Street North, Suite 825 Birmingham, AL 35203 parkman@parkmanlawfirm.com adams@parkmanlawfirm.com wwhite@parkmanlawfirm.com Susan G. James Denise A. Simmons Susan G. James & Associates 600 S. McDonough Street Montgomery, AL 36104 sgjamesandassoc@aol.com dsimlaw@aol.com Thomas M. Goggans	2008 Third Avenue South Birmingham, AL 3523 dmcknight@bddmc.com bbaxley@bddmc.com jdillard@bddmc.com Brett M. Bloomston Joseph J. Basgier, III Bloomston & Basgier 1330 21st Way South, Suite 120 Birmingham, AL 35235 brettbloomston@hotmail.com joebasgier@gmail.com William N. Clark Stephen W. Shaw William Mills Redden Mills & Clark 505 North 20th Street, Suite 940 Birmingham, AL 35203 wnc@rmclaw.com sws@rmclaw.com whm@rmclaw.com Ron W. Wise Attorney at Law 200 Interstate Park Drive, Suite 105 Montgomery, AL 36109 ronwise@aol.com G. Douglas Jones Thomas J. Butler Anil A. Mujumdar Haskell Slaughter Young & Rediker, LLC 1400 Park Place Tower 2001 Park Place Birmingham, AL 35203 Phone: (205) 251-1000 gdj@hsy.com tb@hsy.com aam@hsy.com Sandra Payne Hagood 7660 Fay Avenue Suite H-526 LaJolla, CA 92307

Attorney at Law 2030 East Second Street Montgomery, AL 36106 tgoggans@tgoggans.com Samuel H. Franklin Jackson R. Sharman, III LIGHTFOOT, FRANKLIN & WHITE, L.L.C. The Clark Building 400 North 20th Street Birmingham, AL 35203 sfranklin@lightfootlaw.com jsharman@lightfootlaw.com James D. Judkins Larry Dean Simpson Judkins, Simpson, High & Schulte P.O. Box 10368 Tallahassee, FL 32302 jjudkins@readyfortrial.com lsimpson@readyfortrial.com	sandra@hagoodappellate.com David J. Harrison Post Office Box 994 306 South Academy Street Geneva, Alabama 36340 davidjharrison@centurytel.net Jeremy S Walker Haskell Slaughter Young & Gallion, LLC 305 South Lawrence Street Montgomery, Alabama 36104 jsw@hsy.com Joshua L. McKeown The Cochran Firm Criminal Defense- Birmingham LLC 505 20th Street North Suite 825 Birmingham, AL 35203 jmckeown@parkmanlawfirm.com Jeffery Clyde Duffey Law Office of Jeffery C. Duffey 600 South McDonough Street Montgomery, AL 36104 jcduffey@aol.com

/s/ Mark Englehart_____
MARK ENGLEHART