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December 29, 2016

President Barack Obama
The White House
1600 Pennsylvania Avenue, N.W.
Washington DC. 20500

Dear President Obama:

I write on behalf of my client, Richard M. Scrushy, who was prosecuted in 2006 along with former Governor Don Siegelman of Alabama in an effort by certain known and unknown Republican political operatives in Washington, D.C. and Alabama to remove Governor Siegelman, a popular Democratic candidate, from the political scene. The basis for the prosecution of my client and Governor Siegelman was the repayment of a loan to the Democratic Party following an unsuccessful initiative to establish a state run lottery to fund statewide education, especially for low income children. Mr. Scrushy and I entreat you to grant a timely pardon under Article II, Section 2 of the United States Constitution based on the several improprieties that occurred in this prosecution. I am aware that a similar request on behalf of Governor Siegleman has been made of Your Office as President.

1. Political and Selective Prosecution

Our democratic electoral process depends on private contributions to finance political campaigns. The Supreme Court has held in the clearest terms that the ability of candidates to seek contributions and the right of citizens to support political candidates with their contributions are essential to our democracy. Indeed, it is activity protected by the Constitution. *McCormack v. United States*, 500 U.S. 257, 111 S.Ct. 1807 (1991). In that case, the Supreme Court stated that:

> "To hold otherwise would open to prosecution not only conduct that has long been 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"

The advancement of statewide education in Alabama, especially for low-income children, was among the platforms on which Don Siegelman ran for election as governor of Alabama in 1998. He won that gubernatorial race. With funding provided by the

Democratic Party, Don Siegelman then engaged in a "get-out-the-vote" campaign in support of a referendum to establish a state funded lottery system in Alabama for statewide education, similar to the lottery in the neighboring state of Georgia. A prominent local attorney established the Alabama Education Lottery Foundation to raise money for the marketing effort. After the initiative failed, Mr. Scrushy, along with other business men in Alabama, was asked by Mr. Elmer Harris, then CEO of Alabama Power and a person whose charitable services previous occupants of the White House have utilized, to contribute funds to retire the debt owed by the Democratic Party. HealthSouth, the company over which Mr. Scrushy was CEO, contributed $250,000 to the Alabama Education Foundation, the successor foundation, to help retire that debt.

In 2002, Karl Rove, together with William Canary, a political operative in Alabama, Bob Riley, who was seeking to defeat Governor Siegelman in the next gubernatorial election, two incumbent United States Attorneys for the Northern and Middle Districts of Alabama, and unknown others contrived a plan to prosecute Governor Siegelman. Prosecutors initially charged Governor Siegelman in the Northern District of Alabama with an effort to rig bids on a state project, which did not implicate matters concerning the state lottery campaign. The presiding judge, Judge U.W.Clemon, made short shrift of the case, dismissing it as "the most unfounded criminal case" over which he had ever presided and intimating that he was going to pursue the prosecutorial misconduct employed.

Karl Rove and his operatives then readjusted their strategy to include Mr. Scrushy, my client, and shifted their chosen venue to the Middle District of Alabama, apparently with the assistance of the Department of Justice in Washington, D.C. This time, they focused on the lottery campaign for statewide education and charged Mr. Scrushy not only with federal funds bribery, even though no federal funds were implicated, but also with honest services fraud for his appointment to an uncompensated position on the Alabama Certificate of Need ("CON") Board which oversees and approves the launch of health care facilities and projects in the state. Karl Rove and his colleagues managed to get Chief Judge Mark Fuller assigned as presiding judge, who had been investigated earlier in his career at the request of Don Siegelman, then State Attorney General of Alabama, for Fuller's salary-spiking (which is the practice of making extraordinary salary payments to someone near retirement) while Fuller was a county district attorney. Given the politicized criminal charges and the presence of a federal judge (now discredited) who held a grudge against Governor Siegelman, the prosecution, trial and conviction of my client and Governor Siegelman will go down in the annals of American criminal justice as a prime example of prosecutorial and judicial misconduct. The pain staking and dolorous details of how this prosecution was launched have been recounted in the Declaration of Mr. Scrushy, which has been supplied to the Your Office as President and to the Office of the Pardon Attorney, Department of Justice.

Governor Siegelman and Mr. Scrushy were improperly charged and convicted with federal funds bribery and honest services fraud. Professor Blakey of the Notre Dam School of Law previously sent you a letter laying out the bogus nature of the charges. *See Letter to Office of the President dated September 20, 2012 and attached to Mr. Scrushy's Declaration as Exhibit 14.* You can also review a small sampling of the prosecution team's mendacious efforts to convict by manipulating the facts and interpretation of the statute. *See Declaration of Mr. Scrushy, paragraphs 170 – 184.* Beyond the synthetic interpretation given to the statute by the government, a more fundamental and unresolved problem is how a *federa*l bribery charge could have ever been brought when there were no federal funds involved. Neither the state lottery campaign, nor the Alabama Education Foundation, nor the HealthSouth contribution, nor even the state CON board to which Mr. Scrushy was appointed used federal funds.

The House Judiciary Committee commenced an investigation into this case in 2007. An Alabama lawyer named Dana Jill Simpson signed an affidavit before the House Judiciary Committee, in which she disclosed that, in November 2002, she heard Alabama Republican political operative William Canary say that Karl Rove had contacted the Justice Department about bringing a prosecution against Don Siegelman. (William Canary is married to the United States Attorney in the Middle District of Alabama, Leura Canary.) Ms. Simpson stated in the affidavit that Mr. Canary also said that "my girls would take care of" Mr. Siegelman. When Ms. Simpson asked Mr. Canary who "his girls" were, Mr. Canary said they were his wife and Alice Martin, the U.S. Attorney for the Northern District of the state. *See Report of House Judiciary Committee (April 17, 2008),* at 9, attached as Exhibit 16 to Mr. Scrushy's Declaration. Thus, Ms. Simpson had been a participant in a telephone conference during which Leura Canary's husband, William Canary, stated that he had spoken with "Karl," that "Karl" had spoken with the Department of Justice, and that "his girls" would "take care of" Siegelman.

The House Judiciary Committee Report further stated:

> On September 14, 2007, the House Judiciary Committee conducted a sworn, on-the-record interview of Ms. Simpson in which she affirmed the statements in her affidavit. Ms. Simpson described an additional conversation in early 2005 in which Governor Riley's son, Rob Riley, told her that his father, Bob Riley, Governor of Alabama, had again spoken to Karl Rove who had in turn communicated with the head of the Department's Public Integrity Section about bringing a second indictment against Don Siegelman after the first case was dismissed in [the Northern District of Alabama]. Mr. Rob Riley, the son, stated that Karl Rove had asked the Department of Justice to mobilize additional resources to assist in the prosecution effort. Mr. Riley also said that the case would be [filed]

> in the Middle District of Alabama and would be heard by Chief Judge Mark Fuller, a judge who Mr. Riley stated could be trusted to 'hang Don Siegleman..'" And Mr. Riley claimed that the prosecution would try Mr. Siegelman and Mr. Scrushy together, in the hopes that Mr. Scrushy's unpopularity in the state would affect the proceedings against Siegelman."

Report of United States House of Representatives Committee on Judiciary, Prepared for Chairman John Conyers, Jr., at 9-10 (April 17, 2008), attached as Exhibit 16 to Mr. Scrushy's Declaration.

Mr. Karl Rove resigned while defying Congressional subpoenas to appear before House Judiciary Committee, broadly claiming White House executive privilege.

In addition to the clearly political nature of the prosecution, the prosecution of Siegelman and Scrushy could not have been successful for another reason. In the Supreme Court's recent June 2106 decision in *McDonnell v. United States*, in which the federal government prosecuted the Governor of Virginia for bribery but which was overturned, the Supreme Court said that "we decline to 'construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards" of 'good government for local and state officials.' " 136 S.Ct. 2355, 2373 (2016). *McDonnell* dealt the federal government a stinging defeat for its unsuccessful efforts to transform federal bribery law into a tool for traducing the conduct of local officials. Thus, by adopting a sensible interpretation of the reach of federal bribery law, the Supreme Court has done much to cabin the temptation and misguided verve of federal prosecutors who select local politicians as targets, especially for unworthy politically motivated reasons.

This same form of inappropriate political prosecution caught the attention of Justice Jackson as far back as 1940. In his seminal article on the "The Federal Prosecutor," he stated that prosecutorial discretion becomes a threat to liberty when its exercise and scope are unrestrained and unquestioned. Mr. President, as a constitutional scholar, you will appreciate and recognize that unfettered prosecutorial discretion systematically weakens ordered liberty and undermines constitutional protections. Federal prosecutors cannot be left free to charge individuals whose only crime is "being attached to the wrong political views." *31 Journal of Crim. Law & Criminology (May/June 1940)*. Thus, in *McDonnell*, Chief Justice Roberts noted that the government's interpretation of what constitutes bribery and what might be an "official act" would "cast a pall of potential prosecution" over quite ordinary political participation. The Chief Justice poignantly and sharply stated that "we cannot construe a criminal statute on the assumption that the Government will use it responsibly." *See also* "Opinion" article by nationally recognized syndicated columnist George Will in the *Washington Post*, "Is it bribery or Just Politics?" (February 10, 2012)(attached).

From start to finish, these wise sentiments and admonitions expressed by Justice Jackson and by the current Supreme Court did not stop the unfounded criminal prosecution of Governor Siegelman and Mr. Scrushy. But society must be guarded from " 'standardless sweeps' of the Government's reading" of a statute. Otherwise, "public officials could be subject to prosecution, without fair notice, for the most prosaic interactions." *McDonnell v. United States,* 136 S.Ct. 2355, 2373. The Alabama Education Foundation, the referendum for a state funded lottery for education, and contributions to them by local businessmen should under no set of circumstances engender federal bribery charges.

There has been a travesty of justice. It cries out for correction. You hold the power to do so. My client implores you to exercise it. [1]

2. Prosecutorial and Judicial Misconduct

Beyond the mere improper political motives behind the prosecution, evidence of prosecutorial and judicial misconduct started to surface after the trial. It continues to surface.

Credible magazines and newspapers are rife with stories of prosecutorial and judicial misconduct in this case. The misconduct has been a topic of stories by *60 Minutes* (CBS); Jeffery Toobin from CNN (*New Yorker Magazine*, "Why Obama Should Pardon Don Siegelman (January 14, 2015); a number of articles by Columbia Law Professor Scott Horton – *e.g.,* First Monday: The Siegelman Case - A Political Prosecution Exposed (March 3, 2007) and *Harper's Magazine*, "Judge Fuller and the Trial of Don Siegelman, (August 3, 2007); Law Professor Bennett l. Gershman, *Time Magazine*, "Selective Prosecution in Alabama (October 4, 2007);" *Time*, "Rove Named in Alabama Controversy," (June 1, 2007); *Time*, "More Allegations of Misconduct in Alabama Governor Case (November 14, 2008); *HuffPost,* "New Evidence Reveals Feds 'Coached, Cajoled, Threatened 'Star Witness in Siegelman Case (May 25, 2011); *HuffPost Politics*, "Siegelman Deserves New Trial Because of Judge's Grudge," Evidence shows (May 25, 2011); *Daily Beast,* "What the Justice Department is Hiding" (November 14, 2008); POGO, "Justice Department Downplays Evidence of Politics in Probe of Governor (December 11, 2014). These are but a few; but, the shear quantity of these articles and the strength of the evidence discussed by such credible sources cannot be ignored.

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[1] Attached is an article by Columbia Law Professor Scott Horton, which summarizes several salient points about this case and the need for a pardon. See *Washington Spectator,* "The Case for a Presidential Pardon for Don Seigelman" (March 8, 2016).

Professor Bennett L. Gershman, nationally recognized as the leading expert on prosecutorial misconduct, after reviewing the evidence and testimony of House Judiciary Committee, concluded:

> "The prosecution of Don Siegelman may be the most outrageously unfair 'corruption' prosecution ever brought by the Justice Department, ranking much higher than several other recent inept and misguided prosecutions — late Senator Ted Stevens, John Edwards, the River Birch defendants in New Orleans, and the Alabama casino operators. Why President Obama has refused to grant Siegelman a pardon or commute his sentence is incomprehensible."

See Bennett l. Gershman,"Cruel Justice: The Case of Don Siegelman," Greene County Democrat, (July 2, 2014).

An employee in the United States Attorneys Office for the Middle District of Alabama, acting as a whistleblower, disclosed the reprehensible conduct occurring within that office by the prosecutors, including the need to make up and twist facts to ensure a conviction in their "Big Case." *See Letter from Tamarah Grimes, attached to Mr. Scrushy's Declaration as Exhibit 12.*

Judge Fuller, who has now been discredited and was forced to resign by the Judicial Panel of the Eleventh Circuit rather than suffer impeachment proceedings for, among other things, perjury and spousal abuse, was hand picked by the United States Attorney for the Middle District of Alabama, Leura Canary, and by Governor Riley and his son, to "hang Don Siegelman." *Report of United States House of Representatives Committee on Judiciary, Prepared for Chairman John Conyers, Jr.*, at 9-10 (April 17, 2008). There were also lucrative contracts awarded to Judge Fuller's company, Doss Aviation, by the government for his "correct" handling of the trial. Finally, as reported by jurors, had it not been for the pressure applied by Judge Fuller to the jury, who were twice hung, there would have been mistrial. *See Affidavit of Charles Stanford, (August 9, 2006), attached to Mr. Scrushy's Declaration as Exhibit 15.*

Mr. President, we are also aware that you have received a letter or petition from more than 112 former United States and State Attorneys Generals requesting a pardon.

With so much public outcry, it behooves you to act before your term of office comes to an end.

3. The Jury

The prosecution team relied on jury confusion to achieve its conviction. The government presented evidence for much of 27 days and called 65 witnesses. The trial lasted almost seven (7) weeks and resulted in over 8,000 pages of transcript. Jurors later acknowledged that they could not handle the overwhelming quantity of evidence and the confusion it created.

At times during the trial, the prosecutors argued that the "real evidence" was not that as provided by witness testimony, According to the lead prosecutor, "the way you have it **factually**, Your Honor, with all due respect, is **not** the way the **testimony** was." Straining credulity, the prosecutors during their closing argument even suggested to the jury that they abandon the evidence and instead the prosecutors resorted to melodrama:

> "Ladies and gentlemen of the jury, conspiracies are not hatched in the light of day. They are hatched in back rooms with dimly lit lights, with cigar smoke floating around, with whispers and nods and winks and conspiratorial discussions."

Conjuring up images in the jurors' minds of dimly lit rooms filled with cigar smoke hardly suffices as evidence – let alone proof – of criminal bribery or conspiracy. It was puerile. There was no evidence to support it. It was deceitful, regardless how piquant.

The jury sought to unravel the smoke of intentional confusion created by the prosecution. It asked very pointed questions, but received unhelpful answers. As to whether the HealthSouth contribution to the Education Foundation – or for that matter any prior contributions to the lottery campaign – could be a "thing of value" to Governor Siegelman under the bribery statute, the jury was told that "a campaign contribution can qualify as a thing of value." Indeed, the jury was instructed that "a campaign contribution may violate 18 U.S.C. §666 [the federal bribery statute] if it benefits a defendant **directly or indirectly,** either in his personal finances or **the finances of another person or entity** at his direction, so long as the other elements of that code section have been satisfied." Worse, at one point during the trial, Judge Fuller sided with the prosecution and remarked in open court, though outside the presence of the jury, that a campaign contribution in and of itself – even to the former Alabama Educational Lottery Foundation by a contributor – could be enough to convict, because it "enhanced" Governor Siegelman's "**political capital** because that is the **platform** he ran on." That simply cannot – and is not – the law. Yet, the jury was fed these didactic remarks.

From the prosecution's so-called "evidence" and the judge's comments, the jury was twice deadlocked. There was talk of jury nullification. By the time a third jury note was sent out to the judge stating that they were still hung, Judge Fuller issued the Allen charge, or dynamite charge, to force a decision. One juror commented afterwards that the judge "practically threatened us." The juror's other comments reveal the stress, confusion, and angst the jurors felt. "All the information on all those men was too much for us to decide on." "I was confused between all the evidence and the other Internet stuff and information that some of the jurors brought in and [were] talking about." There was deal-making going on between jurors just to please the judge. "They were bargaining to speed things up." "So, I felt pressure and forced to just agree with most of the other jurors and just reach a verdict, right or wrong." " I continued to go along with the deal making to get it over with." "I told them to let me know when they had figured it out, then I'd vote which ever way they needed me to." Without all the pressure applied by the judge, that juror stated that "it would have been a hung jury, plain and simple." *See Affidavit of Charles Stanford, August 9, 2006), attached to Mr. Scrushy's Declaration as Exhibit 15.*

A contrived prosecutions, concocted criminal charges, scripted witnesses, a biased and hand picked judge, and jury coercion – none of it can square with any notion of constitutional due process. It is no excuse to claim, as did the Eleventh Circuit in upholding the convictions, that we must not intrude on the sanctity of the jury system and their assessment of witness demeanor, when the jury was intentionally misled by the prosecution and its key witness, who now acknowledges that he never believed that there was any form of conspiracy or bribery between Governor Siegelman and Mr. Scrushy. *See Declaration of Richardson ¶7, attached as Exhibit 10 E to Mr. Scrushy's Declaration.*

In April 2016, a bipartisan group of 112 former state Attorneys General urged you to commute Governor's Siegelman's sentence and issue a formal pardon. I would like to remind you of what they said in that letter from Justice story's *Commentaries on the Constitution.* The power to pardon is:

> "indispensable under the most common administration of the law by human tribunals; since, otherwise, men would sometimes fall a prey to the vindictiveness of accusers; the inaccuracy of testimony; and the fallibility of jurors and courts."

Joseph Story, *Commentaries on the Constitution,* §770, at 547 (1833) (Carolina Academic Press 1987). This is just such a case.

Mr. President, on behalf of my client, Richard Scrushy, I implore you – as a just and fair man – to grant the pardon so deservedly justified in this case.

Thank you for your utmost consideration.

Sincerely,

Thomas V. Sjoblom

cc: Neil Eggleston
White House Counsel

Department of Justice
Pardon Office