

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

UNITED STATES)	
)	
v.)	Case No. 2:05-cr-119-MEF
)	
DON EUGENE SIEGELMAN,)	
Defendant)	

**REPLY OF DEFENDANT DON EUGENE SIEGELMAN
TO GOVERNMENT’S OPPOSITION
TO NEW TRIAL AND DISCOVERY MOTIONS**

**I. ;
Because there are dueling affidavits and exhibits, an evidentiary hearing is required**

When Siegelman filed his motion for a new trial and adopted the Scrusby Exhibits, the assertions were, at that point, uncontested and he treated them as true. The motion reflects as much. Now, the Government has filed its own affidavits and exhibits and, in essence, asks the Court to believe that their documents assert the truth and that the defendant’s exhibits should be ignored.

It doesn’t work that way. Now, there is a conflict on issues of fact. The Court, it is respectfully asserted, should, decline to make findings, conclusions and/or decisions on the motion without a hearing *simply* because, as the Government seems to boldly claim, “We’re the Government, so it must be true.”

On the contrary, because of its past behavior, in other recent cases, the Government's submissions should be received with caution. In *United States v. Stevens*, the case against the former Alaska senator was dismissed on the motion of the Government because of improper prosecutorial behavior. There the Government withheld documents from and made false representations to the court. Siegelman attaches as Siegelman Reply Exhibit B, an Opinion and Order in that case, from the United States District Court for the District of Columbia, per Judge Sullivan.

In describing the Government's misconduct, Judge Sullivan said in his January 19, 2009, Opinion and Order:

“This case, and this most recent incident, involves numerous attorneys and offices throughout the Department of Justice. Those attorneys have not been able to provide a cohesive or credible answer to this Court's questions . . .”

Judge Sullivan has appointed a Special Prosecutor to look into the matter.

Some of the miscreant actors referred to in Judge Sullivan's Opinion and Order, William Welch, Chief of the DOJ's Public Integrity Section and Patty Stemler, Chief, Appellate Section, Criminal Division of DOJ and perhaps others have been active players in this case.

Siegelman is unaware of any wrongdoing by Patty Stemler in this case. She was the lawyer who brought to the Court and defense counsel's

attention that the deputy marshals had shown the email non-authenticity postal inspector report to the Court. Still, she reported it in July 2008 -- over a year after the incident occurred in April 2007. This Court and Siegelman are entitled to know who was aware of that information, when were they aware of it, and why wasn't it disclosed for over a year.

There are other cases where the DOJ has been accused of gross and malicious misconduct. Some of those cases are described in an April 28, 2009 letter from the Hon. Mark L. Wolf, Chief Judge of the United States District Court for the District of Massachusetts to Attorney General Holder and is attached as Siegelman Reply Exhibit C.

Siegelman believes that the proper response to the dueling documents is a hearing where counsel for all parties can engage in cross-examination. "As Professor Wigmore put it, '[cross-examination] is beyond any doubt the greatest legal engine ever invented for the discovery of truth' 5 J. Wigmore, Evidence § 1367 (Chadbourn rev. 1974)." *Watkins v. Sowders*, 449 U.S. 341, 358, f.n. 4 (1981)

II. Throughout the Government’s Opposition, it complains that the defendants should have known or raised complaints when, in fact, they didn’t know about the violations, and in many cases, the Government failed to disclose what it was required to or willfully concealed it

“A rule thus declaring ‘prosecutor may hide, defendant must seek,’ is not tenable . . .” *Banks v. Dretke*, 540 U.S. 668, 696 (2004).

III. If U. S. Attorney Leura Canary had a conflict and acted in the case after her announced recusal, a new trial (if not more) is required. An evidentiary hearing is necessary

A. It is reversible error for a prosecutor to proceed when she has a conflict of interest.

Williams v. Taylor, 529 U.S. 420, 440-443 (2000); *United States ex rel., Securities & Exchange Commission*, 907 F.2d 484, 486 (5th Cir. 1990); *Young v. U.S. Ex Rel. Vuitton Et Fils S. A.*, 481 U.S. 787 (1987).

B. By ignoring one of the emails that support Tamarah Grime’s report of continued participation by U.S. Attorney Canary in the Siegelman case, the Government must think that it will just go away.

After seeking to discredit Tamarah Grimes, the Government said, “In arguing that AUSA Canary failed to abide by her recusal defendants rely on *two emails* she forward to members of the prosecution team . . .” Gov’t Opp. at 17 (Emphasis supplied).

The prosecution acts as if the “smoking gun” third email from District Ethics Officer and First Assistant United States Attorney, Patricia Snyder (later Watson) does not exist. But it does.

That email included the following:

“I wanted to let you know that Tami has agreed to work on the big case that Steve Feaga and J.B. Perrine are busily working up. Since this case has ACE potential, having her work on it is justified. *Leura* [Mrs. Canary] *and Louis* [Franklin (“Franklin”) who was supposed to be in charge of the Siegelman case after the alleged recusal] *both liked the concept*, and Tami is excited about it as well. Because of the large volume of documents involved.” (Emphasis Supplied).
Schrushy Exhibit III-J.

C. The Middle District and DOJ Prosecution Team have grounds for concern

All of the evidence is not yet in and won’t be until the Government finally produces documents and its employees are cross-examined under oath. But if the facts show that the third email is accurate, attorneys and others in the Department of Justice and the United States Attorney’s Office for the Middle District of Alabama (“ASUO – Montgomery”) may have engaged in criminal conduct¹ as well having violated a statute prohibiting

¹ 18 U.S.C. § 208 (a) (conflict of interest); 18 U.S.C. § 3 (accessory after the fact); 18 U.S.C. § 4 (misprision of a felony) among others.

conflicts of interest by employees of DOJ. 28 U.S.C. § 528 (Disqualification of officers and employees of the Department of Justice).

D. The Government dwells in two parallel but contradictory universes. The Court should decline its invitation to visit.

1. The FOIA Universe

Here, documents on the recusal of U.S. Attorney Canary cannot be disclosed because to do so would interfere in an ongoing criminal investigation.²

² The Government's ability to thwart the FOIA is breathtaking.

On February 6, 2006, John Aaron filed his initial FOIA Request with the DOJ requesting materials on the recusal of U.S. Attorney Canary. That request was met with a refusal to release any documents. After that, his request went up and down and up and down the administrative appeals elevator. Over three-years later and after the filing of an FOIA lawsuit, this is what has been produced so far: two pages of press releases and 187 pages of newspaper articles. Far larger numbers of pages are still being withheld. The FOIA requests, the administrative appeals, and documents from the FOIA suit are contained in Siegelman Reply Exhibit A. No one would believe it otherwise.

2. The ASUO – Montgomery Universe

U.S. Attorney Canary has not been involved in the case since 2002.

IV. **The threats to witnesses claim cannot be written off without a hearing**

Earp v. Stokes, 423 F.3d 1024 (9th Cir. 2005) (defendant entitled to evidentiary hearing on claim of threats to witness); *United States v Wright*, 43 F.3d 491, 499 (10th Cir. 1994) (threats to indict family member when no probable cause exists is impermissible).

The Government calls the affidavits of the two individuals who Bailey talked to before taking the stand about Government threats to him “hearsay.” Hearsay they are not. Should Bailey deny that threats were made, the testimony of the affiants is received as substantive evidence. FRE Rule 801 (d) (1) (A).

Again, all the evidence is not in, but if it turns out that the Government threatened witnesses, those who did so may have their own problems. 18 U.S.C. § 1512 (Tampering with a witness, victim, or an informant).

V. **Having set in motion the chain of events that resulted in the judge being shown the Postal Inspector Report of Email Non-authenticity, the Government trivializes what it has done**

Even if the Court did not read the report, it doesn't matter. The Government secretly commissioned the Postal Inspector to determine the non-authenticity of the

emails. After it received the report, it did not tell the defense, but it was shown to the Court. If there was ever anything that smacked of the appearance of judicial impropriety, this was it. It was also a screaming violation of due process to have secret investigations arranged by the Government and to conceal the results from the defense.

Since the defense was not told of the existence of the report being showed to the Court until it had filed its opening appellate brief, it is left to wonder whether the judge was unconsciously affected by the report including its determination of sentence. Again, unconsciously, the Court may have felt that the defense had tried to lead it down the garden path.

No matter. This is not how things are done in the United States! The Court is required to recuse itself at this point, Siegelman respectfully submits. In any event, Siegelman is entitled to an evidentiary hearing on the circumstances surrounding this Government-instigated fiasco.

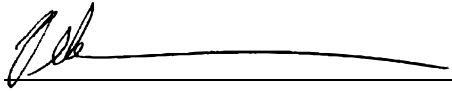
VI. Siegelman is entitled to a hearing on possible juror contacts and Government misconduct

The integrity of the jury process is serious business. Again, the Government would have the Court and the defense *simply accept* its untested declarations. That is not due process.

Joke or not, the email about FBI Agent Baker and jurors sending out notes about him are on their face convincing. As Tamarah Grimes asked in her letter, how did the USAO – Montgomery know that the other jurors nicknamed the gymnast “flipper?”

VII. Siegelman agrees with, adopts, and incorporates all parts of Defendants Scrushy’s reply which are not in conflict with this reply and specifically that part of the Scrushy reply which demonstrates that a new trial motion is appropriate here.

Dated: September 21, 2009



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