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April 6, 2009

Hon. Thomas Kahn, Clerk
U.S. Court of Appeals
56 Forysth St. NW
Atlanta GA 30303

Re: *U.S. v. Siegelman*, No. 07-13163 (pending on petition for rehearing *en banc* or panel rehearing)

Dear Mr. Kahn:

This is an 11th Cir. R 40-5 submission for the panel and *en banc* Court, by Governor Siegelman.

The first issue in the rehearing petition is the meaning of the *McCormick* standard, which requires proof of an "explicit" *quid pro quo* promise in bribery cases involving campaign or issue-advocacy contributions. *McCormick v. U.S.*, 500 U.S. 257 (1991). As shown in the petition, the panel erred in taking the word "explicit" to mean something other than its normal definition, in which it is synonymous with "express."

In support of its divorce of "explicit" and "express," the panel relied significantly on a Sixth Circuit decision which interpreted *Evans v. U.S.*, 504 U.S. 255 (1992) as affecting the "explicit" standard for cases involving contributions. *U.S. v. Blandford*, 33 F.3d 685, 696 (6th Cir. 1994) ("*Evans* instructed that by 'explicit' *McCormick* did not mean 'express.'"). We showed in our petition that *Blandford*'s reading of *Evans* was contrary to this Circuit's precedent, and is dangerously wrong on the merits.

A new decision shows that not even the Sixth Circuit follows *Blandford* anymore. *U.S. v. Abbey*, No. 07-2278 (6th Cir. April 3, 2009) (treating *Blandford*'s analysis of *McCormick* and *Evans* as dicta, and not following it). The relevant discussion, slip opinion pp. 5-6, shows that the Sixth Circuit now recognizes that the *McCormick* "explicit" standard still robustly applies in contributions cases. Even after *Evans*, proof of an "*explicit* quid pro quo promise" is required in contributions cases, while "outside the campaign context," by contrast, "something short of a formalized and thoroughly

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articulated contractual arrangement" is enough to constitute a crime. (p. 6). *Abbey* shows that *Blandford*'s reading of *Evans* does not represent the current law even in the Sixth Circuit. The law in the Sixth Circuit (*Abbey* p. 6, "*Evans* modified the standard in non-campaign contribution cases") is now like the law as it existed in this Circuit under *U.S. v. Martinez*, 14 F.3d 543, 553 (11 Cir. 1994), before the panel departed from precedent.

After *Abbey*, it is clearer than ever that the panel misunderstood the *McCormick* standard, and that rehearing *en banc* is appropriate.

Very truly yours,

Sam Heldman

cc: John-Alex Romano
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Bruce Rogow