

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

UNITED STATES OF AMERICA)	
)	
v.)	CR. NO. 2:05-CR-119-MEF
)	
DON EUGENE SIEGELMAN and)	
RICHARD M. SCRUSHY)	

**UNITED STATES' RESPONSE TO DEFENDANTS' MOTIONS FOR NEW TRIAL
BASED ON NEWLY DISCOVERED EVIDENCE AND MOTIONS FOR DISCOVERY**

COMES NOW the United States of America, by and through Louis V. Franklin, Sr., Acting United States Attorney for the Middle District of Alabama, and William M. Welch, II, Chief of the Public Integrity Section of the Criminal Division of the United States Department of Justice, and hereby responds to Defendants' Motions for New Trial Based on Newly Discovered Evidence (the "Motions"), D. 953 & 960, and Motions for Discovery. D. 955 & 961.

On June 29, 2006, following a two-month trial, a jury returned verdicts of guilty on six counts charging defendant Scrushy with federal funds bribery, conspiracy to commit honest services mail fraud, and honest services mail fraud. D. 438. The jury found defendant Siegelman guilty on seven counts of bribery, conspiracy, honest services fraud, and obstructing justice. D.437. Nearly three years later, on March 6, 2009, the court of appeals upheld those verdicts on all but two counts against Siegelman, and on all counts against Scrushy, finding that the "government's case was strong on the counts of conviction." *United States v. Siegelman*, 561 F.3d 1215, 1238 (11th Cir. 2009). Defendants now challenge their convictions on five different grounds, most of which have nothing to do with the accuracy of the jury's verdict. As we explain below, most of these claims are not cognizable under a Rule 33 motion grounded on newly discovered evidence, and one claim was waived because it was not made before trial. But even when considered on their merits, defendants

claims fail both legally and factually. Accordingly, their new trial motions should be denied.

1. Most of Defendants' Claims Are Not Cognizable Under Rule 33(b)(1), and They Must Therefore Be Considered Under 28 U.S.C. § 2255.

A. Rule 33(b)(1).

Since the jury returned its verdicts on June 29, 2006, each defendant has filed two motions pursuant to Fed. R. Crim. P. 33. They filed their first motion under Rule 33(a) and (b)(2), which permits a court to grant a motion for a new trial in the interests of justice “grounded on any reason other than newly discovered evidence” if that motion is filed within “7 days after the verdict.”¹ That joint motion alleged claims of juror misconduct, D. 467, and was denied by the Court on December 13, 2006. D. 518.

Once the seven-day period, as extended, has passed, the defendant can only file a new-trial motion under Rule 33 if the motion is “grounded on newly discovered evidence.” *See* Fed. R. Crim. P. 33(b)(1); Charles Alan Wright, Nancy J. King & Susan R. Klein, *Federal Practice and Procedure* § 552 (3d ed. 2004) (noting that the Supreme Court deleted a provision from the original rule submitted by the Advisory Committee in 1944 that would have allowed a defendant to allege the deprivation of a constitutional right without time limit in a new trial motion). The seven-day deadline for non-newly discovered evidence claims is “rigid.” *Eberhart v. United States*, 546 U.S. 12, 13 (2005).

Defendants filed their second new-trial motions three years after the verdict, and therefore those motions are restricted to claims “grounded on newly discovered evidence.” Fed. R. Crim. P. 33(b)(1). As a general matter, “[a] Rule 33 motion filed more than seven days after the verdict may

¹ The Court extended this seven-day period pursuant to Fed. R. Crim. P. 33(b)(2) to September 29, 2006. D. 443. Defendants filed a joint motion that day. D. 467.

only address newly discovered evidence of *innocence*, not a constitutional violation.” *United States v. Spuza*, 194 Fed. Appx. 671, 674 (11th Cir. 2006) (emphasis added); *see also United States v. Evans*, 224 F.3d 670, 672-674 (7th Cir. 2000) (Rule 33(b)(1) is restricted to “a genuine claim of newly discovered evidence tending to show innocence”); *Guinan v. United States*, 6 F.3d 468, 470 (7th Cir. 1993) (“The purpose of granting a new trial on the basis of newly discovered evidence is not to correct a legal error, but to rectify an injustice” in that the factfinder, without the benefit of the new evidence, “reached the wrong result”), *overruled on other gds, Massaro v. United States*, 538 U.S. 500 (2003). In other words, permissible claims after the initial Rule 33 deadline must be grounded on newly discovered evidence of “such a nature that a new trial would probably produce a different result.” *United States v. Thompson*, 422 F.3d 1285, 1294 (11th Cir. 2005) (internal quotation and citations omitted).

In this circuit, in addition to claims of innocence, a motion based on newly discovered evidence can also address “questions regarding the fairness or impartiality of a jury” or “the existence of a *Brady* violation.” *United States v. Campa*, 459 F.3d 1121, 1151 & n.268 (11th Cir. 2006) (*en banc*), citing *United States v. Williams*, 613 F.3d 573, 575 (5th Cir. 1980) (court can consider whether *ex parte* contact between the court and juror “impugned the integrity of the jury’s verdict”).² Like “newly discovered evidence of innocence” claims, these claims attack the accuracy and reliability of the verdict.

Defendants proffer no “newly discovered evidence of innocence,” and at most two of their claims implicate “the integrity of the jury’s verdict,” namely, their claims (1) of juror bias and (2)

² *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (adopting as binding precedent all decisions of the United States Court of Appeals for the Fifth Circuit handed down prior to close of business on September 30, 1981).

that the government suppressed information that certain testimony was scripted, coerced, and inaccurate. Accordingly, only these claims can be addressed now under Rule 33.

With regard to claims properly addressed under Rule 33's "newly discovered evidence" provision, the Court must remember that such motions "are highly disfavored in the Eleventh Circuit and should be granted only with great caution. Indeed, the defendant bears the burden of justifying a new trial." *Campa*, 459 F.3d at 1151. To obtain a new trial on non-*Brady* claims, a defendant must show that:

(1) the evidence was discovered after trial, (2) the failure of the defendant to discover the evidence was not due to a lack of due diligence, (3) the evidence is not merely cumulative or impeaching, (4) the evidence is material to issues before the court, and (5) the evidence is such that a new trial would probably produce a different result.

United States v. Jernigan, 341 F.3d 1273, 1287 (11th Cir. 2003). A similar standard applies to *Brady* allegations. In particular, the challenger must establish that

(1) the government possessed favorable evidence to the defendant; (2) the defendant [did] not possess the evidence and could not [have] obtain[ed] the evidence with any reasonable diligence; (3) the prosecution suppressed the favorable evidence; and (4) had the evidence been disclosed to the defendant, there is a reasonable probability that the outcome would have been different.

United States v. Vallejo, 297 F.3d 1154, 1164 (11th Cir. 2002). "A reasonable probability of a different result is shown when the government's evidentiary suppression undermines confidence in the outcome of the trial." *United States v. Scheer*, 168 F.3d 445, 451-52 (11th Cir. 1999). The failure to satisfy any element of either test is fatal. *Thompson*, 422 F.3d at 1294; *United States v. Lee*, 68 F.3d 1267, 1274 (11th Cir. 1995). As we will demonstrate later, defendants cannot satisfy their burden for either their non-*Brady* or *Brady* claim.

B. 28 U.S.C. § 2255.

Defendants' remaining claims neither support a claim of innocence nor impugn the integrity of the jury's verdict. In those claims, defendants allege errors that occurred *before* or *after* trial. Specifically, they argue that (1) the indictment was politically motivated and should therefore be dismissed; (2) the United States Attorney violated the terms of her recusal *before* trial when she communicated on two occasions with the trial team; (3) the Court and the Marshals met *after* trial outside the presence of the defense to discuss a post-trial investigation into juror harassment; and (4) a juror who was contemplating law school asked to speak to the prosecutors *after* trial. Because the evidence supporting the latter two claims was not "in existence at the time of trial," it cannot "justify a new trial" under the "newly discovered evidence" provision of Rule 33(b)(1). *United States v. Lafayette*, 983 F.2d 1102, 1105 (D.C. Cir. 1993).

The four claims listed above are consequently more properly brought in a motion filed pursuant to 28 U.S.C. § 2255. *Evans*, 224 F.3d at 674 (regardless of the caption, a Rule 33 motion that is not "a genuine claim of newly discovered evidence tending to show innocence" should be treated as a collateral attack under 28 U.S.C. § 2255). With respect to claims that are not cognizable under Rule 33(b)(1), the Court has discretion to recharacterize them as a Section 2255 motion even if defendants' convictions are not yet final. *See United States v. Casaran-Rivas*, 311 Fed. Appx. 269, 272 (11th Cir. 2009) (in "extraordinary circumstances," court may entertain Section 2255 motion while direct appeal is pending). In fairness to defendants, however, the Court should first explain the consequences of recharacterizing their motions and "provide an opportunity to withdraw the pleading[s]." *Federal Practice and Procedure, supra*, § 552; *see also* 28 U.S.C. § 2255(h) (limiting grounds for second or successive collateral attacks); *United States v. Palmer*, 296 F.3d

1135, 1145-46 (D.C. Cir. 2002) (district court may recharacterize a Rule 33 motion only after warning the defendant about the restrictions on second and successive Section 2255 motions); *Evans*, 224 F.3d at 675 (same); *United States v. Miller*, 197 F.3d 644, 646 (3d Cir. 1999) (same); *Adams v. United States*, 155 F.3d 582, 584 (2d Cir. 1998) (same); *cf. Castro v. United States*, 540 U.S. 375, 383 (2003) (*pro se* litigant must be warned of consequences prior to court's recharacterization of motion under Rule 33 as a Section 2255 motion, and be allowed to withdraw or amend the motion).

If defendants choose to proceed under Section 2255, and in the absence of some other procedural bar, the Court should deny their claims on the merits, for the reasons set forth below.³ If defendants insist on proceeding under Rule 33, the Court should deny any claim that does not pertain to innocence or the integrity of the verdict as time-barred under *Eberhart*.

2. Defendants Have Waived Their Claim of Selective Prosecution, and in Any Event, They Have Failed to Show That They Are Entitled To Discovery On This Claim.

For the first time, defendants claim (Siegelman Motion 28-36, 65-70, 73; Scrusby Motion 2-11, 40-46) that they were the victims of selective prosecution. In particular, defendants allege that their prosecution was initiated for political purposes, namely, to ensure that Siegelman, a Democrat, was defeated by his Republican opponent in the 2006 Alabama Governor's race. The Court, however, should not entertain this claim. First, as discussed *supra*, it does not support defendants' innocence nor does it impugn the integrity of the verdict. Consequently, it may only be considered under Section 2255, not Rule 33(b)(2). Second, even were the Court inclined to consider the claim

³ This Court cannot grant relief under Section 2255 until the mandate issues. *See United States v. Khoury*, 901 F.2d 975, 976 (11th Cir. 1990). On August 17, 2009, the court of appeals issued the mandate as to Scrusby only. D. 971.

in a Rule 33 motion, defendants have waived the claim by failing to timely raise it.

The law is clear that a claim of selective prosecution is one that implicates a defect in the institution of the prosecution and must be raised before trial under Fed. R. Crim. P. 12(b)(3); if such a claim is not raised prior to trial, it is considered waived under Fed. R. Crim. P. 12(e). *United States v. Jennings*, 991 F.2d 725, 729-30 (11th Cir. 1993); *accord*, *United States v. Huber*, 404 F.3d 1047, 1054 (8th Cir. 2005); *United States v. Abboud*, 438 F.3d 554, 579 (6th Cir. 2006); *United States v. Edwards*, 188 F.3d 230, 237 (4th Cir. 1999); *United States v. Kelley*, 152 F.3d 881, 886 (8th Cir. 1998); *United States v. Westmoreland*, 122 F.3d 431, 434 (7th Cir. 1997); *United States v. Gary*, 74 F.3d 304, 313 (1st Cir. 1996); *United States v. Bryant*, 5 F.3d 474, 476 (10th Cir. 1993); *United States v. Cortez*, 973 F.2d 764, 766 (9th Cir. 1992); *United States v. Taylor*, 562 F.2d 1345, 1356 (2d Cir. 1977); *United States v. McCord*, 509 F.2d 334, 345-46 (D. C. Cir. 1975).

Courts have found a claim of selective prosecution waived not only when it is raised during or after trial - (*see, e.g., Abboud*, 438 F.3d at 579; *Taylor*, 562 F.2d at 1356 (five weeks into trial); *Huber*, 404 F.3d at 1054 (after trial, in motion under Fed. R. Crim. P. 29); *Edwards*, 188 F.3d at 237 (after trial, in motion to set aside verdict); *Westmoreland*, 122 F.3d at 434 (three months after trial)) - but even when it is raised for the first time shortly before trial, after the deadline for pretrial motions had passed (*see, e.g., Gary*, 74 F.3d at 313 (morning of trial); *Kelley*, 152 F.3d at 885-86) (one day before trial); *Jennings*, 991 F.2d at 729 (three days before trial)). It is surely too late to allege selective prosecution for the first time, as in this case, months after a defendant's conviction has been affirmed on appeal. This Court should hold, in accord with the uniform view of the courts of appeals, that defendants have waived their belated selective prosecution claim and refuse to consider the claim.

Rule 12 allows a defendant's waiver of a claim to be excused for "good cause." *See* Fed. R. Crim. P. 12(e) ("For good cause, the court may grant relief from the waiver."). But defendants have not even addressed their obvious waiver, or sought to excuse their untimeliness with a showing of "good cause." *See Bryant*, 5 F.3d at 476 (refusing to consider a defendant's selective prosecution claim despite district court's rejection of the claim on the merits, because defendant had "failed to show cause for his failure to make a timely motion"). The Eleventh Circuit has found, in a case where a selective prosecution motion was filed before trial but well after the deadline for pretrial motions, that the district court did not abuse its discretion in refusing to consider the untimely motion. The court of appeals held that the defendant's "general allegation" that his filing was tardy because he lacked the knowledge on which to base his motion did not satisfy the "cause" requirement, reasoning that the defendant "never alleged that he could not have discovered the facts on which he based his motion through the exercise of reasonable diligence." *Jennings*, 991 F.2d at 730.

In this case, it may be that defendants, by including their late claim of selective prosecution in a motion based on "newly discovered evidence," would assert that they have "newly discovered" the Conyers report (Scrushy Exh. I-A: House of Representatives Judiciary Committee Staff Report, April 17, 2008) with its description of various statements by people claiming to have knowledge of the political motivations behind the prosecution of Siegelman and Scrushy. But such an explanation would be insufficient for a finding of "good cause." As the record of this case clearly shows, defendants have been publicly complaining about political motivations behind their prosecution for

years, yet they chose not to raise the claim as a defense.⁴

As early as March 2002, Siegelman alleged that political considerations were involved in the investigation of his activities. In a letter to then-Deputy Attorney General Thompson and then-Director of the Executive Office of U.S. Attorneys Kenneth Wainstein, Siegelman's counsel asked that U.S. Attorney Leura Canary be removed from any role in the investigation of Governor Siegelman. He cited a conflict of interest because of USA Canary's husband's role as a Republican political consultant; and he claimed that alleged grand jury leaks appeared to be intentional and designed to harm Siegelman's reelection campaign. Scrushy Exh. III-A. The letter stated: "Governor Siegelman is now facing the power and taxpayer resources of both state and federal governments being used for the benefit of his political opponents and to the apparent political and financial advantage of the very Federal official charged with the fair and neutral enforcement of the law." *Id.* at 7. And in a campaign letter emailed to supporters and received by Leura Canary on September 14, 2005, Siegelman reported that "[a] recent survey showed that a full 67% of voters believe that the investigation of Don Siegelman is politically motivated." Scrushy Exh. III-H at 2. Thus, defendants cannot say that they had no reason to raise their selective prosecution claim in a timely fashion.

If, as it appears from their own communications, they believed well before trial that their prosecution was instigated for constitutionally impermissible reasons, it was incumbent upon them to file a timely motion, as the rules require. As one court put it, in affirming a finding of waiver,

⁴ The Conyers Report, dated April 17, 2008, was published while defendants' appeal of their convictions was pending. Yet defendants waited until after their convictions were affirmed by the court of appeals, and more than a year after publication of the Conyers Report, to raise their selective prosecution claim.

when a defendant “does not allege that he did not know of this defense at the time of his trial,” and when “all the facts upon which this defense is based were known to [him] at trial, he cannot claim that newly discovered evidence has prompted him to raise the defense now.” *McCord*, 509 F.2d at 346. The Supreme Court has also observed that evidentiary obstacles should not prevent a valid claim of selective prosecution, observing that “if the claim of selective prosecution were well founded, it should not have been an insuperable task to prove that persons of other races were being treated differently than respondents.” *United States v. Armstrong*, 517 U.S. 456, 470 (1996). So here, if defendants had a well founded claim of selective prosecution, they should have been able to assemble enough evidence before trial of other similarly situated people who were not similarly prosecuted to warrant discovery on their claim at that time. Though defendants made clear their belief before trial that their prosecution was politically based, they chose not to present their claim at the appropriate time. The claim was deliberately waived and this Court should refuse to hear it now.

Even if this Court decides to consider this belated claim, defendants have failed to satisfy the “rigorous” threshold showing that the Supreme Court has held must be made for an allegation of selective prosecution to merit discovery. *Armstrong*, 517 U.S. at 468. That is, to overcome the presumption that a prosecutor has not violated a defendant’s equal protection rights and to become entitled to discovery, a defendant must produce some evidence tending to show each of the two elements of a selective prosecution claim - discriminatory effect and discriminatory intent. Further, to show the discriminatory effect element, a defendant must show “some evidence of differential treatment of similarly situated members of other races or protected classes.” *Id.* at 470.

To show discriminatory effect, defendants have cited the Conyers Report’s references to

several other prosecutions of Democratic office holders, claiming that the Report shows a “pattern of politicized prosecutions against prominent Democrats or supporters of Democratic candidates or their causes.” Siegelman Motion 33; Scrushy Motion 8. They also rely on an academic study that concluded that “federal prosecutors during the Bush Administration have investigated Democratic office holders far more frequently than their Republican counterparts.” Siegelman Motion 33-34; Scrushy Motion 8-9. In citing these materials, defendants fail to match their factual support with the relevant standard, which does not ask how many of the same general category have been prosecuted. Rather, one must show that the government “has failed to prosecute others who are similarly situated to the defendant.” *Armstrong*, 517 U.S. at 469. Using the guidance of *Armstrong*, the Eleventh Circuit has defined a “similarly situated” person “as one who engaged in the same type of conduct, which means that the comparator committed the same basic crime in substantially the same manner as the defendant - so that any prosecution of that individual would have the same deterrence value and would be related in the same way to the Government’s enforcement priorities and enforcement plan - and against whom the evidence was as strong or stronger than that against the defendant.” *United States v. Smith*, 231 F.3d 800, 810 (11th Cir. 2000).

Defendants have not offered any cases in which persons who are truly “similarly situated,” as the appellate court has defined it, have not been prosecuted. They cite (Siegelman Motion 32; Scrushy Motion 7), as does the Conyers Report (Scrushy Exh. I-A at 15-16), instances in which government witness Lanny Young described having made so-called “conduit contributions” to Governor Siegelman, but also to the campaigns of Republican politicians; yet it did not appear that the government investigated his allegations concerning Republicans. What defendants fail to note, however, is that the government chose not to pursue any of the conduit campaign evidence offered

by Young, including the evidence relating to the Siegelman campaign. Defendant Scrushy was charged with conspiracy, bribery, and mail fraud, and Defendant Siegelman faced a host of charges (*e.g.*, RICO, bribery, mail fraud, obstruction of justice), but neither defendant was charged with committing a campaign contribution violation. Furthermore, Young's allegations of contributions he made to Republican Senator Jeff Sessions concerned conduct that occurred in 1996, and the applicable statute of limitations would have run in 1999, two years before Young's initial interview. The allegations of conduit contributions to the campaign of Republican Alabama Attorney General Bill Pryor, as well as to Siegelman's campaign for Governor, concerned conduct that would not have been subject to federal campaign finance laws.

As for other examples to which defendants cite (Siegelman Motion 35-36; Scrushy Motion 10-11) where donors to Governor Riley's campaign were later appointed to public offices, those instances are distinct from the instant case because they, unlike the record evidence here, are void of any evidence of actual bribery and/or mail fraud in connection with an ostensible campaign contribution. As the court of appeals said in affirming defendants' convictions, "the evidence was sufficient such that a reasonable juror could have concluded that Siegelman and Scrushy explicitly agreed to a corrupt *quid pro quo*, thereby proving the bribery, conspiracy and the two related mail fraud counts." *Siegelman*, 561 F.3d at 1229. In short, unless defendants can show some evidence of cases in which others "committed the same basic crime in substantially the same manner as the defendant," yet were not prosecuted, they fail to satisfy the *Armstrong* test. *Smith*, 231 F.3d at 810-811. Defendants have presented no such evidence, and they are therefore not entitled to discovery, much less ultimate relief, on their selective prosecution claim. *See also Armstrong*, 517 U.S. at 470 (finding that defendants had failed to meet threshold for discovery when they "failed to identify

individuals who were not black and could have been prosecuted for the offenses for which respondents were charged, but were not so prosecuted”); *United States v. Khan*, 461 F.3d 477, 498 (4th Cir. 2006) (discovery properly denied - no showing that “other terrorist groups * * * are ‘similarly situated’ to them for purposes of selective prosecution”); *In re U.S.*, 397 F.3d 274, 284 (5th Cir.) (per curiam) (defendant not entitled to discovery - no showing of different treatment of similarly situated persons where only defendant was in position to prevent victims’ deaths); *United States v. Quinn*, 123 F.3d 1415, 1425-1426 (11th Cir. 1997) (motion for discovery correctly denied; no showing of similarly situated person when not all circumstances meriting federal prosecution were met).

Defendants have also failed to show “some evidence” of the second essential element of a selective prosecution claim - discriminatory intent. Defendants allege, again relying upon the Conyers Report, that their prosecution was ““ directed or promoted by Washington officials, likely including former White House Deputy Chief of Staff and Advisor to the President Karl Rove, and that political considerations influenced the decision to bring charges.”” Siegelman Motion 29; Scrusby Motion 4 (each quoting Conyers Report, Scrusby Exh. I-A at I-ii). The Conyers Report makes much of the allegations made by Jill Simpson, an attorney who claimed connections to the campaign of the Republican candidate, Bob Riley, who narrowly defeated Siegelman for Governor of Alabama in 2002. In an affidavit written in May 2007, and in a subsequent sworn interview with the House Judiciary Committee staff on September 14, 2007, Simpson recounted the substance of a telephone call she allegedly made to Rob Riley, Bob Riley’s son, on November 18, 2002. Simpson claims that during the call, she heard Bill Canary, a Republican lobbyist and husband of USA Canary, tell Rob Riley and Terry Butts, who represented Scrusby at trial, that they would not have

to worry about Siegelman in the future because Canary had spoken to Karl Rove, who had spoken to the Justice Department, which was pursuing Siegelman. Simpson asserts that she heard Canary say that “his girls” would “take care of” Siegelman, with “girls” referring to USA Canary and Alice Martin, then-U.S. Attorney for the Northern District of Alabama. *See* Scrushy Exh. I-A at 9; Scrushy Exh. I-F at 17-19, 22-24.

In her congressional interview, Simpson added information that was not present in her earlier affidavit. For example, she claimed that Rob Riley had told her in early 2005 that Bill Canary had told him that Karl Rove had communicated with the Justice Department’s Public Integrity Section about bringing a second case against Siegelman because USA Martin had lost her case against him. Scrushy Exh. I-A at 9; Scrushy Exh. I-F at 26-28, 50-51.

The Conyers Report itself acknowledges that the only other parties who should have first-hand knowledge of these allegations - Rob Riley, Bill Canary, and Terry Butts, as well as another person present with Riley on November 18, 2002, Matt Lembke - have all denied Simpson’s accusations including that such a phone conversation ever occurred, in sworn affidavits submitted to the House Committee. Scrushy Exh. I-A at 10 (“Ms. Simpson’s statements have been denied by Bill Canary, Rob Riley, and the other figures involved.”). But the Report questions the denials, noting that telephone records show that a call was made to Rob Riley’s office from Simpson’s cell phone on the day in question, and referring to media reports and allegations from defendants’ counsel in support of Simpson’s statements. Scrushy Exh. I-A at 10-15. In short, Simpson’s statements, contradicted in sworn statements by everyone else involved, including one of Defendant Scrushy’s trial attorneys, Terry Butts, and supported only by speculations and self-serving statements of those representing defendants, can hardly be considered sufficient evidence of an impermissible

discriminatory intent in the prosecution of Siegelman and Scrushy.

Furthermore, in addition to his earlier denials of these allegations, Karl Rove has recently provided testimony to Congress, in which he has quite specifically denied contacting anyone at the Justice Department about the Siegelman prosecution. Rove told the House Judiciary Committee that he never spoke to anyone at the Justice Department about the Siegelman prosecution, and that he was not aware of any such communications by anyone else in the White House. Rove Testimony, July 30, 2009, Gov. Exh. 15 at 80, 84, 93-94; *see id.* at 94 (“I had no such communications, and I’m not aware of any communications about Governor Siegelman in any context with the Justice Department.”). Rove testified that he had no prior knowledge that Siegelman would be indicted, and that his first knowledge about the *Siegelman/Scrushy* indictment in this case occurred when he read about it in the newspaper. *Id.* at 85, 93.

And finally, the attached declarations of three career prosecutors involved in deciding whether to pursue the case against Siegelman and Scrushy - Louis Franklin, the Acting U.S. Attorney for the Middle District of Alabama, Stuart Goldberg, Principal Deputy Chief of the Public Integrity Section of the Criminal Division at the time the indictment was returned, and Andrew Lourie, Chief of the Public Integrity Section of the Criminal Division at the time of trial - also demonstrate that defendants’ selective prosecution claims are entirely insubstantial. Each one unequivocally denies having been pressured or directed for political reasons, and states that only the evidence developed in the investigation and applicable prosecutorial principles played any part in the decision to bring charges against defendants. Franklin Dec. ¶ 5 (Gov. Exh. 4); Goldberg Dec. ¶¶ 3, 4 (Gov. Exh. 6); Lourie Dec. ¶¶ 3, 4 (Gov. Exh. 9).

In the face of these unqualified declarations from those knowledgeable about the decision

to proceed with the prosecution, defendants' claims of political motivation, far from being supported by "some evidence," are entirely unsubstantiated. Defendants have not come close to meeting the "rigorous" threshold showing required by the Supreme Court before a court may order discovery on a selective prosecution claim. The Court should refuse to consider this claim because it was clearly waived, and further because defendants have failed to meet their burden to justify discovery.

3. **United States Attorney Laura Canary Did Not Direct the Investigation and Prosecution in this Case.**

Defendants claim (Siegelman Motion 60-64; Scrusy Motion 53-58) that USA Canary secretly controlled the investigation and prosecution despite her recusal,⁵ thereby depriving them of their right to a "disinterested prosecutor." See *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 804 (1987) (private attorney prosecuting a criminal contempt should be "as disinterested as a public prosecutor"); *id.* at 810 ("the state [must] wield its formidable criminal enforcement powers in a rigorously disinterested fashion"); *Wright v. United States*, 732 F.2d 1048, 1056 (2d Cir. 1984) (a prosecutor is not disinterested if he is under the influence of someone with "an axe to grind" against the defendant); *Clearwater-Thompson v. Michael A. Grassmueck, Inc.*, 160 F.3d 1236, 1237 (9th Cir. 1998) (setting aside criminal contempt conviction because bank was an interested prosecutor). This claim also is not based on innocence and it does not impugn the integrity of the verdict. It is therefore brought too late under Rule 33(b)(2), and can only be considered under Section 2255. In any event, it is also flatly wrong.

⁵ On May 16, 2002, USA Canary recused herself from the investigation that led to the charges in this case "out of an abundance of caution," although she had been advised that there was "no actual conflict of interest." Scrusy Exh. III-B. Because she remained recused throughout the proceedings, we will not address defendants' claim that she had a financial stake in the outcome of the 2002 gubernatorial election, requiring her recusal.

On May 16, 2002, USA Canary recused herself from the Siegelman investigation and his subsequent prosecution. Scrusby Exh. III-B. From that point forward, interim Acting United States Attorney Niven, and following Niven's retirement, Acting United States Attorney Franklin led the prosecution team from the United States Attorney's office, along with the career attorneys in the Public Integrity Section. Acting U.S. Attorney Franklin and then-Public Integrity lawyers Goldberg and Lourie state without reservation that, from the time of USA Canary's recusal to the present, they never consulted with her about the case or took directions from her. *See* Franklin Dec. ¶ 3 (Gov't Exh. 4); Goldberg Dec. ¶ 2 (Gov't Exh. 6); Lourie Dec. ¶ 2 (Gov't Exh. 9).

In arguing that USA Canary failed to abide by her recusal, defendants rely on two emails she forwarded to certain members of the prosecution team on September 19 and 28, 2005. Scrusby Exhs. H & I. In the first, USA Canary forwarded an unsolicited email she had received from the Siegelman campaign citing surveys and outlining the planks of his platform. In the second, she forwarded a letter to the editor written by a Siegelman supporter denouncing the grand jury investigation. Neither email had any evidentiary value. USA Canary wrote a short note with the first email (*id.* at III-H):

Heaven only knows how I got on this e-mail list. Ya'll need to read because he [Siegelman] refers to a "survey" which allegedly shows that 67% of Alabamians believe the investigation of him to be politically motivated. (Perhaps grounds not to let him discuss court activities in the media?) He also admits to making "bad hires" in his last administration. Also, it shows that it was sent last Thursday night, though I didn't receive it until late Friday.

She affixed no note to the second email. Scrusby Exh. III-I. The prosecution team ignored both emails and took no action in response thereto. Franklin Dec. ¶ 3 (Gov't Exh. 4). The government never sought a gag order against Siegelman, as Canary had intimated. Whether or not USA Canary should have forwarded these two emails to certain members of the prosecution team, they had no

effect on Acting U.S. Attorney Franklin, a tenured career prosecutor who never surrendered the reins. With a team led and staffed by career prosecutors, defendants had the “disinterested prosecutors” to which they were entitled.⁶

4. The April 2007 Conversation between Representatives of the U.S. Marshals Service and the Court Provides No Basis for Granting Defendants a New Trial.

Defendants claim (Siegelman Motion 54-56; Scrushy Motion 61-63) that the government engaged in prosecutorial misconduct when representatives of the United States Marshals Service met with the Court in April 2007 and gave the Court an unsolicited report about an ongoing investigation into post-trial harassment of two jurors. Pointing to the same meeting, Scrushy also accuses (Motion 47-52) this Court of violating the Code of Conduct for United States Judges and his Fifth and Sixth Amendment rights to counsel and due process. Because the alleged misconduct took place nearly one year after trial, it does not bear on defendants’ innocence or the integrity of the verdict. *See Lafayette*, 953 F.2d at 1105 (evidence not “in existence at the time of trial” cannot support a Rule 33(b)(1) claim). Therefore, to the extent defendants seek to bring this claim under Rule 33, it is time-bared under *Eberhart, supra*. If the Court addresses it under Section 2255, it should deny the claim as lacking merit.

A. The Relevant Facts.

In their first motion for a new trial, defendants relied on purported juror emails that Scrushy and defense counsel had received from an anonymous source in the weeks preceding their filing of

⁶ As the Supreme Court stated in *Young*, prosecutors are not held to the same “standard of disinterest as judges.” 481 U.S. at 807. “In an adversary system, [prosecutors] are necessarily permitted to be zealous in their enforcement of the law.” *Ibid.*, quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1098); *see also Kalina v. Fletcher*, 522 U.S. 118, 125 (1997) (confirming “the importance to the judicial process of protecting the prosecutor when serving as an advocate in judicial proceedings”).

the motion. The purported emails allegedly were exchanged between Jurors 7 and 40, and between Juror 40 and possibly two other jurors; according to defendants, if authentic, they showed that some jurors were communicating about the case before and during deliberations and may have considered information about the applicable penalties. D. 467 at 11-12. On November 17, 2006, the Court conducted an evidentiary hearing at which each of the 12 jurors responded to questions regarding the jury's exposure to any outside influences or extraneous information. D. 502. On December 13, 2006, in a 57-page memorandum opinion and order, the Court denied defendants' new-trial motion. D. 518. In so doing, the Court assumed, *arguendo*, that the emails were authentic. *Id.* at 53.

One week later, Scrushy and defense counsel received two more purported juror emails, also mailed anonymously, which defendants submitted in support of motions to reconsider. D. 519, 520. The purported emails appeared to have been sent from Juror 40's email address to Juror 7's email address during the course of the jury's deliberations, and, according to defendants, provided evidence that the jurors had been exposed to extrinsic evidence obtained from the internet and showed that Jurors 7 and 40 were biased against defendants. D. 519 at 4-7. In their motions, defendants asked the Court to conduct a full investigation into the authenticity of the emails. *Id.* at 19; D. 520 at 7.

Also around December 21, 2006, at least five co-workers of Jurors 7 and 40 received in the United States mail at their places of employment copies of purported emails identical to the ones submitted in support of Scrushy's motion to reconsider. Scrushy Exh. II-A at 2. After their co-workers respectively showed them the purported emails, Jurors 7 and 40 each notified the United States Marshals, who, in turn, notified Acting United States Attorney Franklin. *Ibid.* Franklin asked the Postal Inspectors to attempt to determine who had sent the emails to the jurors' co-workers. *Ibid.* He then transferred oversight of the investigation to an attorney in the United States Attorney's

Office who was not involved in the prosecution of defendants. *Ibid.*

As part of the ensuing criminal investigation, a Postal Inspector interviewed Jurors 7 and 40 and some of their co-workers. *Ibid.* He also compared the purported emails received by the co-workers to test emails sent from and received by Juror 40's email account. *Ibid.* And he submitted the purported emails and their accompanying envelopes for forensic examination. *Ibid.* The Postal Inspector ultimately concluded that the purported emails were not authentic and had been forged but he was unable to determine who had sent them to the co-workers. *Ibid.* The Postal Inspector provided the United States Marshals Service with a status report on the investigation in early April 2007, and closed the investigation on September 10, 2007. *Ibid.* No charges were brought. *Ibid.*

While the investigation was ongoing, and while defendants' motions to reconsider were pending before this Court, representatives of the Marshals Service apprised the Court that the Postal Inspectors were investigating the receipt of purported emails by co-workers of two jurors and had concluded that the purported emails were not authentic. They further advised the Court that the Postal Inspectors had not yet determined who had sent copies of the purported emails to the co-workers. *Id.* at 3. The Court did not solicit the Marshals' report. *Ibid.*

Over two months later, on June 22, 2007, the Court denied defendants' motions to reconsider. D. 611. The Court noted that there were certain irregularities in the purported emails, but stated that "[w]hatever concerns or doubts the Court has about these documents, it has not influenced its ruling on the matters before it." *Id.* at 4, n.9. The Court sentenced defendants on July 3, 2007, and they promptly appealed to the Eleventh Circuit. D. 626, 627, 634, 635, 637. Scrushy, in his opening brief, argued that he was entitled to a new trial based on the purported emails. Br. 38-79. *See also* Siegelman Br. 84 (adopting Scrushy's argument).

The Appellate Section in the Criminal Division, working with the prosecution team, prepared the government's brief on appeal. In the course of preparing that brief, the government focused on the Postal Inspectors' investigation into the harassment of Jurors 7 and 40 and the April 2007 meeting between the Marshals and the Court. On July 8, 2008, in a letter signed by Section Chief Patty Merkamp Stemler, the government disclosed this information to defendants, copying this Court and the court of appeals. Scruschy Exh. II-A. Ten days later, citing the Stemler letter, Scruschy filed with the Eleventh Circuit a "Motion for Appointment of a Special Master Pursuant to Rule 48, Federal Rules of Appellate Procedure, to Supervise Investigation of the Source and Authenticity of the E-Mails * * * ."

In a thorough, unanimous decision, the court of appeals thereafter rejected defendants' arguments based on the purported emails (*Siegelman*, 561 F.3d at 1242-43 [footnote omitted; emphasis added]):

We conclude * * * that the district court did not abuse its discretion in deciding that the purported emails, *assuming they are authentic*, do not entitle defendants to a new trial. The district court applied the relevant factors to the email evidence, and was well within its discretion to conclude that they did not demonstrate premature deliberation or deliberation with fewer than all jury members sufficient to arise to a constitutional violation.

See also id. at 1237 n.26 (denying Scruschy's motion for appointment of a special master); *id.* at 1241 n.34 (finding no abuse of discretion in this Court's handling of the "other emails called to its attention after the evidentiary hearings").

B. The April 2007 Meeting Does Not Provide a Basis for Granting Defendants a New Trial.

Defendants' arguments to the contrary, the April 2007 meeting between the Court and the Marshals did not constitute either prosecutorial or judicial misconduct, nor did it deprive defendants

of their rights to due process and to counsel. To begin, defendants err in equating a meeting between a federal judge and the United States Marshals Service with an *ex parte* meeting between a court and federal prosecutors. An *ex parte* meeting occurs when a party meets with a court “without notice to or argument from the adverse party.” See *Black’s Law Dictionary* (8th ed. 2004). There was no *ex parte* meeting in this case. To be sure, the United States Marshals are located within the Department of Justice, see 28 U.S.C. § 561(a), but they do not represent the United States in litigation and they were not a party to this case. On the contrary, their “primary role and mission” is to provide security for the federal courts and to enforce federal court orders. *Id.* § 566(a). See generally *Allmond v. Akal Security, Inc.*, 588 F.3d 1312, 1314 (11th Cir. 2009) (“The United States Marshals Service is responsible for securing the federal courts”); *Ballard v. Spradley*, 557 F.2d 476, 481 (2d Cir. 1977) (“The *raison d’etre* of the Marshals Service is to service the federal forum in civil as well as criminal litigation.”); see also *Pennsylvania Bureau of Correction v. U.S. Marshals Service*, 474 U.S. 34, 47-48 (1985) (Stevens, J., dissenting) (noting the “closeness of the relationship” between the court and the marshal). More specifically, Marshals “provide for the personal protection of Federal jurists, court officers, witnesses, and other threatened persons in the interests of justice where criminal intimidation impedes the functioning of the judicial process * * * .” 28 U.S.C. § 566(e)(1)(A).

It was in this capacity that representatives of the Marshals Service notified the Court that someone was harassing, perhaps for the purpose of intimidating, two jurors who had served on the *Siegelman/Scrushy* jury and whose alleged conduct was the subject of post-trial litigation. In arguing that the Court violated the Code of Conduct for United States Judges by giving the Marshals an audience, defendants ignore the fact that Marshals routinely serve as conduits between court and

jury, and that they cannot carry out their court security functions without talking to the very individuals they are hired to protect, namely, federal judges and other court participants. Significantly, defendants have not cited a single case holding that a defendant has a right to attend meetings between a Marshal and a federal judge, and we are aware of no such authority. *Cf. United States v. Gagnon*, 470 U.S. 522, 526 (1985) (“[T]he mere occurrence of an *ex parte* conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right. The defense has no constitutional right to be present at every interaction between a judge and a juror, nor is there a constitutional right to have a court reporter transcribe every such communication.”), quoting *Rushen v. Spain*, 464 U.S. 114, 125-126 (1983) (Stevens, J., concurring in judgment). Indeed, all of the cases on which defendants rely involve *ex parte* communications with prosecutors or other government attorneys. *See, e.g., Carroll v. President & Comm’rs of Princess Anne*, 393 U.S. 175, 180-182 (1968) (on *ex parte* motion of local government attorneys, court restrained members of political party from holding rallies); *Remmer v. United States*, 347 U.S. 227, 228-230 (1954) (during trial, court discussed allegation of jury tampering with prosecutors *ex parte*); *United States v. Barnwell*, 477 F.3d 844, 847-850 (6th Cir. 2007) (prosecutors met with judge *ex parte* throughout jury deliberations); *Haller v. Robbins*, 409 F.2d 857, 859 (1st Cir. 1969) (prior to sentencing, prosecutor disclosed to judge *ex parte* “sordid behavior” engaged in by the defendant); *United States v. Minsky*, 963 F.2d 870, 871 (6th Cir. 1992) (prosecutor and judge held *ex parte* bench conference during trial); *Application of Storer Communications, Inc. v. Presser*, 828 F.2d 330, 335 (6th Cir. 1987) (prosecutor submitted possible discovery materials to the court *ex parte*); *United States v. Earley*, 746 F.2d 412, 415-416 (8th Cir. 1984) (prosecutor submitted to court *ex parte* trial brief outlining upcoming testimony); *United States v. Hackett*, 638 F.2d 1179, 1188 (9th Cir. 1980)

(finding no prejudice to the defense resulting from *ex parte* meetings between the prosecutor and the court relating to *in camera* review of possible *Brady* material); *In re Taylor*, 567 F.2d 1183, 1185 (2d Cir. 1977) (prosecutor made *in camera* submission to court for the purpose of disqualifying counsel for grand jury witness). To draw sustenance from these cases, defendants allege that the Marshals contacted the Court at the behest of the United States Attorney's Office. *See, e.g.*, Scrushy Motion 51-52. But the Stemler letter, on which defendants rely, provides no support for this claim, *see* Scrushy Exh. II-A at 3, which has been completely refuted by Acting United States Attorney Franklin. *See* Franklin Dec. ¶ 15 (Gov't Exh. 4).

Not only did the Court violate no ethical rule or constitutional amendment by meeting with the Marshals, the Court also acted appropriately in maintaining the secrecy of the Postal Inspectors' ongoing criminal investigation. *See United States v. Simms*, 385 F.3d 1347, 1352 (11th Cir. 2004) ("Ex parte communications are * * * justified in order to protect a continuing criminal investigation and the safety of persons placed at risk by those investigations."); *United States v. Nava-Salazar*, 30 F.3d 788, 801(7th Cir. 1994) (*ex parte* submissions were necessary to protect ongoing investigation). That is particularly true where, as here, the Court receives evidence of juror harassment. *United States v. Moten*, 582 F.2d 654, 664 (2d Cir. 1978) ("[T]he proper functioning of the jury system requires that the courts protect jurors from being 'harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict.'"), quoting *McDonald v. Pless*, 238 U.S. 264, 267 (1915).

In this case, not only was the investigation prudent, but it did not interfere with either the trial or the post-trial hearing. Indeed, the event that triggered the investigation – the receipt by the co-workers of copies of the purported emails – did not occur until six months after the trial ended, over

a month after the jurors had testified at an evidentiary hearing, and one week after the Court denied defendants' new trial motion. By that time, the jurors' role in the proceedings had ended. *Compare United States v. Barnwell, supra* (investigation during deliberations).

In any event, even if defendants should have been invited to attend the April 2007 meeting, or should have been apprised of the Postal Inspectors' investigation, they suffered no prejudice, let alone prejudice that was "manifest and obvious." Siegelman Motion 55. In ruling on defendants' juror misconduct claims, both this Court and the court of appeals assumed that the emails were authentic. Consequently, further testing could not have improved defendants' position. In short, under any harmless error standard, the record conclusively establishes that defendants were not disadvantaged by their exclusion from the Marshals' meeting with the Court. *See Rushen*, 464 U.S. at 118-119 (*ex parte* conversation between trial judge and juror is reviewed for harmless error); *Simms*, 385 F.3d at 1353 ("Because Simms did not suffer any prejudice from the purportedly off-topic discussions [between the court and the prosecutors], we find that there was no error."); *United States v. Swindall*, 971 F.2d 1531, 1550 (11th Cir. 1992) ("*ex parte* conference did not affect the fairness of the rest of the trial and thus cannot be a basis for reversal of the remaining counts"); *cf. United States v. Brantley*, 68 F.3d 1283, 1291 (11th Cir. 1995) (court's meeting with juror outside the presence of the defendant can be harmless); *United States v. Adams*, 799 F.2d 665, 668-669 (11th Cir. 1986) (court's interview of juror outside the presence of the defendant and his counsel did not result in prejudice). Plainly then, there is no need for an evidentiary hearing, and defendants are not entitled to a new trial.

5. Defendants Cannot Show Either Improper Communications Between the Government and the Jury, or Juror Bias.

Citing unsworn allegations made by Tamarah Grimes, a terminated employee of the United States Attorney's Office,⁷ defendants claim (Siegelman Motion 51-54; Scrushy Motion 58-61) that one or more jurors communicated *ex parte* with the government on three occasions during and after trial. *See* Scrushy Exhs. III-K at 5, IV-C&D. Not only do defendants charge the government with prosecutorial misconduct based on Grimes' allegations, they also argue that the communications demonstrate bias on the part of a particular juror. These contentions are frivolous.

First, the primary arrow in defendants' quiver is Grimes' allegation - made in a 2009 letter to the Attorney General—that she “received information from [a contract employee] that one of the jurors was sending messages through the Marshals asking if a member of the prosecution team was married.” Scrushy Exh. III-K at 5. Defendants support Grimes' rumor with emails dated June 15, 2006, between Grimes and former First Assistant U.S. Attorney Patricia Watson in which they gossip about a juror's interest in FBI case agent “Keith” Baker. *Id.* at IV-D. But defendants offer no proof from anyone with direct knowledge of the alleged messages, and for good reason. No juror inquired about Baker's marital status. Rather, as explained below, the Watson-Grimes emails stemmed from a joke the jury administrator played on Agent Baker.

Melissa Myers, the jury administrator for the Court, first met Agent Baker during the *Siegelman* and *Scrushy* trial. Myers Dec. ¶ 9 (Gov't Exh. 10). As the trial progressed, Baker sometimes teased Myers in friendly conversation, prompting Myers to turn the tables. *Id.* at ¶ 12.

⁷ Grimes' allegations also figure in defendants' *Brady/Giglio* claims. In responding to those claims, we discuss Grimes and her charges against the U.S. Attorney's Office in greater detail. *See infra* at 33-35.

“[T]o get [Baker] back,” Myers told Baker “that one of the jurors thought he was very cute.” *Ibid.* As Myers had hoped, Baker “turned as red as a tomato” and “walked off.” *Ibid.* Myers, who had fabricated the juror’s interest, “got a good laugh out of it.” *Ibid.* As she later explained (*ibid.*): “No juror ever told me that, rather, it was just something I told Special Agent Baker on the spur of the moment to get him to hush and walk away.” *Ibid.* Indeed, Myers is unaware of anyone “passing notes or any correspondence from jurors to members of the prosecution team or anyone else,” other than the note or notes given to the Court during deliberations. *Id.* at ¶ 10. Likewise, Myers witnessed no contact between the jurors and the prosecution team. *Id.* at ¶ 13. And Baker confirms both Myers’ joke and that he had no contact with the jurors. Baker Dec. ¶ 2 (Gov’t Exh. 1); *see also* Shaw Dec. ¶ 2 (Gov’t Exh. 13) (declaration of Debbie Shaw, who witnessed the conversation between Baker and Myers). In short, these eyewitness accounts squarely refute defendants’ idle speculation. *See United States v. O’Connor*, 124 F.3d 206 (7th Cir. 1997) (Table) (“[a] belief is not evidence”). Accordingly, defendants’ unsubstantiated note-passing claim fails on its facts.⁸

But even if we assume, *arguendo*, that a juror took a liking to Agent Baker, that would not provide a basis for setting aside the jury verdict in this case. In the absence of any contact between the prosecution team and the juror, there was no misconduct. A trial is not unfair because jurors

⁸ Because there were no *ex parte* communications between a juror and the Marshals concerning Agent Baker, all of the cases cited by defendants are distinguishable. *See, e.g., Remmer*, 347 U.S. at 229-230 (defendant entitled to a hearing on effect of third party contact with jury); *United States v. Betner*, 489 F.2d 116, 118 (5th Cir. 1974) (new trial granted where AUSA “conversed and fraternized” with the jury and trial judge did not investigate matter sufficiently); *United States v. Rutherford*, 371 F.3d 634, 643 (9th Cir. 2004) (remanding for an evidentiary hearing to assess prejudice where a number of IRS agents seated behind the prosecutors regularly glared at jury); *Pekar v. United States*, 315 F.2d 319, 320-22 (5th Cir. 1963) (AUSA conversed with juror about his bonding business during recess).

develop a preference for one attorney over the other, or find a witness, agent, or defendant particularly attractive. *See United States v. Smith*, 424 F.3d 992, 1011-13 (9th Cir. 2005) (district court did not abuse its discretion in denying request for evidentiary hearing where, after trial, juror sent letter expressing interest in agent who testified; “[i]t is unlikely that any trial goes by without one juror finding one witness nice or attractive”). Jurors are not robots. In this case, in particular, where the jury returned a mixed verdict of convictions and acquittals, there is no evidence that the jury was unable to deliberate impartially.

Defendants’ second allegation of an improper *ex parte* contact is based on information from Grimes and a media report dated July 13, 2006. Scrushy Exh. III-K at 5, IV-C. As defendants acknowledge, they had “contemporaneous” knowledge of this contact (Siegelman Motion 54; Scrushy Motion 61), and yet they did not include it in their first new trial motion or bring it to the Court’s attention when it occurred. They failed to do so plainly because there was no misconduct on the part of either the juror or the prosecutors.

Approximately one week after trial, a juror reached out to the prosecutors to ask if she could meet with them to discuss a career in law. Scrushy Exhs. III-K at 5. Acting U.S. Attorney Franklin and AUSA Stephen Feaga told the juror that the prosecutors would be willing to meet with her at a future time if the Court approved the meeting. Franklin Dec. ¶ 14 (Gov’t Exh. 4). During their brief phone conversation with the juror, the prosecutors did not discuss the case with the juror or ask about the jury’s deliberations. *Ibid.* *See* Local Rule 47.1 (barring attorneys from interrogating jurors about their deliberations or the basis for the verdict). No one from the prosecution team ever met with the juror. Franklin Dec. ¶ 14 (Gov’t Exh. 4). And far from concealing the brief conversation, Feaga spoke publicly about the contact. *See* Scrushy Exh. IV-C (newspaper account of the incident

dated July 13, 2006, quoting Feaga).

Defendants boldly claim that the juror who reached out to the prosecutors was the very juror who allegedly had an interest in Agent Baker, and, they claim, this second outreach to the prosecution team confirms the juror's pro-government bias. But, as shown above, the first incident did not occur. No juror inquired about Agent Baker's marital status. Thus, defendants are left with a prospective law student who wanted to discuss a career in law. Defendants fail to explain how a juror's interest in law school calls into question the accuracy of the verdict. *See Jernigan*, 341 F.3d at 1287 (defendants must show "that a new trial would probably produce a different result," citing *United States v. Ramos*, 179 F.3d 1333, 1336 n.1 (11th Cir. 1999)).

Finally, defendants attempt to bolster their claim of juror bias by relying on another fabrication by Grimes. Grimes writes that, "in the fall of 2007, [she] heard Mr. Franklin state that his legal assistant (Debbie Shaw) had spoken with a juror, whom he described as, 'just a kid...she is afraid that she is going to get in trouble.'" Scrusy Exhs. III-K at 5. Defendants jump to the conclusion that the frightened juror is, once again, the very same juror who had an interest in both Agent Baker and law school and a talent for back flips. But not even Grimes pins all this activity on a single juror. And in any case, Grimes' account of Franklin's alleged remark makes no sense. On the one hand, Grimes claims that the conversation between Shaw and Franklin took place in 2007, but she also asserts that the conversation occurred "immediately prior to a hearing on juror misconduct." *Ibid.* The misconduct hearing, however, took place in November 2006, well before the alleged 2007 conversation. Grimes' tale is not only discredited by its internal inconsistency, it is false. The conversation between Franklin and Shaw never occurred, as both of the alleged participants attest. *See* Franklin Dec. ¶ 16 (Gov't Exh. 4); Shaw Dec. ¶ 3 (Gov't Exh. 13).

In sum, defendants' claims based on improper contact with the juror or juror bias are wholly unavailing. Two of the alleged contacts between the prosecution team and the jury never occurred. The one contact that did occur happened post-trial and was a brief phone conversation about a possible meeting that never took place, would have only occurred with the Court's approval, and was publicly disclosed years ago. For all the reasons stated, this post-trial contact warrants no relief. *See Lafayette*, 953 F.2d at 1105 (teaching that post-trial events cannot support a Rule 33 motion).

6. Defendants' Brady/Giglio Claims Should Be Denied.

Next, defendants contend that the government's attorneys committed misconduct regarding witnesses, primarily Nick Bailey. The gist of this claim is that government agents and lawyers surreptitiously engaged in a scheme to "mold" Bailey's testimony via undisclosed meetings with him and threats and promises made against and to him – all designed to browbeat him into changing his testimony. Defendants assert that the government's failure to disclose this alleged scheme and accompanying tactics violated *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972); and resulted in false trial testimony, in violation of *Napue v. Illinois*, 360 U.S. 264 (1959). Siegelman Motion 39-51; Scrushy Motion 25-39, 63-80. Defendants likewise contend that the government obtained favorable testimony from Loree Skelton by threatening to revoke her "plea agreement" unless she testified consistently with the government's theory of prosecution. Siegelman Motion 44; Scrushy Motion 36.

As we noted earlier, a heavy burden of proof applies to defendants' misconduct claims. Briefly stated, *Bailey* and *Giglio* require proof that the government suppressed materially exculpatory evidence not otherwise available to the defense in a manner that undermines confidence in the outcome of the trial. *See supra* at 4. Obtaining relief under *Napue* requires proof that the

government knowingly presented false testimony that could, in any reasonable likelihood, have affected the judgment of the jury. *Occhicone v. Crosby*, 455 F.3d 1306, 154 (11th Cir. 2006); *see Napue*, 360 U.S. at 271. Defendants do not come close to meeting these burdens here.

A. Defendants' Claims Regarding Nick Bailey.

Any analysis of defendants' misconduct claim regarding Bailey should begin with his testimony at trial. Among other things, Bailey described the negotiations through which Siegelman agreed to appoint Scrushy to the CON Board in exchange for a \$500,000 contribution to the lottery campaign. Tr. 496-97, 500-02, 519-20, 545-47, 1152. Of particular relevance here, Bailey testified to a meeting between Scrushy and Siegelman in or around July 1999. Bailey stated that at some point after that meeting (but perhaps not on the same day), Siegelman showed him a \$250,000 check dated July 19, 1999, told him it was from Scrushy, and said that Scrushy was "halfway there." Tr. 504-12. Bailey testified that he asked "what in the world is he [Scrushy] going to want for that?" and that Siegelman replied "the CON Board." Tr. 507. According to Bailey, he then said to Siegelman "I wouldn't think that would be a problem, would it?" to which Siegelman responded, "I wouldn't think so." *Id.* Bailey was unable to recall the precise date that he saw Scrushy at the Governor's office, or whether his conversation with Siegelman about the check occurred on that date. Tr. 504, 515-16.

At trial, as this Court is well aware, defendants strenuously attacked Bailey during three days of cross-examination. Defendants sought, *inter alia*, to show that Bailey had spent years "rehearsing" his trial testimony, Tr. 555, that this testimony was "the complete opposite" of what Bailey told the government when he first met with it, Tr. 556, and that government agents had put words in Bailey's mouth. Tr. 931. Bailey denied these allegations, insisted that the government had

asked him only to tell the truth, and maintained that his testimony was true. Tr. 379, 555, 556, 724, 931, 1163-65.

Defendants now claim that all of this testimony was a lie, induced by government misconduct. Importantly, defendants do not present any independent proof that Bailey's testimony at trial was false. Instead, they rely on hearsay evidence to suggest that in conversations with others, Bailey has expressed doubts about his testimony and blamed government pressure for inducing him to testify falsely at trial.

Courts rightly view post-trial claims based on recanted testimony with "utmost suspicion." *United States v. Nolte*, 440 F.2d 1124, 1128 (5th Cir. 1971). Where a recanting witness has testified against a former associate and friend, this skepticism is particularly justified. Tr. 637 (Bailey testifies that he still respects Siegelman and considers him a friend). Such witnesses may try to rationalize their actions and avoid the disapproval of mutual friends by renouncing their testimony after trial. *See In re Davis*, 565 F.3d 810, 825-26 (11th Cir. 2009) (explaining that courts severely discount recantation testimony because it "upsets society's interest in the finality of convictions, is very often unreliable and given for suspect motives, and most often serves merely to impeach cumulative evidence rather than to undermine confidence in the accuracy of the conviction.") (quoting *Dobbert v. Wainwright*, 468 U.S. 1231, 1233-34 (1984) (Brennan, J., dissenting)); *United States v. Connolly*, 504 F.3d 206, 215 (1st Cir. 2007). Accordingly, courts – including the Eleventh Circuit – regularly reject "new evidence" claims based on post-trial recantations. *See, e.g., United States v. Puentes*, 50 F.3d 1567 (11th Cir. 1995); *United States v. Baker*, 479 F.3d 574 (8th Cir. 2007); *United States v. Jones*, 315 Fed. Appx. 714 (10th Cir. 2009). Further, because it presided over the trial and observed Bailey under cross-examination, this Court is uniquely qualified to pass on the

credibility of defendants' factual assertions, including any "recanting affidavits." *United States v. MMR Corp.*, 954 F.2d 1040, 1049 (5th Cir. 1992).

What is remarkable here is that defendants' "new evidence" claims do not rest on even a foundation as shaky as recantation testimony from a trial witness. Defendants have obviously spoken to Bailey about their allegations of prosecutorial misconduct. *See, e.g.*, Richardson Dec. ¶ 4 (Scrushy Exh. V-G) (defense investigator interviewed Bailey for nine hours). But tellingly, Bailey's own sworn declaration supports none of defendants' central claims. Bailey's declaration, for example, (1) fails to allege that he testified falsely in any respect; (2) does not assert that government agents pressured or threatened him; and (3) does not contend that he changed his account of events in any way previously undisclosed to the defense. Scrushy Exh. V-H. Because Bailey has declined to recant his trial testimony, accuse the government of wrongdoing, or attest to the statements attributed to him by others, defendants' misconduct claims should be denied without further inquiry. *See In re Davis*, 565 F.3d at 825-26 (key trial witness's refusal to corroborate recantation affidavits supports district court's denial of relief on collateral attack).

Although defendants' claims regarding Bailey do not warrant any in-depth analysis, we nonetheless address them here. Before doing so, however, it is important to emphasize the sources on which defendants rely. Defendants' "newly discovered evidence" largely consists of statements from people who claim to have spoken with Bailey after the trial. Although many of these statements are made under oath, they simply relate hearsay statements Bailey allegedly made in conversation. In a recent unpublished decision, the Eleventh Circuit has described such statements as "highly suspect," and suggested that they do not justify an evidentiary hearing. *Williams v. United States*, 239 Fed. Appx. 553, 558; 2007 WL 2407039 at *5 (11th Cir. 2007).

Defendants also rely on an unsworn letter from Tamarah Grimes, a former government paralegal. Grimes worked on the *Siegelman/Scrushy* prosecution from approximately April 2005 until November 2005, but made no claims of any prosecutorial misconduct until July 2007. Watson Dec. ¶¶ 4, 7. Indeed, after she no longer worked on the case, but before she made any formal complaints against the United States Attorney's Office, Grimes expressly denied having observed any prosecutorial misconduct by the *Siegelman/Scrushy* team. Harmon Dec. ¶¶ 3-4 (Gov't Exh. 7).⁹ Grimes first raised a battery of "whistleblower" charges in the summer of 2007, around the time that she filed an EEO complaint against officials in the Middle District of Alabama.¹⁰

Significantly, the misconduct claims that Grimes raised in July 2007 are different from the allegations on which defendants now rely.¹¹ Grimes's new claims were set forth in a 10-page letter to Attorney General Eric Holder dated June 1, 2009, more than three years after Grimes's limited involvement with the *Siegelman/Scrushy* team, and after she had retained Martin Adams, Scrushy's

⁹ Although Grimes did raise complaints during this time period, they centered on her interactions with an attorney on the case, and an alleged dispute with a third party regarding the removal of documents from its offices. Watson Dec. ¶¶ 4-8 (Gov't Exh. 14); Harmon Dec. ¶ 2 (Gov't Exh. 7).

¹⁰ The Executive Office of United States Attorneys terminated Grimes's employment with the Department of Justice on June 9, 2009. As Grimes acknowledged in a press release after her firing, she was advised that her alleged whistleblower "disclosures" were not the basis of her termination. *See also* June 25, 2009 Letter from the U.S. Office of Special Counsel to Stuart Melnick, EOUSA (Gov't Exh. 16) (closing investigative file into Grimes's allegations of prohibited personnel practices without further action).

¹¹ Although not released by the Department of Justice, an OPR complaint filed by Grimes in July 2007 has been made available on the internet by the New York Times. The U.S. Office of Special Counsel has issued a lengthy report addressing and rejecting many of Grimes' earlier claims. Although the New York Times has placed one version of that report on the internet, the Office of Special Counsel has not yet publicly released any report. The Office of Special Counsel will make public its final report by posting it on the OSC website: www.osc.gov, and, once the report is released, the government will provide hard copies to the Court and counsel.

son-in-law (and criminal defense attorney) to represent her. D. 486 (Adams becomes counsel of record for Scrusby on October 27, 2006). This recent letter makes clear that Grimes is prepared to make (or repeat) virtually any allegation against her former employer. But not under oath. Even though one of Scrusby's lawyers now represents Grimes, defendants apparently cannot persuade her to put her allegations in declaration form. Her unwillingness to swear to her allegations subject to the penalty of perjury or other criminal sanctions should lead this Court to dismiss summarily her allegations. *See In re Davis*, 565 F.3d at 826 (Eleventh Circuit is "loath to consider" and "afford[s] . . . precious little weight, if any" to an unsworn post-trial recantation affidavit of even a trial witness).

1. **Bailey's Meetings With the Government.**

Defendants' claims regarding Bailey begin with the assertion that government agents met with him more often than Bailey disclosed at trial. *See* Siegelman Motion 31, 45-46; Scrusby Motion 73, 77. No competent evidence supports this claim. Indeed, Bailey's own declaration simply reaffirms his trial testimony. Scrusby Exh. V-H ¶ 4 ("*As I estimated in my testimony at trial, I attended two or three dozen interviews during the Siegelman/Scrusby investigation where I met with government prosecutors and investigators in the same meeting.*") (emphasis added); *See* Tr.1019, 1090 (Bailey trial testimony).¹² The government believes Bailey's estimate to be

¹² Defendants complain that Bailey's testimony at trial about the number of meetings he had with the government was "conflicting" and "confusing." Siegelman Motion 5; Scrusby Motion 28-29, 73. Defendants had every opportunity to question Bailey about this matter at trial, and did. Moreover, the answer to the question "how often did you meet with the government?" depends on, *inter alia*, the relevant time period, who constitutes "the government," the location and subject matter of the conversation, and whether a phone call constitutes a "meeting." If perfect clarity on this subject was important to the defense, it fell to their experienced attorneys to frame the cross-examination questions with care.

accurate.¹³ Feaga Dec. ¶ 2 (Gov't Exh. 2); Fitzpatrick Dec. ¶ 2 (Gov't Exh. 3); Franklin Dec. ¶ 6 (Gov't Exh. 4); Garrett Dec. ¶ 2 (Gov't Exh. 5); Perrine Dec. ¶ 2 (Gov't Exh. 12); Pilger Dec. ¶ 2 (Gov't Exh. 11).

Defendants contend that Bailey's trial testimony must be wrong because a "60 Minutes" broadcast claimed that Bailey had told their reporters that he met with prosecutors "more than 70 times" before the Siegelman trial. Siegelman Motion 7; Scrushy at 73; *see* Scrushy Exh. V-C at 7 (broadcast transcript). Bailey's declaration clears up any confusion, estimating that while Bailey "spoke with government prosecutors or agents approximately 60-70 times," "*a number of those meetings and conversations did not involve Governor Siegelman or Mr. Scrushy.*" Scrushy Exh. V-H ¶ 4 (emphasis added).¹⁴ The declaration of Robert Harrison Hickman likewise suggests that "60 Minutes" simply misreported Bailey's claim. Scrushy Exh. V-F ¶ 9 (Bailey told "60 Minutes" he "met with or had been contacted by" "the government" nearly 80 times "during the period of his cooperation").

Grimes eagerly jumps on this rickety bandwagon, alleging in her unsworn letter that "70 times" would be a "modest estimate" of how often Bailey met with prosecutors to "rehearse" his testimony. Scrushy Ex III-K at 3. As Grimes worked on the case only for a few months, she would

¹³ At the same time, the government does not believe that the list of meetings contained in Bailey's declaration, Scrushy Exh. V-H ¶ 10, is accurate. That list includes dates when the government believes that no interview occurred (*e.g.*, June, 4, 2003, November 29, 2003 (a Saturday), February 3, 2004, February 4, 2004, February 5, 2004 and August 29, 2004 (a Sunday)), and omits dates when the government's interview memoranda show that it did speak with Bailey (*e.g.*, June 30, 2003, July 8, 2003, July 22, 2003, December 17, 2003, March 4, 2004 and September 7, 2005).

¹⁴ Bailey provided substantial assistance to the government, both federal and state, in at least four separate criminal investigations.

have no reason to know how often prosecutors met with Bailey during a five-year investigation. Her willingness to endorse an obviously inflated figure, notwithstanding her lack of personal knowledge, significantly detracts from the veracity of her entire letter.

In any event, even if Bailey had met with the government more often than was disclosed at trial, there is no “reasonable probability” that disclosure of this fact would have resulted in a different verdict. The jury was well aware that the government had met with Bailey often, and over a long period of time, and whether the number of meetings was 24-36 (as Bailey suggested at trial, Tr. 1090), or 70 would not likely have had any effect on their deliberations. At most, this “newly discovered evidence” would merely be cumulative information for impeaching Bailey – a wholly incompetent basis to justify a new trial. *See United States v. Noriega*, 117 F.3d 1206, 1219 (11th Cir. 1997) (explaining that suppression of “cumulative impeachment” evidence did not call into question the verdicts against the defendant); *United States v. Garcia*, 13 F.3d 1464, 1472 (11th Cir. 1994) (“Newly discovered impeaching evidence is unworthy of a new trial.”) (quoting *United States v. Champion*, 813 F.2d 1154, 1171 (11th Cir. 1987)).

2. The “Scripted” Testimony Claim.

Next, defendants contend that Bailey’s testimony was “scripted,” and that the government should have disclosed this “fact” to the defense. Siegelman Motion 39-43; Scrushy Motion 66-70, 77. At trial, Bailey specifically denied that he had “rehearsed a script.” Tr. 1164; *see id.* at 689, 1163-65. Likewise, Bailey’s more recent declaration does not support this claim. While acknowledging that the government provided him with his “302 statements and Grand Jury testimony” in advance of trial, Bailey does not also claim that the government provided him with any “script.” Scrushy Exh.V-H ¶ 7.

Defendants' "scripting" charge is false. While the government did meet with Bailey prior to trial, preparing a witness to testify is not misconduct. *See United States v. Johnson*, 487 F.2d 1318, 1324 (5th Cir. 1973). Moreover, defendants could (and did) bring out these meetings at trial and argue their significance to the jury. *See, e.g.*, Tr. 1018-19, 1089-90; *cf. Geders v. United States*, 425 U.S. 80, 89-91 (1976) (proper remedy for the "coaching" of defense witnesses is vigorous cross-examination).

What the government did not do is provide Bailey with answers to specific questions and ask him to study or memorize them. Feaga Dec. ¶ 5 (Gov't Exh. 2); Fitzpatrick Dec. ¶ 5 (Gov't Exh. 3); Franklin Dec. ¶ 9 (Gov't Exh. 4); Garrett Dec. ¶ 2 (Gov't Exh. 5); Perrine Dec. ¶ 5 (Gov't Exh. 12); Pilger Dec. ¶ 5 (Gov't Exh. 11). In claiming otherwise, Scrushy Motion 75-76; *see also* Siegelman Motion 48, defendants apparently rely on a videotaped statement by Amy Methvin, who claims to have spoken to Bailey shortly before he testified at trial.¹⁵ Scrushy Exh. V-D-2 (video transcript); *see* Scrushy Motion 66; *see also* Pate Dec. ¶ 17 (Scrushy Exh. V-E) (claiming that Bailey told him that "written versions of the answers were produced" but not identifying who allegedly produced them). In the "documentary," Methvin asserts that she accused Bailey during this conversation of "sound[ing] like a robot, like you have this thing memorized," and claims that Bailey replied "you would have it memorized, too, if you've heard the answers as many times as I've heard the answers." Scrushy Exh. V-D-2 at 4. Methvin's videotaped statement is double hearsay. Moreover, assuming *arguendo* that Bailey made this statement to her, it could mean nothing more

¹⁵ The videotape was created for a "documentary" produced on behalf of defendants and publicly disseminated approximately one month before the sentencing hearing via the internet and television. For example, the "documentary" was aired on a television station that a son-in-law of Scrushy purchased shortly before defendants' trial commenced and on which Scrushy and his wife regularly appeared each morning in the weeks before, during and after trial.

than that Bailey had heard himself answer the questions numerous times during meetings with the government, his attorney, or someone else. Accordingly, this videotape raises no credible specter about whether the government provided Bailey with the “answers” to any questions, let alone whether it did so via some suppressed “script.”¹⁶

Defendants also allege that the government made Bailey create his own “script” by instructing him to write down his answers to questions and study them. Siegelman Motion 39; Scruschy Motion 33, 66, 75-76. This similar charge is likewise false. *See* Feaga Dec. ¶ 5 (Gov’t Exh. 2); Fitzpatrick Dec. ¶ 5 (Gov’t Exh. 3); Franklin Dec. ¶ 9 (Gov’t Exh. 4); Garrett Dec. ¶ 2 (Gov’t Exh. 5); Perrine Dec. ¶ 5 (Gov’t Exh. 12); Pilger Dec. ¶ 5 (Gov’t Exh. 11). Once again, Bailey’s declaration does not support this claim. Although Bailey asserts that he inserted his own “notes” into a binder containing the documents the government gave him, he does not claim that the government instructed him to take these notes, that any government representative knew anything about them, or that they contained a “script” for trial. Scruschy Exh. V-H ¶ 7.

Defendants’ claim that the government made Bailey produce a “script” rests on hearsay claims about what Bailey has allegedly told others. Hickman Dec. ¶ 12 (Scruschy Exh. V-F); Pate Dec. ¶ 17 (Scruschy Exh. V-E); Richardson Dec. ¶ 11 (Scruschy Exh. V-G); *see also* Scruschy Exh. V-C at 6 (“60 Minutes” transcript). To eliminate any doubt about this matter, the government’s trial attorneys have each provided a declaration asserting that they did not instruct or advise Bailey to write down his answers to various questions, and that, to the extent that Bailey made notes or

¹⁶ Methvin’s claim can assist defendants’ Brady claim only if, *inter alia*, they had no reason to know about it before trial. It appears, however, that defendants had already heard her claim (or a similar charge) because their counsel during cross-examination asked Bailey whether he had ever told anyone he had his testimony “memorized front to back.” Tr. 1164.

otherwise independently prepared for this trial testimony, they did not know about it. *See* Feaga Dec. ¶ 5 (Gov't Exh. 2); Fitzpatrick Dec. ¶ 5 (Gov't Exh. 3); Franklin Dec. ¶ 9 (Gov't Exh. 4); Garrett Dec. ¶ 2 (Gov't Exh. 5); Perrine Dec. ¶ 5 (Gov't Exh. 12); Pilger Dec. ¶ 5 (Gov't Exh. 11).¹⁷ Because Bailey did not share his notes with, or disclose their existence to, the government, these private notes do not fall under the purview of *Brady* or its progeny. *See Parker v. Allen*, 565 F.3d 1258, 1277 (11th Cir. 2009) (“The prosecution does not, however, have an obligation to seek evidence of which it has no knowledge or which is not in its possession.”); *United States v. Beasley*, 582 F.2d 337, 340 (5th Cir. 1978) (“[T]he duty of the government under Brady can only be measured in terms of documents in the government’s possession at the time that the Brady duty existed.”).

As a corollary to their claim that Bailey’s testimony was “scripted,” defendants charge that the government put words in his mouth, requiring him to adopt its own turns of phrase. Siegelman Motion 7-11; Scrushy Motion 31-36. Defendants cite no authority holding that a prosecutor cannot make semantic suggestions to a witness as long as the witness’s testimony is ultimately truthful. *See United States v. Copple*, 827 F.2d 1182, 1190 (8th Cir. 1987) (claim that witnesses were coached by the government on how to present their testimony rejected because defendants failed to allege that the witnesses testified untruthfully). Nor do they cite any cases suggesting that, by proposing a particular word choice, the government creates *Brady* material that must be disclosed to the defense.

In any event, the government did not put words in Bailey’s mouth and defendants’ evidence to the contrary is insubstantial. Feaga Dec. ¶ 4 (Gov't Exh. 2); Fitzpatrick Dec. ¶ 4 (Gov't Exh. 3); Franklin Dec. ¶ 8 (Gov't Exh. 4); Garrett Dec. ¶ 2 (Gov't Exh. 5); Perrine Dec. ¶ 4 (Gov't Exh. 12);

¹⁷ Although Richardson’s declaration makes a hearsay allegation to the contrary, it is simply wrong. *See* Scrushy Exh. V-G ¶ 12 (alleging that “Bailey is confident that the government was aware of [his notetaking] practice.”).

Pilger Dec. ¶ 4 (Gov't Exh. 11). Although the hearsay declarations include this charge, they make only one specific allegation of coaching via word choice. Two declarants claim that Bailey told them that prosecutors convinced him to use the term "absolute agreement" at trial to describe the relationship between Siegelman, Bailey, Paul Hamrick and Lanny Young. Pate Dec. ¶ 16 (Scrushy Exh. V-E); Hickman Decl ¶ 14 (Scrushy Exh. V-F); *see* Tr. 401 (Bailey testifies that he and Siegelman honored Young's request because "we had an absolute agreement."). At trial, however, defense counsel specifically asked Bailey if he got the words "absolute agreement and understanding" from the government or anyone else, and Bailey unequivocally stated he did not, testifying that he had "shared those words" with the government. Tr. 931. An FBI 302 corroborates Bailey's trial testimony, reflecting that as early as September 2005, Bailey used the term "absolute agreement and understanding" in describing the arrangement between Young, Siegelman, Bailey and Hamrick. Scrushy Exh. V-A-5 at 4. Likewise, Bailey used the term "absolute" to discuss this agreement during his September 21, 2005 grand jury testimony, without prompting by the government. *See* Scrushy Exh. V-A-11 at 13. Finally, the government's trial attorneys have confirmed that they did not ask Bailey to use this particular term at trial. Feaga Dec. ¶ 4 (Gov't Exh. 2); Fitzpatrick Dec. ¶ 4 (Gov't Exh. 3); Franklin Dec. ¶ 8 (Gov't Exh. 4); Garrett Dec. ¶ 2 (Gov't Exh. 5); Perrine Dec. ¶ 4 (Gov't Exh. 12); Pilger Dec. ¶ 4 (Gov't Exh. 11).¹⁸

Finally, even if the government had "scripted" Bailey's testimony in some way, the failure to disclose this fact to the defense would not be materially exculpatory information under either

¹⁸ Pate claims that Bailey told him that he ultimately "refused to deal with [Louis] Franklin any more" because Franklin was "particularly relentless" in trying to get him to answer questions in a certain way. Scrushy Exh. V-E ¶ 16; *see* Hickman Dec. ¶ 11 (Scrushy Exh. V-F); *see also* Scrushy Motion 33-34. This allegation is false. Franklin Dec. ¶ 9 (Gov't Exh. 4); Feaga Dec. ¶ 6 (Gov't Exh. 2).

Brady or *Giglio*. The defense cross-examined Bailey for three days, impeaching him with, *inter alia*, his own admissions that he had repeatedly lied, including to the government, the grand jury and his own attorney. Tr. 669-670, 803-804, 883-886. Given this searching cross-examination, evidence of government “scripting” would have been cumulative impeachment, which would not warrant a new trial. *Routly v. Singletary*, 33 F.3d 1279, 1285-86 (11th Cir. 1994); *see also Pederson v. Fabian*, 491 F.3d 816, 826 (8th Cir. 2007) (failure to disclose summary of witness testimony prepared by the government does not warrant a new trial); *LeCroy v. Secretary, Florida Dep’t of Corrections*, 421 F.3d 1237, 1266 (11th Cir. 2005) (no *Brady* violation where state failed to disclose witness scripts to defense as testimony was not false and evidence of guilt was overwhelming).¹⁹

3. *The “Morphing” Testimony Claim.*

Next, defendants claim that Bailey’s testimony “morphed over a period of time,” and that the government failed to disclose this fact. Siegelman Motion 40; Scrushy Motion 67-68. Once again, this charge was raised at trial, and denied by Bailey, and, once again, Bailey’s recent declaration fails to support it. Tr. 556; Scrushy Exh. V-H.

Most significantly, defendants are unable to identify any change to Bailey’s testimony about which they were unaware during trial. Indeed, Bailey’s trial testimony varied from the account he gave to the FBI on January 27, 2004 in only one significant respect: Bailey originally told the

¹⁹ Grimes suggests that AUSA Feaga “molded” the testimony of witnesses before the grand jury to fit his “selected scenario.” Scrushy Exh. III-K at 2. This claim is false. *See* Feaga Dec. ¶ 8 (Gov’t Exh. 2); *see also* Fitzpatrick Dec. ¶ 8 (denying claim of Siegelman supporter that Fitzpatrick alluded to grand jury misconduct). In any event, such conduct before the grand jury would not warrant the grant of a new trial. *United States v. Mechanik*, 475 U.S. 66, 72-73 (1986). In an attempt to support her claim that the prosecution adopted a “creative approach to the facts,” Grimes also alleges that Special Agent Keith Baker stated in her presence that “there is the truth, the facts, and then there are Feaga facts.” Scrushy Exh. III-K at 2. This claim is likewise false. Baker Dec. ¶ 3 (Gov’t Exh. 1).

government that Siegelman showed him a \$250,000 check on the *same day* that Siegelman met with Scrushy, and then testified at trial that he was not sure of this detail. Tr. 514-15; *see also* Pate Dec. ¶ 22(d) (Scrushy Exh. V-E); Hickman Dec. ¶ 15 (Scrushy Exh. V-F). Although defendants emphasize this change in Bailey's recollection (Scrushy Motion 69), it does not advance their *Brady* claim because the government notified the defense of this development before trial, Tr. 1035-38, 1218-19, as manifested by the extensive questioning of Bailey on this topic during cross-examination. Tr. 515, 721-39, 1009-25, 1092-1133, 1140-52, 1169-78. Because a *Brady* claim must rest on information not disclosed pre-trial, this particular change in Bailey's recollection cannot support such a claim.

In an apparent effort to substantiate this claim, Grimes contends that at a meeting with "all of the prosecutors" including AUSAs Feaga and Franklin, Bailey was persuaded to testify "to recall something that he claimed he did not actually recall" concerning "a meeting between Governor Siegelman and Richard Scrushy, a check and a supposed conversation." Scrushy Exh. III-K at 3; *see* Scrushy Motion 36. If Grimes means to allege that the government induced Bailey to fabricate his testimony that he spoke with Siegelman regarding the first \$250,000 check, her allegation is obviously false. As the January 27, 2004, FBI 302 memorandum makes clear, Bailey informed the government about this event before either Grimes or AUSA Feaga joined the case and had even the possibility of discussing matters with Bailey. Scrushy Exh. V-A-3 at 2; Feaga Dec. ¶ 1 (Gov't Exh. 2); Watson Dec. ¶ 3 (Gov't Exh. 14). If Grimes means to suggest that the government forced Bailey to change his recollection about *when* this conversation took place, this claim is equally implausible. Bailey addressed this issue at trial, testifying that he began to doubt his own recollection on this point, and that his attorney subsequently notified the government of this fact. *See* Tr. 1024.

Moreover, Bailey further testified that no one from the government suggested that he change the information he had provided about the day the check was delivered. Tr. 515. Grimes's vague and unsworn claims provide no reason to doubt Bailey's testimony on this point.

Defendants also suggest that the government withheld, or deliberately chose not to create, interview memoranda that would document the supposed evolution of Bailey's testimony. Siegelman Motion 46-47; Scrushy Motion 66, 74. But as the government has repeatedly assured the Court, defendants were provided with every relevant interview memorandum regarding Bailey, as well as his grand jury testimony. Tr. 1017, 1039-40, 1214-15; *see* Scrushy Exh. V-A-1 through V-A-11. To be sure, not every government contact with Bailey resulted in a memorandum. Instead, written records were prepared when an interview or contact disclosed new information not previously recorded. *See* Feaga Dec. ¶ 3 (Gov't Exh. 2); Fitzpatrick Dec. ¶ 3 (Gov't Exh. 3); Franklin Dec. ¶ 7 (Gov't Exh. 4); Garrett Dec. ¶ 2 (Gov't Exh. 5); Perrine Dec. ¶ 3 (Gov't Exh. 12); Pilger Dec. ¶ 3 (Gov't Exh. 11). But the Due Process Clause does not require the government to create redundant interview memoranda – or indeed to create any interview memoranda at all – as long as it provides the defendant with all materially favorable information in its possession. That happened here.²⁰

²⁰ The government has reviewed the notes of FBI agents present during interviews of Bailey, and has concluded that they do not contain any information not revealed in the materials provided before trial. Although defendants now demand disclosure of these notes, they have failed to demonstrate any basis for such discovery post-trial. *See infra* at 51-55. These notes are, however, available should the court decide to review them *in camera*. Defendants likewise allege a Jencks Act violation based on Bailey's observation that AUSA Julia Weller "typed constantly on her laptop." Scrushy Motion 77-78; Scrushy Exh. V-H ¶ 6. That a prosecutor took notes during an interview in no way establishes that she created a verbatim statement covered by 18 U.S.C. § 3500.

4. *The Claim Regarding Alleged Threats and Promises.*

Defendants also contend that the government failed to disclose that it had improperly pressured Bailey by threatening to prosecute his brother and to publicly disclose embarrassing allegations about his personal life. Siegelman Motion 43-45; Scrushy Motion 32-34. And they suggest that the government made undisclosed promises to Bailey regarding his sentence. None of these allegations warrants any further inquiry by the Court.

I. *The Alleged Threat Regarding Bailey's Brother.*

At trial, Bailey testified that “my brother was never a discussion in my conversations with the government[.]” Tr. 1000. Bailey’s recent declaration does not recant this testimony. Scrushy Exh. V-H. Defendants’ hearsay declarations, however, allege that in out-of-court statements, Bailey has (1) claimed that “one or more prosecutors” told him that his brother was in a “situation;” Hickman Dec. ¶ 10 (Scrushy Exh. V-F); and (2) stated that Bill Long, a then-investigator for the Alabama Attorney General’s Office, told Bailey that his brother was “OK – for now;” Richardson Dec. ¶ 18 (Scrushy Exh. V-G). Neither allegation raises any serious doubt about whether, contrary to Bailey’s testimony at trial, the government threatened to prosecute Bailey’s brother. Defendants’ failure to provide any context for the alleged “situation” remark – including who said it and when it was said – precludes the government from refuting this claim head on. Nonetheless, each of the government’s trial attorneys has filed a declaration making clear that they did not threaten, either explicitly or implicitly, to prosecute Bailey’s brother. *See* Feaga Dec. ¶ 7 (Gov’t Exh. 2); Fitzpatrick Dec. ¶ 6 (Gov’t Exh. 3); Franklin Dec. ¶ 10 (Gov’t Exh. 4); Garrett Dec. ¶ 2 (Gov’t Exh. 5); Perrine Dec. ¶ 6 (Gov’t Exh. 12); Pilger Dec. ¶ 6 (Gov’t Exh. 11). Likewise, although Investigator Long does not remember ever speaking with Bailey about his brother, his own declaration makes clear that

any remark he might have made on this topic could not reasonably be viewed as a threat. *See* Long Dec. ¶ 3 (Gov't Exh. 8).

ii. ***The Alleged Threat to Release Embarrassing Information About Bailey.***

Defendants further suggest that the government terrified Bailey by threatening to leak embarrassing personal information about him. *See* Pate Dec. ¶¶ 12-13 (Scrushy Exh. V-E) (alleging that the government's conduct had a "dramatic effect" on Bailey; that Bailey was "visibly shaken" by it; and that Bailey was "so frightened" of the government). At trial, however, Bailey specifically denied that he was afraid. Tr. 7712-13 (when asked whether one of his "fears" was that the government would decide he had not been truthful, Bailey responded, "I actually don't have any fears here today."). Defendants' hearsay declarations provide no reason to believe that Bailey lied about his state of mind.

Defendants' claim largely distills to the allegation that the government *asked* Bailey about rumors regarding his personal life. *See, e.g.,* Richardson Dec. ¶ 18 (Scrushy Exh. V-G) (alleging that, according to Bailey, Investigator Long asked Bailey whether he had a sexual relationship with three other people who were also under investigation); Pate Dec. ¶ 12 (Scrushy Exh. V-E) (alleging that, according to Bailey, AUSA Matt Hart told Bailey that the government was working to prevent the publicizing of an alleged sexual relationship between Bailey and Siegelman); *ibid.* (alleging that, according to Bailey, an unidentified government agent asked Bailey if he used drugs with Siegelman or had a sexual relationship with him). Whether true or not, these allegations are irrelevant, as the government had a legitimate reason to inquire about any rumors that the defense might attempt to raise at trial. *See* Feaga Dec. ¶ 7 (Gov't Exh. 2); *but see* Long Dec. ¶ 2 (Gov't Exh. 8) (Long had no discussions with Bailey about his sexual relationships). Making such discrete inquiries is not

an implicit threat. This case therefore bears no resemblance to *United States v. Scheer*, 168 F.3d 445, 449 (11th Cir. 1999), on which defendants rely (Scrushy Motion 71-73), where a prosecutor informed a witness that if he didn't "come through for us" in testifying, he would be handcuffed and incarcerated.

Defendants' motions contain only one hearsay allegation of a real threat and it is too vague to warrant any response. *See* Hickman Dec. ¶ 10 (Scrushy Exh. V-F) (alleging that, according to Bailey, "one federal prosecutor threatened to cause purported information of a highly personal nature about Nick to be disclosed."). Nonetheless, the government's trial attorneys have provided sworn declarations indicating that they did not threaten to publicly reveal any embarrassing details about Bailey's personal life. Feaga Dec. ¶ 7 (Gov't Exh. 2); Fitzpatrick Dec. ¶ 6 (Gov't Exh. 3); Franklin Dec. ¶ 10 (Gov't Exh. 4); Garrett Dec. ¶ 2 (Gov't Exh. 5); Perrine Dec. ¶ 6 (Gov't Exh. 12); Pilger Dec. ¶ 6 (Gov't Exh. 11).

iii. The Alleged Promises Regarding Bailey's Sentence.

Finally, defendants suggest that the government made Bailey some sort of undisclosed and improper promise regarding his sentence. Scrushy Motion 73. At trial, Bailey testified to his hope "that I would get a good recommendation [from the government] to the judge for my truthful testimony today." Tr. 378. To the extent that Bailey's hope that the government would recommend a sentencing reduction constitutes the "promise" about which defendants speculate, it was neither improper nor undisclosed, as defendants cross-examined Bailey extensively at trial about his plea agreement with the government. Tr. 710-11; *see Scheer*, 168 F.3d at 457. If defendants mean to suggest that the government promised to recommend a sentence reduction if Bailey testified *untruthfully*, there is no evidence to support their claim. Bailey testified at trial that the government

asked him “to tell the truth” at every interview they had with him, Tr. 379, and defendants have provided no evidence suggesting that this testimony was a lie. Moreover, the government’s trial attorneys have denied in their declarations that they made promises to Bailey regarding his sentence. Feaga Dec. ¶ 7 (Gov’t Exh. 2); Fitzpatrick Dec. ¶ 6 (Gov’t Exh. 3); Franklin Dec. ¶ 10 (Gov’t Exh. 4); Garrett Dec. ¶ 2 (Gov’t Exh. 5); Perrine Dec. ¶ 6 (Gov’t Exh. 12); Pilger Dec. ¶ 6 (Gov’t Exh. 11).

5. Miscellaneous Claims Regarding Statements Allegedly Made by Bailey.

Defendants’ hearsay declarations contend that, in recent conversations, Bailey has expressed misgivings about his testimony. Pate, for example, claims that “A week ago, Nick told me that he had just reread his testimony in the Siegleman/Scrushy trial and said, ‘I can’t even believe I said those things.’” Scrushy Exh.V-E ¶ 19; *see* Scrushy Motion 66. Hearsay allegations that Bailey now questions *some unidentified aspect* of his testimony do not warrant any attention from the Court. *See United States v. Jordan*, 316 F.3d 1215, 1252 n.81 (11th Cir. 2003) (“[M]ere speculation or allegations that the prosecution possesses exculpatory information will not suffice to prove ‘materiality.’”). Moreover, in the one instance where the declarant provides a specific example of testimony that Bailey allegedly now disputes, Bailey’s sworn declaration reaffirms the testimony in question. *Compare* Hickman Dec. ¶ 13 (Scrushy Exh. V-F) (claiming that Bailey disavowed his testimony regarding “the number of interviews with investigators and prosecutors at which Siegelman was discussed”), *with* Bailey Dec. ¶ 4 (Scrushy Exh. V-H) (reaffirming trial testimony regarding the number of interviews with *Siegelman/Scrushy* investigators and prosecutors).

The hearsay declarations also identify certain “beliefs” that Bailey allegedly now holds that defendants contend are contrary to the jury’s verdict. Richardson Dec. ¶ 7 (Scrushy Exh. V-G);

Hickman Dec. ¶ 16 (Scrushy Exh. V-F). Assuming *arguendo* that these declarations are accurate, Bailey's current beliefs are not relevant to any *Brady* claims unless (1) Bailey held the same belief before trial; (2) Bailey communicated that belief to the government; and (3) Bailey's belief constituted material exculpatory evidence not otherwise available to the defense.

In only one instance do the declarations even allege that Bailey communicated his purported belief to the government pre-trial. See Richardson Dec. ¶ 19 (Scrushy Exh. V-G) (alleging that Bailey said that he "told one of the investigators his view" that "he did not believe that Don Siegelman worried even for an instant that he would ever have to pay back any of [the Lottery Fund] debt out of his own pocket").²¹ Even here, the declaration does not identify to *whom* Bailey relayed this belief, making a direct response impossible. The FBI 302 memoranda contain no evidence that Bailey made such a remark and Bailey's own declaration is silent on the matter. Scrushy Exh. V-H.

But assuming *arguendo* that Bailey expressed this view to someone in the government, it was not materially exculpatory evidence for the defense. It is doubtful that Bailey's opinion about Scrushy's state of mind would even have been admissible at trial. Moreover, Siegelman was no doubt aware of his own state of mind, so that Bailey's speculation about what Siegelman thought is not evidence that Siegelman could not have obtained elsewhere. *MMR Corp.*, 954 F.2d at 1050 (observing that information that was within a non-testifying defendant's knowledge should not even be considered "newly discovered" much less a basis for a new trial). Further, whether Siegelman was worried about having to repay the AELF loan says nothing about whether he accepted \$500,000

²¹ Contrary to Scrushy's claim (Motion 69), Hickman's declaration does not allege that Bailey "probably stated in one or more interviews" that Siegelman would have been unlikely to have discussed any specific request with Scrushy in return for a contribution. Scrushy Exh. V-F ¶ 16.

from Scrushy in exchange for a seat on the CON Board. Indeed, Siegelman obtained the first \$250,000 check from Scrushy in July 1999, long before the AELF loan even came into existence. And if, having ultimately guaranteed the \$730,000 loan, Siegelman did not worry about having to pay it back, that was likely because he knew he could ensure repayment from a pay-for-play scheme or some other dubious activity.²² Accordingly, the unsubstantiated allegation that Bailey told someone in the government that he did not think that Siegelman was worried about repaying the loan does not come close to stating a post-trial *Brady* claim.

B. Defendants' Claims Regarding Loree Skelton.

In her unsworn letter to the Attorney General, Grimes asserts that the government threatened to revoke the “plea agreement” of Loree Skelton, another witness, unless she testified “in a certain manner to support Nick Bailey’s meeting-check-conversation testimony.” Scrushy Exh. III-K at 3. Grimes also claims that “there was discussion of filing a Bar complaint as leverage to obtain the desired testimony.” *Id.*; see also Siegelman Motion 44; Scrushy Motion 36. As with their allegations of misconduct involving Bailey, defendants have not supported Grimes’ allegations regarding Skelton with any statement from this witness nor have they claimed that she is unavailable to them. Skelton’s refusal to corroborate these allegations largely eviscerates them. See *In re Davis*, 565 F.3d at 825-26; *Baxter*, 45 F.3d at 1507 & n.14. Further, the government’s attorneys never threatened, coerced, or pressured Skelton to testify, and only desired that she, like every other witness, testify consistent with her true recollection of the facts. Feaga Dec. ¶ 10 (Gov’t Exh. 2);

²² For example, at the sentencing hearing, the former chairman of the Alabama Democratic Party testified that during the period of the lottery campaign Siegelman had diverted approximately \$200,000 in contributions made to the Alabama Democratic Party to a brokerage account in Boston without his knowledge. Sentencing Hearing Transcript at 288-294.

Fitzpatrick Dec. ¶ 7 (Gov't Exh. 3); Franklin Dec. ¶ 11 (Gov't Exh. 4); Garrett Dec. ¶ 3 (Gov't Exh. 5); Perrine Dec. ¶ 7 (Gov't Exh. 12); Pilger Dec. ¶ 7 (Gov't Exh. 11).²³ Accordingly, Grimes's unsworn suggestion that the government pressured Skelton to testify falsely does not warrant further inquiry from the Court.

7. This Court Should Not Grant Defendants' Request For Discovery Because Their Allegations Have No Firm Evidentiary Basis.

Defendants, cognizant of the shaky factual underpinnings for the allegations in their Motions, *see e.g.*, Scrushy Motion 2-3, 15, 20, 25, seek extensive discovery from the government and the Court. *See* Scrushy Motion 80-83; Scrushy Motion for Discovery, D. 955; Siegelman Motion for Discovery, D. 961. Defendants claim they need the requested materials to prove their claims for a new trial. *See* Scrushy Motion 80. This Court should deny defendants' discovery requests because their theories for relief lack a firm evidentiary basis and they merely seek a court-ordered fishing expedition.

In disposing of a motion for new trial, the district court has discretion to order discovery, but should do so only in the "rare case." *United States v. Velarde*, 485 F.3d 553, 560 (10th Cir. 2007). *See Thompson*, 2009 WL 1863398, at *5 (concluding that the district court did not abuse its discretion in denying the defendant discovery and an evidentiary hearing on his motion for new trial).

²³ Although defendants claim that the government committed misconduct during unsuccessful plea negotiations with Scrushy (Scrushy Motion 37-38, Scrushy Exh. I-G), the Court has already rejected this claim. As defense counsel Art Leach well knows, he represented Scrushy in making these (false) allegations in a pretrial motion. D. 132. That motion proceeded to an evidentiary hearing before Magistrate Judge Coody (in which Leach participated as Defendant Scrushy's counsel and as a fact witness) and then to rulings by Judge Coody and this Court. D. 261 & 353. Notwithstanding these prior rulings, government trial attorneys who participated in these negotiations have once again denied this charge. Feaga Dec. ¶ 9 (Gov't Exh. 2); Pilger Dec. ¶ 8 (Gov't Exh. 11). Further, since Defendant Scrushy never testified, this claim has no possible bearing on the jury's verdict. *Thompson*, 422 F.3d at 1294.

In particular, post-trial discovery should be permitted only where the defendant has made a showing that “further investigation under the court’s subpoena power *very likely would lead* to the discovery of [evidence sufficient to support a motion for new trial or, at least, a motion for evidentiary hearing on a new trial].” *United States v. Silva-Arzeta*, 2007 WL 2344937, at *8 (N.D. Okla. 2007) (quoting *Velarde*, 485 F.3d at 560). This standard for granting discovery is a “high one,” *id.*, for the defendant must provide “a firm evidentiary basis for believing such evidence likely exists.” *Id.* (quoting *Velarde*, 485 F.3d at 561). “[D]iscovery is not to be allowed if it is a ‘mere fishing expedition based on the defendant’s mere hopes of finding exculpatory evidence.’” *Id.* (quoting *Velarde*, 485 F.3d at 561).

Though “extraordinary,” *Siegelman*, 561 F.3d at 1219, this case does not qualify as “rare” for purposes of ordering post-trial discovery on defendants’ motions. Defendants have failed to show that they are entitled to discovery because they have not supported their requests with a “firm evidentiary basis.” Rather, their allegations have the sandy foundation of speculation, innuendo, factual misstatements, unsubstantiated hearsay allegations, and hunches. In fact, defendants admit that their discovery requests only “*might* yield information that will assist . . . [their] claims.” *Scrushy Discovery Motion 11* (emphasis added). But serendipity is not the standard defendants must meet to receive the extraordinary relief they seek.

As we have argued above, *see supra* at 10-15, defendants have not met the threshold requirements for discovery on their selective prosecution claim. And they have proffered no evidence showing that USA Canary, rather than Acting U.S. Attorney Franklin, directed the prosecution. Nor have defendants shown a firm evidentiary basis for believing that discovery would lead to evidence entitling them to a new trial on their claims pertaining to the Stemler letter. The

government acknowledges that the Marshals advised the Court, while defendants' motion to reconsider was pending, that an investigation into harassment of the jurors showed that the emails were forged. Accordingly, defendants need no discovery for that point. Further, their bare speculation that the Marshals made their disclosure at the behest of the United States Attorney's Office is dead wrong. Moreover, defendants cannot overcome this Court's assumption that the emails were authentic in denying their new trial motion and the motion to reconsider. In short, if there was an improper *ex parte* contact in April 2007, it was harmless.

Bereft of firm evidence to show improper *ex parte* communications between the prosecution team and the jury, defendants rely on the unsworn musings of a disgruntled former employee in a longstanding employment dispute with the government. Grimes's motive to impugn the United States Attorney's Office discredits her claims. In addition, the government has submitted sworn declarations directly answering and refuting Grimes's unsworn allegations. The Court should require nothing more. *See Jernigan*, 341 F.3d at 1288-89 (district court properly refused to conduct an evidentiary hearing on new trial motion where defendant's proffer in support of motion "unquestionably was hearsay" and not trustworthy); *United States v. Johnson*, 305 Fed. Appx. 524, 525 (11th Cir. 2008) (motion for new trial can ordinarily be resolved on affidavits without an evidentiary hearing), citing *United States v. Hamilton*, 559 F.2d 1370, 1373 (5th Cir. 1977); *United States v. O'Connor*, 124 F.3d 206, 1997 WL 413594, at *1 (7th Cir. 1997) (Table) ("A movant must have new evidence; wishful thinking (plus a request for discovery to seek new evidence) is no substitute for facts.").

The case for discovery regarding petitioner's *Brady/Giglio* claims is particularly weak. As we noted above, defendants rely on hearsay claims that a trial witness has recently expressed doubt

regarding the accuracy of his testimony. The witness, however, has declined to repeat these alleged statements under oath. Under similar circumstances, the Eleventh Circuit has concluded that discovery is not required before a district court denies a motion for a new trial. *Baxter*, 45 F.3d at 1507 & n.14 (district court properly denied evidentiary hearing where witness refused to recant his testimony under oath); *see also Williams*, 239 Fed. Appx. at 558 (hearsay claims that witness had recanted were “highly suspect” and likely would not have led to an evidentiary hearing) .

United States v. Espinosa-Hernandez, 918 F.2d 911 (11th Cir. 1990), on which defendants rely (Siegelman Motion for Discovery at 9; Scrushy Motion for Discovery at 9), is entirely inapposite. In that case, the Customs Service agent in charge of the case, who testified at trial, was subsequently indicted for serious misconduct involving dishonesty. *Espinosa-Hernandez*, 918 F.2d at 913. It was undisputed that this agent had made false statements in his grand jury testimony and in his affidavit for a criminal complaint. *Ibid*. Moreover, the agent was apparently also under investigation for helping an incarcerated government informant escape from custody – a potentially relevant accusation as a key informant witness had disappeared before defendant’s trial. *Id.* at 913-14. Under these highly unusual circumstances, the court of appeals determined that it was “too soon to declare out of hand that the new evidence will not require a new trial.” *Id.* at 914. That fact-specific determination has no bearing here where nothing remotely comparable has been discovered post-trial.

Finally, this case is nothing like the “rare case” of *Velarde*. In that case, the defendant’s conviction for sexually abusing a minor was based almost exclusively on the testimony of the minor victim. *Velarde*, 485 F.3d at 563. In requesting discovery to support his motion for new trial, the defendant presented an affidavit of an individual who allegedly had told an FBI agent before trial that

the minor victim had lied to school officials about being improperly touched by a teacher. *Id.* at 555. The defendant also had information showing that the school officials had conducted an investigation into the minor victim's accusations, but the results of the investigation could not be obtained absent a court order. *Id.* at 555-58. The court of appeals ordered the district court to determine first whether the FBI agent had been so informed, and, if he had, to permit discovery sufficient for the defendant to learn about this incident. *Id.* at 563. In contrast here, defendants' evidence of guilt does not hinge exclusively on the testimony of Bailey. *See Siegelman*, 561 F.3d at 1228 (noting that "substantial additional testimony" established defendants' guilt). Moreover, unlike the defendant in *Velarde*, defendants have not shown that any of their discovery requests will likely lead to information sufficient to support a motion for new trial or, at least, a motion for evidentiary hearing on a new trial. In sum, defendants' request for discovery, like their motions for a new trial, should be denied.

Wherefore, premises considered, the United States respectfully submits that this Court, based on the record before it, should deny defendants' Motions for New Trial Based on Newly Discovered Evidence and their Motions for Discovery.

Respectfully submitted this the 27th day of August, 2009.

LOUIS V. FRANKLIN, SR.
ACTING UNITED STATES ATTORNEY

/s/ Louis V. Franklin, Sr.
Acting United States Attorney
131 Clayton Street
Montgomery, AL 36104
Phone: (334)223-7280
Fax: (334)223-7135
Email: louis.franklin@usdoj.gov

/s/ J.B. Perrine
Assistant United States Attorney
131 Clayton Street
Montgomery, AL 36104
Phone: (334)223-7280
Fax: (334)223-7135
Email: jb.perrine@usdoj.gov
ASB-9077-E31J

/s/ Stephen P. Feaga
Assistant United States Attorney
131 Clayton Street
Montgomery, AL 36104
Phone: (334)223-7280
Fax: (334)223-7135
Email: steve.feaga@usdoj.gov
ASB-7374A60S

WILLIAM M. WELCH, II
CHIEF, PUBLIC INTEGRITY SECTION

/s/Richard C. Pilger
Department of Justice, Criminal Division
Public Integrity Section
10th & Constitution Ave, NW
Bond Building - 12th Floor
Washington, DC 20530
Phone: (202)514-1412
Fax: (202)514-3003
Email: richard.pilger@usdoj.gov

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

UNITED STATES OF AMERICA)
)
 v.) **CR. NO. 2:05-CR-119-MEF**
)
DON EUGENE SIEGELMAN and)
RICHARD M. SCRUSHY)

CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

Respectfully submitted,
LOUIS V. FRANKLIN, SR.
ACTING UNITED STATES ATTORNEY

/s/ Louis V. Franklin, Sr.
LOUIS V. FRANKLIN, SR.
Acting United States Attorney
131 Clayton Street
Montgomery, Alabama 36104
Phone: (334) 223-7280
Fax: (334) 223-7135
louis.franklin@usdoj.gov