ONE HUNDRED TENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6216

(202) 225–3951
http://www.house.gov/judiciary

November 7, 2008

The Honorable Michael B. Mukasey
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

Dear Mr. Attorney General:

We write to transmit certain information received from a Department of Justice whistleblower. This information relates to the prosecution of former Alabama Governor Don Siegelman and his codefendant Richard Scrushy, and appears relevant to the investigation of the Siegelman matter currently underway at our request by the Department's Office of Professional Responsibility.[1] This information, including the attached documents, raises serious questions regarding possible misconduct by the Siegelman prosecution team, including the apparent failure to disclose to the Court or to defense counsel communications received from one or more members of the Siegelman jury while the trial was underway, and also the failure of United States Attorney Leura Canary to fully honor her recusal from this case.

We are recently informed that this whistleblower now fears workplace retaliation and the possible loss of her job. Accordingly, we believe it important that you and those responsible for these matters have all the relevant facts.

[1] See May 5, 2008, Letter from H. Marshall Jarrett to Hon. John Conyers Jr. stating that the Office of Professional Responsibility is investigating "allegations of selective prosecution relating to the prosecutions of Don Siegelman, Georgia Thompson, and Oliver Diaz and Paul Minor."

1. Information Regarding Contacts Between Siegelman/Scrushy Jury and Prosecution Team

Ms. Tamarah Grimes, an employee of the United States Attorney's Office for the Middle District of Alabama, has provided an email chain raising serious questions about the prosecution team's apparent failure to disclose important information about possible jury contacts to the Court or the defense.

This email chain is dated June 15, 2006 – the day the Siegelman/Scrushy case was submitted to the jury for its decision. The key email in the chain was written by Ms. Patricia Watson, who was at this time the First Assistant United States Attorney for the Middle District of Alabama. According to a complaint filed by Ms. Grimes in July 2007 with the Department's Office of Professional Responsibility, Ms. Watson was also married to United States Attorney Leura Canary's first cousin.

In this email, Ms. Watson writes: "I just saw Keith in the hall. The jurors kept sending out messages through the marshals. A couple of them wanted to know if he was married."[2] Apparently, the "Keith" referenced in this email is FBI Special Agent Keith Baker, a member of the Siegelman prosecution team who reportedly sat at or near the prosecution's counsel table throughout the trial. Ms. Grimes responded to this email, writing "Yeah, that's what Vallie said. He said one girl was a gymnast and they called her 'Flipper,' because she apparently did back flips to entertain the jurors. Flipper was very interested in Keith."[3] "Vallie" refers to another member of the prosecution team in this case.

This email exchange raises several important issues.

First, the fact that members of the prosecution team may have received one or more messages from one or more members of the jury via the US Marshals was apparently never disclosed to the trial judge or the defense. Any ex parte contact with a member of an empaneled jury - even "seemingly innocuous juror conversations and contact between [government agents] and a juror" – will raise serious issues.[4] Indeed, the Middle of District of Alabama's own trial

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[2]June 15, 2006, email from Patricia Watson to Tamarah Grimes.

[3]June 15, 2006, email from Tamarah Grimes to Patricia Watson.

[4]United States v. Rutherford, 371 F.3d 634,643 (9th Cir. 2004); see also, e.g., United States v. Napoli, 173 F.3d 847 (2d Cir. 1999) (juror was dismissed after attending social event at which an FBI agent was merely present and without any evidence that the juror spoke to the agent); United States v. Harry Barfield Co., 359 F.2d 120 (5th Cir. 1966) (new trial ordered where witness had a short conversation in an elevator with juror about a distant family connection and did not discuss the case); Pekar v. United States, 315 F.2d 319 (5th Cir. 1963) (new trial ordered where prosecutor spoke with a juror during recess about the juror's business and did not discuss the case, and describing this conduct as "inexcusable"); United States v. Massey, 2003 WL

handbook warns jurors against "embarrassing contacts [with] persons interested in the case."[5] Yet it appears that none of the members of the prosecution team with knowledge of these alleged messages made a report, with the exception of the complaints eventually filed by Ms. Grimes.

Second, not only does this email exchange describe undisclosed ex parte contacts with the jury, but the substance of the apparent contacts is also very troubling. Where a juror or jurors expresses the kind of social interest in a member of the prosecution team reflected in this exchange, the risk of bias – whether conscious or unconscious – is obvious.[6] And this concern is heightened here because it appears that, after a prosecution verdict was reached in this case, the juror who was reportedly "very interested" in the FBI Special Agent went on to reach out to members of the prosecution team for personal advice about her career and educational plans.[7] In addition, a complaint filed by Ms. Grimes with the Office of Professional Responsibility on July 30, 2007, includes a quotation from the Acting United States Attorney for this case, Louis Franklin, allegedly stating about this juror that another member of the prosecution team "talked to her. She is just scared and afraid she is going to get in trouble."[8] The specter of one or more jurors passing messages to members of the prosecution team during trial is deeply troubling. The additional evidence of casual post-trial contact between a juror and the prosecution present here is cause for even greater concern.

Third, as you know, the issue of possible juror misconduct went on to become a significant issue in this case when several emails surfaced that allegedly had circulated among members of the jury during the trial. Press reports indicate that one of the jurors involved in that controversy was the juror referenced in the email chain described above as being "very interested" in FBI agent Baker.[9] That matter, including the sufficiency of the trial judge's investigation of the issue, is now pending before the Eleventh Circuit. Unfortunately, because this additional information regarding possible additional jury improprieties was never previously

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1720064 (conversation in which juror approached a prosecutor on an elevator and asked if he could pose a question, but was told no and had no further contact with the prosecutor was reported to the court and ultimately the juror was dismissed).

[5]Handbook for Trial Jurors in the Federal Courts at 6, *available at* http://www.almd.uscourts.gov/jurorinfo-docs/Handbook_for_Trial_Jurors.pdf

[6]See United States v. Rutherford, 371 F.3d 634 (9th Cir. 2004) (new trial ordered where IRS agents attended trial and reportedly "glared" at jurors); Pekar v. United States, 315 F.2d 319 (5th Cir. 1963) (admonishing litigants that no "social attention" may be showed to jury members)

[7]Linn, *Siegelman Juror Wants to Talk Shop With Prosecutors*, Montgomery Advertiser, July 13, 2006.

[8]July 30, 2007, Letter to H. Marshall Jarrett from Tamarah Grimes.

[9]Hammons, *Scrushy/Siegelman Attorneys Receive More E-Mails; Strong Differences of Opinion Between Government and Defense*, WSFA 12 News Montgomery, Dec. 28, 2006, *available at* www.wsfa.com/global/story.asp?s=5869041.

disclosed, it could not be addressed as part of the trial judge's investigation or the defense's response to the matter.[10] Thus, the record on this issue necessarily appears incomplete and the Appeals Court will be left to address the matter on what seems to be an artificially truncated basis.

Fourth, the failure of the prosecution to disclose this information to the Court and the defense is additionally troubling because of other critical information about contacts between the court, federal investigators and two jurors (again, including one of the jurors referenced in the email described above) that was also kept from the defense. As you know, on July 8, 2008, the Chief of the Appellate Division of the Department's Criminal Division was compelled to inform the defense of a lengthy investigation into some of the emails allegedly exchanged by members of the jury during the trial that had been conducted at the prosecution's request by the United States Postal Inspection Service.[11] According to that disclosure, the Postal Inspectors interviewed at least two jurors and their co-workers, and eventually communicated their findings to the Siegelman/Scrushy trial judge, but neither the investigation findings nor this ex parte contact between prosecution agents and the trial judge were timely disclosed to defense counsel. It is startling to see such repeated instances of federal prosecutors failing to keep the defense properly apprised of key developments in an active criminal case.

Fifth, we have recently learned that this issue and others raised by Ms. Grimes was referred by the Office of Special Counsel to your office for evaluation. In response, an initial report has been prepared by two Assistant United States Attorneys which essentially concludes that, despite the plain statement to the contrary in this email chain, no messages were actually sent by any members of the jury to the prosecution through the US Marshals.[12] The Report of Investigation further concludes that the matter was little more than an idle rumor that "grew from humble factual beginnings into unrecognizable detailed and distorted factual form."

We are troubled, however, that the investigators appear to have reached this conclusion without interviewing the US Marshals who supervised the Siegelman jury and who are described in the email as having been the conduit for jury messages to the prosecution.[13] Nor do the investigators appear to have interviewed any member of the jury. Indeed, from the Report of Investigation it appears that the only witnesses to this matter interviewed other than Ms. Grimes

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[10] Cf. United States v. Betner, 489 F.2d 116 (5th Cir. 1974) (remanding for a new trial where district judge failed to conduct a full investigation of charges of improper contact between jury and the prosecution).

[11] July 8, 2008, Letter from Patty Merkamp Stemler to Bruce S. Rogow, Vincent F. Kilborn, et al.

[12] Report of Investigation, OSC File No, DI-08-0715, Allegations Regarding the United States Attorneys Office For the Middle District of Alabama.

[13] Report of Investigation at 8-9 (listing interviews conducted).

were approximately ten members of the prosecution team.[14] In a matter where it is the prosecution's own conduct that is at issue, such a one-sided investigation seems incomplete.

We are also troubled by the failure of the report to examine the implications of this matter even after it concluded that the messages described in Ms. Watson's email had not been sent. In particular, even if the emails described above merely reflect a rumor that was puffed up as it passed around the office, it is not clear how that justifies the conduct of Ms. Watson, the First Assistant United States Attorney at the time, or other members of the prosecution team who knew of these rumors but apparently did not investigate their veracity or disclose them to the defense or the Court. Ms. Watson's casual mention to a subordinate of jurors passing social messages to the prosecution team through the US Marshals suggests that she approved of or was amused by such events. It is highly disturbing that the number two official in a federal prosecutor's office could be so cavalier about so serious a matter. Even if the Report of Investigation is correct in finding that the messages were never sent, Ms. Watson could not have known that at the time.

Accordingly, we ask that you consider and take any appropriate action regarding this information provided by Ms. Grimes.

2. Information Regarding Failure of United States Attorney Leura Canary to Honor Her Recusal from the Siegelman/Scrushy Matter

Department of Justice records show that United States Attorney Leura Canary recused herself from the Siegelman case on May 16, 2002. According to the Acting United States Attorney responsible for the case, "In May 2002, very early in the investigation, and before any significant decisions in the case were made, U.S. Attorney Leura Canary completely recused herself from the Siegelman matter, in response to unfounded accusations that her husband's Republican ties created a conflict of interest."[15] Mr. Franklin further explained that "Ms. Canary had no involvement in the case, directly or indirectly, and made no decisions in regards to the investigation or prosecution after her recusal. Immediately following Ms. Canary's recusal, appropriate steps were taken to ensure the integrity of the recusal, including establishing a 'firewall' and moving all documents relating to the investigation to an off-site location."[16] On October 5, 2007, Mr. Franklin stated again "[Leura Canary's] recusal was scrupulously honored

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[14]Report of Investigation at 8-9. The Report does mention that two OPR counsels were also interviewed.

[15]July 18, 2007, Statement of Acting United States Attorney Louis Franklin, *available at* http://blog.al.com/bn/2007/07/middle_district_of_alabamas_re.html.

[16]July 18, 2007, Statement of Acting United States Attorney Louis Franklin, *available at* http://blog.al.com/bn/2007/07/middle_district_of_alabamas_re.html.

by me."[17] These statements have been repeated many times and have been relied on by defenders of the Department's handling of this politically-sensitive matter.

Ms. Grimes has provided several emails casting serious doubt on these assertions, however. The most significant of these emails is a September 19, 2005, email from Ms. Canary to Acting United States Attorney Franklin, Assistant United States Attorneys Feaga and Perrine, First Assistant United States Attorney Patricia Watson (whose last name was Snyder at this time), and criminal legal assistant Debbie Shaw. This email was sent at a critical time in the Siegelman/Scrushy case – Mr. Siegelman had been indicted, although that fact had not been revealed to his attorneys, and the Government was preparing a superceding indictment that would be publicly revealed the following month.

In this email, Ms. Canary forwards an article regarding the Siegelman case and writes: "Ya'll need to read because he 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."[18]

This email raises obvious questions about the degree to which Ms. Canary honored her recusal from this case. A recused United States Attorney should not be providing factual information such as relevant news clippings containing a defendants' statements to the team working on the case under recusal. And this email does not just show Ms. Canary forwarding an article – it reflects her analyzing the article and highlighting certain facts. And most troubling of all it contains a litigation strategy recommendation – that the prosecution should seek to bar Mr. Siegelman from speaking to the media. We note too that it was sent only to members of the Siegelman/Scrushy prosecution team – it was not an office wide email that inadvertently reached people working on the case.

Ms. Grimes has provided other documents to the Committee that bear on this issue. In one email, Ms. Canary forwards another article to essentially the same group of recipients.[19] This too appears improper and again raises the question why a recused United States Attorney would be providing such information to the active prosecution team. Another email notes that Ms. Canary was consulted about the decision to add Ms. Grimes to the Siegelman/Scrushy team –

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[17]October 5, 2007, Statement of Acting United States Attorney Louis Franklin, *available at* http://www.wsfa.com/global/story.asp?s=7176844&ClientType=Printable.

[18]September 19, 2005, email from Leura Canary to JB Perrine, Steve Feaga, Louis Franklin, Debbie Shaw, and Patricia Snyder.

[19]September 27, 2005, email from Leura Canary to Steve Feaga, Louis Franklin, JB Perrine, and Patricia Snyder.

referred to as the "big case" – and states that "Leura and Louis both liked the concept: and further reports that "Leura asked me to pass this information [regarding Ms. Grimes' role on the case] on . . ."[20] We appreciate that a United States Attorney who is recused from a particular matter will continue to play a role in the overall administration of the office, but question whether participating in detailed discussions about the staffing of the matter from which she has been recused is appropriate and whether messages or information from the recused United States Attorneys should be passed on to new members of the team.

In her July 2007 report to OPR, Ms. Grimes elaborated on this subject, stating that "Leura Canary kept up with every detail of the case through Debbie Shaw and Patricia Watson."[21] Once again, if this statement is accurate, it raises serious concerns. It is difficult to imagine the reason for a recused United States Attorney to remain so involved in the day to day progress of the matter under recusal.

Accordingly, we ask that you consider and take any appropriate action regarding this information provided by Ms. Grimes

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We appreciate Ms. Grimes providing this information,[22] which she apparently has previously presented to several executive branch offices.[23] It is no easy thing to speak up in these circumstances, but we in Congress and all Americans depend on whistleblowers like Ms. Grimes taking action when they learn of troubling facts like those described above.

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[20] April 6, 2005, email from Patricia Snyder to Steve Doyle.

[21] July 30, 2007 Letter to H. Marshall Jarrett from Tamarah Grimes.

[22] See 5 USC § 7211 ("The right of employees. . . to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied. ")

[23] See 5 USC § 2302(b)(8)(A)(I) & (ii) ("Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority— take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.").

Sincerely,

John Conyers, Jr.
Chairman
Committee on the Judiciary

Linda Sánchez
Chair, Subcommittee on
Commercial and Administrative Law

Enclosures

cc: The Honorable H. Marshall Jarrett