

No. 11-972

In The
Supreme Court of the United States

RICHARD M. SCRUSHY,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit**

**RICHARD SCRUSHY'S REPLY TO BRIEF
FOR THE UNITED STATES IN OPPOSITION
TO SCRUSHY'S PETITION FOR WRIT OF
CERTIORARI**

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CERTIORARI SHOULD BE GRANTED

The Government's primary opposition to Richard Scrushy's certiorari petition is that "[t]he instruction given in this case covered the essential aspects of the instruction approved in *Evans* [*v. United States*, 504 U.S. 255 (1992)], because it required the jury to find that 'the defendant and the official agree[d] that the official [would] take specific action in exchange for a thing of value.'" Brief in Opposition at 15. Thus, the long and short of the Government's position is that the *quid pro quo* "agreement" – the state of being in an exact, certain, absolute, categorical, unequivocal state of mind on a single subject – can be inferred; that *McCormick's* use of "explicit," and its holding that an official must "*assert that his official conduct will be controlled,*" (500 U.S. at 273 (emphasis supplied)), are mere evidentiary markers, and are not the essential elements for proof of criminal conduct.

The trouble with the Government's effort to deconstruct the *McCormick v. United States*, 500 U.S. 257 (1991), language is that "agree[ing] to take specific action" is not akin to an explicit promise, nor does it mean that a party has asserted his or her conduct "will be controlled." "Agree" is more malleable: it can mean "think alike" and "be of one mind," and it can mean "support" or "subscribe." See Random House Webster's School and Office Thesaurus, Revised and Updated (1998). Therefore the instruction that the Government offers as sufficient to meet *McCormick's* medicine, is deficient.

Nor does *Evans* resolve the matter of the proof necessary to sustain Scrushy's conviction. As the Government acknowledges, "*Evans* directly challenged the adequacy of the jury instructions under *McCormick* on the ground that passive acceptance of a campaign contribution based on a specific requested exercise of official power is not a *quid pro quo* unless the official complies or attempts to comply with the request." Brief in Opposition at 16. The instruction deemed sufficient in *Evans* was "[I]f a public official demands or accepts money in exchange for a specific requested exercise of his or her official power, such a demand does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution." *Evans*, 504 U.S. at 258. Certiorari was granted in *Evans* to decide whether "demand" was an element of a Hobbs Act charge. *Id.* at 256.

Thus *Evans* does not retreat from *McCormick's* commands. Indeed, the *Evans* instruction comes much closer to the *McCormick* model than the Scrushy instruction here. *Evans* resolved the question of "whether an affirmative act of inducement by a public official, such as a demand, is an element of the offense of [Hobbs Act] extortion. . . ." 504 U.S. at 256. So *Evans* does not resolve the question posed by Scrushy's petition:

In the context of a First Amendment protected contribution to an *issue advocacy campaign*, does the *McCormick v. United States*, 500 U.S. 257, 273 (1991), holding that campaign contributions cannot constitute

bribery unless “the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act” mean “explicit,” or can something less than proof of an “explicit promise” be sufficient to sustain a conviction?

Petition at i. (emphasis supplied).

Finally, the Government’s arguments that the Court should not review Siegelman’s case because his case was remanded for resentencing, (“so the case is still in an interlocutory posture as to Siegelman” (Brief in Opposition at 25)), has no bearing on Scrushy’s petition. The important question he poses is ripe for review by this Court.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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