No. 09-167

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

REPLY BRIEF FOR PETITIONER ON CERTIORARI

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ARGUMENT

The government's Brief in Opposition actually lends support to Scrushy's arguments. Scrushy asserted two reasons for granting certiorari: (1) conflict with *McCormick* and *Evans* and what proof they require, and (2) confusion and conflict about the impact of *Evans* on *McCormick's* "explicit promise" requirement.

The government plays down the importance of *McCormick's* use of "explicit," saying we rely "on a single word . . . : the reference to a political contribution made in return for an *explicit* promise or undertaking by the official . . . ." Then the government says "[e]ven read in isolation, that sentence does not address the manner in which an agreement is to be proved at trial." Br. in Opp. 17-18 (emphasis added by government). But "explicit" was not isolated; the Court emphasized the "formulation *defines* the forbidden zone of conduct with sufficient clarity." 500 U.S. at 273 (emphasis supplied). And it approvingly quoted the *United States v. Dozier*, 672 F.2d 531, 537 (5th Cir. 1982) definition: "a public official may not *demand* payment as inducement *for the promise* to perform (or not to perform) an official act."' *Id.* (emphasis supplied). "Define," "demand," "promise" lend credence to the notion that the court meant something specific and important when it spoke of the "formulation." How something is proved (and what instruction is required) is a different inquiry, but it is an inquiry that must be informed by a clear understanding of the essence of the proof required to meet explicit, demand and promise. That is a task for this Court.

What does "explicit" mean and what kind of jury instruction keeps faith with the Court's construct? The government tries to finesse the questions with the argument that *Evans* watered down *McCormick*, and that *United States v. Blandford*, 33 F.3d 685, 696 (6th Cir. 1994) had it right: "*Evans* 'gave content to what the *McCormick quid pro quo* entails.'" Br. in Opp. 22. However, the government's reliance on *Blandford* should have included *Blandford's* doubts: "Exactly what effect *Evans* had on *McCormick* is not altogether clear." 33 F.3d at 695. And a hint of doubt is present in the government's submission: "It is doubtful that the Court would have so clearly approved the instruction in *Evans* if, in fact, the instruction was flawed under . . . *McCormick*. Br. in Opp. 21-22.

Why guess? Why not have the question resolved so that the courts of appeals need not struggle to reconcile *McCormick* and *Evans*. The government takes nearly ten pages to try to persuade the Court that there is no conflict with *McCormick* and no threat to the First Amendment (Br. in Opp. 14-24). But the court below recognized that the "potential negative impact of [the statutes used] on issue advocacy campaigns is even more dangerous than it is to candidate-election campaigns." And the court agreed "that this is the first case to be based upon issue-advocacy campaign contributions." Pet. App. 15a, n.13. There can be no doubt about the importance of the issue; the court below said because Scrushy's donation to an education lottery fund gave rise to his convictions, "they impact the First Amendment's core values – protection of free political speech and the right to support issues of great public importance." Pet. App. 14a-15a. Resolving the issue now is preferable to having the issue percolate through the lower courts while citizens contribute to issue-advocacy campaigns and run the risk of prosecution if

appointed to some post by an appreciative elected official.

One would think that if the mechanics of *McCormick* and interplay with *Evans* were so easily understood, the government would not need to work so hard, and the courts of appeals would not have had to work so hard, to fashion the proper formula for reconciling "explicit" with the means to prove it and the jury instructions to convey it. As our Petition showed, the courts of appeals have struggled with the subject. Pet. 13-17. The government's Brief, while striving to portray a consensus on the *McCormick/Evans* meaning, confirms the fact that the courts of appeals have not had an easy time with the matter.

Finally, the government recognizes that "*McCormick's* application to the federal funds bribery and honest services fraud statutes presents a significant threshold question. "Br. in Opp. 25-26.

The government concedes that no court has addressed whether the *McCormick* Hobbs Act formulation applies to the bribery/honest services statutes used here (*id.* at 24-25), but seeks to avoid this Court's inquiry despite the court of appeals' assumption that *McCormick* did apply. That approach is insensitive to the First Amendment "core values" involved (Pet. App. 15a); insensitive to the need to avoid more confusion and conflict in the courts of appeals; and insensitive to the concept of complete judicial review. Since the court of appeals assumed *McCormick* applied here, and since that is an important but unanswered question that is the heart of this case, the Court should grant review to determine if Richard Scrushy's convictions (and Governor Siegelman's) were consistent with *McCormick's* mandate.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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