No. 07-13163-B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA, Appellee

vs.

DON EUGENE SIEGELMAN, et al., Appellants

On Appeal from the United States District Court
for the Middle District of Alabama

PETITION FOR REHEARING EN BANC, OR FOR PANEL REHEARING, OF GOVERNOR DON SIEGELMAN

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Statement of Counsel

1) I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

McCormick v. U.S., 500 U.S. 257, 111 S.Ct. 1807 (1991)

U.S. v. Martinez, 14 F.3d 543 (11th Cir. 1994)

Reeves v. Astrue, 526 F.3d 732 (11th Cir. 2008)

U.S. v. Hurtado, 508 F.3d 603 (11th Cir. 2007)

U.S. v. Veal, 153 F.3d 1233 (11th Cir. 1998)

U.S. v. Ronda, 455 F.3d 1273 (11th Cir. 2006)

2) I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

a) Whether the word "explicit," in the "explicit promise or undertaking" element of proof in alleged bribery cases involving campaign or issue-advocacy contributions, means what the word means in ordinary usage, i.e., expressly communicated, the opposite of implicit – or whether (as the panel concluded) an implicit *quid pro quo* linkage counts as "explicit," so long as there was a particular action that was implicitly to be exchanged for the contribution.

b) Whether a criminal statute must be read according to its text, rather than ignoring an entire clause of the statute in a way that broadens the statute's coverage.

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Governor Siegelman

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PETITION FOR REHEARING EN BANC, OR FOR PANEL REHEARING

"This," the panel said, "is an extraordinary case." [Slip Op. at 3]. And in this extraordinary case, the panel made striking departures from Circuit and Supreme Court precedent, and from the fundamentals of statutory interpretation.

Statement of Issues Asserted to Merit En Banc Consideration[1]

1. Whether the word "explicit," in the "explicit promise or undertaking" element of proof in alleged bribery cases involving campaign or issue-advocacy contributions, means what the word means in ordinary usage, i.e., expressly communicated, the opposite of implicit – or whether (as the panel concluded) even an implicit *quid pro quo* linkage counts as "explicit," so long as there was a particular action that was implicitly to be exchanged for the contribution.

2. Whether (as the panel concluded) an 18 U.S.C. § 1512(b)(3) charge is satisfied by allegations that the defendant was complicit in the creation of a document that was allegedly designed as a "cover up" – or whether a faithful reading of the words of the statute demonstrates that this case is outside the statute.

Course of Proceedings and Disposition of the Case

Governor Don Siegelman, along with others, was the subject of a 34-count indictment. The vast majority of the charges were baseless; Governor Siegelman

[1] If the Court grants rehearing to Scrushy on any issues, such rehearing should apply to Governor Siegelman as well. And upon granting *en banc* rehearing the Court should remain open to considering all issues that were briefed to the panel, if the two issues set forth herein do not yield a complete reversal of the judgment.

was convicted on only seven counts. Six (Counts 3, and 5-9) were "honest services" mail fraud, 18 U.S.C. § 666 bribery, and conspiracy charges, relating to his appointment of Richard Scrushy to the State's Certificate of Need Board. The seventh (Count 17) was an obstruction charge under 18 U.S.C. § 1512(b)(3).

Governor Siegelman appealed. A panel of this Court rejected all of the arguments but one. The panel agreed that on Counts 8 and 9 – relating to things that Scrushy or others did while on the Board – there was no basis whatsoever for the jury's verdict against Governor Siegelman. This confirms that the sole gravamen of Counts 3 and 5-7 was the alleged link between Governor Siegelman's exercise of his appointment power, and contributions to the issue-advocacy campaign for a state lottery to benefit education.

Statement of Facts

Because this petition focuses on questions of law rather than mere disputes about factual inferences, and because space is limited, we state the facts briefly.

1) Richard Scrushy had served on the State's Certificate of Need Board under three previous Governors, prior to Siegelman's election. Governor Siegelman re-appointed Scrushy to the Board. Before that, at Governor Siegelman's urging, Scrushy had begun raising and making contributions for a state referendum campaign supporting the establishment of a State lottery, the proceeds of which would support public education in the State.

There was no evidence from which any reasonable juror could conclude that there was any *actual* – i.e., explicit, express – promise or agreement that Scrushy would receive an appointment for the contributions. The panel declared the evidence sufficient to allow an inference that there was an agreement, though not an express one, linking the appointment and the contributions. But not even the panel contended that the evidence would allow a finding that Governor Siegelman made any such express communication. Nor, undisputedly, was the jury instructed that proof of an explicit (in other words, express) communication was required.

2) Count 17 charged one act as obstruction of justice under 18 U.S.C. § 1512(b)(3): that Governor Siegelman caused his then-aide Nick Bailey to write him a check for $2,973.35, with a notation on the check saying "balance due on m/c." This was the purchase price for the remaining interest in a motorcycle that, upon the completion of this transaction, Bailey had bought in full from Governor Siegelman. The panel viewed Bailey's purchase of the motorcycle as part of an effort to "cover up" a "'pay-to-play' payment" [Slip Op. p. 2] that another person had allegedly made. (The jury had rejected all charges alleging that there was such a "pay to play" payment.) The panel also viewed the evidence as showing that Governor Siegelman and Bailey misled Bailey's attorney, so that "the lawyer would be in a position factually to support the cover up." [pp. 42-43]. While we do not agree with the panel's inferences, we primarily address questions of law at

this point. One such question is whether the facts as described by the panel come within the statute's coverage, even if they were true. As we will show, they do not.

Argument and Authorities

1. Where applicable law requires proof of an "explicit promise or undertaking" connecting a contribution and official action, that is not satisfied by proof of an implicit promise involving an identifiable action.

Major political contributors often receive appointed office, or other actions by politicians that inure to the benefit of the contributors. Some degree of linkage between contribution and action can be inferred in many cases, if not all. What degree of linkage is enough to take a case across the line from politics (which voters can take into account as they see fit) into crime? The Supreme Court answered this question, as to the Hobbs Act, in *McCormick v. U.S.*, 500 U.S. 257, 273, 111 S.Ct. 1807, 1816 (1991): there is a crime "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking."

We showed on appeal that the *McCormick* standard must also apply to 18 U.S.C. § 666 and to "honest services" fraud charges, in cases (like this one) involving campaign or issue-advocacy contributions. The panel did not disagree. Though it stopped just short of so holding, its discussion [Slip Op. pp. 15-17] implicitly recognizes that we are correct on this point.

But the panel took a wrong turn as to what "explicit" means. The panel adopted a definition of that word that is contrary to *McCormick*, to Eleventh Circuit and other precedent, and to basic English usage. The panel held that when *McCormick* required proof that contributions were "made in return for an explicit promise or undertaking by the official to perform or not to perform an official act," this did not mean that the promise or undertaking must be "explicit" in the sense of being actually "express." Instead, in the panel's view, it is enough if the jury can infer that there was an agreement (implied or express) linking the contribution with a "specific" action. [Slip Op, pp. 18-21]. "Specific action" takes the place of "explicit promise" in the panel's understanding of *McCormick*. [*Id.*].

At times the panel wrote as though the crucial question was what sort of *evidence* could be used to prove the necessary communication. [pp. 18, 20]. But the question is first about what *fact* must be proven, about what the element of the crime is. The panel's answer was that there was no requirement of an express communication. The panel did not claim that the evidence was sufficient, if the law requires proof of an actual "explicit," meaning "express," *quid pro quo*.[2] Nor did the panel claim that the jury instructions were adequate, if that is the standard. The "honest services" instructions required no *quid pro quo* at all; and the § 666

[2] Can a non-verbal communication like a "wink" or a "nod" [Slip Op. at 20] ever count as an explicit promise? The question is academic here, as there is no evidence of any non-verbal communication of that sort.

instructions did not require proof of an explicit or express agreement. [Slip Op. 18]. Only by rejecting our argument about the meaning of *McCormick*'s standard, and making "explicit" not mean "express," did the panel find it possible to affirm.

The panel repeatedly asserted that "explicit" does not mean "express"; this was the core of the panel's statement of how it disagreed with us on the law. [pp. 18, 20]. This attempt to distinguish "explicit" from "express" makes it clear that, in the panel's view, an implicit linkage between the contribution and the action is enough. Though the panel claimed that it was still requiring an "explicit" *quid pro quo* as *McCormick* requires, and claimed that Bailey testified that there was an "explicit" agreement [p. 24], such statements depend entirely on the panel's stance that "explicit" does not mean "express." According to the panel, it is sufficient if the agreement linking contribution and action is "implied" from words or actions. [p. 20]. Thus the panel substituted a jury's case-by-case inference about the particular official's "intent" or "state of mind," for *McCormick*'s requirement of proof of an "explicit promise or undertaking." [pp. 20-21, 23-24].

But "explicit" really does mean "express."[3] The opposite is "implicit," or "implied." By changing the *McCormick* standard, the panel decision creates all the dangers and injustices that *McCormick* was designed to avoid. It subjects both

[3] The Oxford English Dictionary, for instance, defines "express" as "stated explicitly." <http://www.askoxford.com/concise_oed/express_3?view=get> Merriam-Webster lists the words as synonyms. <http://www.merriam-webster.com/dictionary/explicit>.

private citizens, and elected officials, to the subjective whim of prosecutors and juries, who are allowed to decide on a case-by-case basis which defendants have crossed a line defined not by actions, or by words spoken, but by projections about state of mind. It does so, in an area that deserves great protection under the First Amendment. The very point of *McCormick* was to avoid such dangers.

Moreover, the English language will not tolerate the definition that the panel gave. An "explicit promise or undertaking" does not mean something like "implicit promise or undertaking about something specific," to a reasonable reader. "Explicit" does mean "express," especially when modifying a phrase like "promise or undertaking," as we showed above. In holding otherwise, the panel was merely taking the side of the dissent in *McCormick*, which had argued that an "implicit" linkage between a contribution and a "specific" action was enough to constitute a crime. *McCormick*, 500 U.S. at 282-83, 111 S.Ct. at 1821 (Stevens, J., dissenting).

The panel justified its conclusion by looking to a brief passage in *Evans v. U.S.*, 504 U.S. 255, 112 S. Ct. 1881 (1992), which the panel took as transforming *McCormick*'s requirement of an "explicit promise or undertaking" in contribution cases. [Slip Op. p. 19]. But *Evans* was not a case about whether to dilute, or how to interpret, the "explicit" element of the *quid pro quo* standard for contribution cases. That was not any part of what the Court granted certiorari to decide. It was not, as we showed the panel, any part of the issues briefed in *Evans*. It was not the

issue that the Court was responding to, in the passage that the panel relied on. [Siegelman reply brief, pp. 1-6]. The panel gave no response to these points.

The panel's expansive interpretation of *Evans*, as diluting the "explicit *quid pro quo*" standard in contributions cases, is also contrary to this Court's precedent. In *U.S. v. Martinez*, 14 F.3d 543, 553 (11th Cir. 1994), this Court read *Evans* as adopting a *quid pro quo* standard for non-contribution cases, almost like the one *McCormick* adopted for contribution cases. But this Court held, "*Evans* modified this [*McCormick*] standard for non-campaign contribution cases …" (emphasis supplied). This Court relied on two other Circuits, which similarly held that *Evans* adopted a less stringent *quid pro quo* standard for cases that do not involve contributions. *Id.* at 553 n. 4, *citing U.S. v. Garcia*, 992 F.2d 409, 414 (2nd Cir. 1993) and *U.S. v. Taylor*, 993 F.2d 382 (4th Cir. 1994). The panel wrongly adopted a contrary reading of *Evans*: that it modified the standard for contribution cases.

As authority for its reading of *Evans*, the panel relied on *U.S. v. Blandford*, 33 F.3d 685, 696 (6th Cir. 1994) ("*Evans* instructed that by 'explicit' *McCormick* did not mean express"). [Slip Op. p. 20]. This was wrong, not least because *Blandford*'s reasoning was premised on an explicit rejection of this Court's decision in *Martinez*, *supra*, and the cases that this Court had relied on in *Martinez*. *Blandford*, 33 F.3d at 695-96. The Sixth Circuit in *Blandford* correctly understood this Court to be among those that retained the strict *McCormick* standard for

contribution cases while allowing a more implicit *quid pro quo* standard for non-contribution cases under *Evans*. *Id.* *Blandford* disagreed with this Court. The panel has now decided to follow *Blandford*'s rejection of our Circuit precedent, rather than following our Circuit precedent. That is wrong.

Other courts too have recognized that while *Evans* may allow conviction without proof of an "express" *quid pro quo* promise in cases not involving contributions, the *McCormick* standard still requires an "explicit," meaning "express," promise or undertaking in contribution cases. *See*, *e.g.*, *U.S. v. Ganim*, 510 F.3d 134, 142-43 (2nd Cir. 2007) (drawing a post-*Evans* distinction between contribution cases and non-contribution cases, holding that "proof of an express promise is necessary when the payments are made in the form of campaign contributions" while an implicit promise is enough in non-contribution cases); *U.S. v. Kincaid-Chauncey*, ___ F.3d ___, ___, 2009 U.S. App. LEXIS 3591, *33-35 (9th Cir. 2009) (same, and quoting *Ganim*); *U.S. v. Bradley*, 173 F.3d 225 (3rd Cir. 1999) (drawing same distinction).

The necessity of a judgment in favor of Governor Siegelman is bolstered by the rule of lenity and the doctrine of fair warning. One cannot be convicted, in a fair system, for violating a rule that he could not have known in advance. At least on questions where there is serious ambiguity, doubts must be resolved in favor of the citizen rather than the prosecutors. That is the case here. There was no way for

anyone to know that the panel in this case would turn the requirement of proof of an "explicit promise or undertaking" into something much less than that, something that neither precedent nor the English language will reasonably allow.

En banc review is warranted not only by the conflict that the panel has created within Circuit precedent (*see Martinez*, *supra*) but also by the importance of the issue as well as the "extraordinary" nature of the case. [Slip Op at 3]. The issue is one of overriding importance, not only to the law but to our democracy. Without clarity as to the dividing line between political action and crime, there is too much room for prosecutorial discretion in this sensitive area. Under the panel opinion, every elected official will now have to fear that he will face many years in prison for doing precisely the same official actions that others before him have taken, with the only difference being the unspoken state of mind that is attributed to him after the fact by prosecutors or jurors in a hostile climate. The *en banc* Court should bring much-needed clarity to this issue.

2. The panel erred in its treatment of 18 U.S.C. § 1512 by failing to adhere to the words of the statute.

Count 17, relating to a check from Nick Bailey to Governor Siegelman, charged Governor Siegelman under a particular subsection of one of the many "obstruction of justice" statutes that appear in the U.S. Code: 18 U.S.C. § 1512(b)(3). That subsection provides in pertinent part for criminal liability on anyone who "knowingly … corruptly persuades another person, or attempts to do

so, or engages in misleading conduct toward another person, with intent to … (3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense …"

The panel upheld the conviction on this count, portraying the evidence as allowing the inference that Governor Siegelman took part in an effort to create documents (including the check that was the gravamen of this count) to "cover up" (Slip Op. p. 2) an earlier, allegedly improper, payment. (As noted above, the jury rejected the charges relating to the earlier payment itself.)

The panel went astray by failing to adhere to the words of the statute, and in particular its clause about the required "intent." By failing to confine itself to the words of the statute, the panel reached the wrong result, and created confusion as to this Court's approach to the interpretation of criminal statutes.

The theory of the prosecution was that Governor Siegelman "persuaded" Bailey to write the check, and that he and Bailey misled Bailey's counsel about the nature of it. On full review, we believe the Court would see that neither of those facts can fairly be inferred from the evidence.[4] But whether the charge was that he

[4] The panel declared it possible to infer that Governor Siegelman "asked" Bailey to write the check [p. 40], thus putatively satisfying the "persuades" portion of § 1512(b)(3). This, we submit, is an example of pro-prosecution "inferring" taken beyond reasonable limits. Bailey was the prosecution's star witness, cooperating to the full extent of his ability. If Governor Siegelman had "asked" Bailey to write

"persuade[d]" or "engage[d] in misleading conduct," the statute also required proof of a particular intent: the intent to "hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense."

This statute, in other words, prohibits efforts to stop or keep people (by persuasions, threats, or trickery) from providing information to law enforcement, or at least to slow them down from doing so. That is the plain meaning of the "intent to hinder, delay or prevent" portion of the statute. There are other statutes that cover, more generally, improper attempts to *influence* what people say in certain contexts. *See*, *e.g.*, 18 U.S.C. § 1512(b)(1). Those statutes might cover efforts to *induce* people to *give* information to law enforcement that they would not otherwise have given, but this is not such a statute; Congress decided not to use the word "influence" in § 1512(b)(3). There are other obstruction statutes that cover misleading acts involving documents in certain contexts. *See*, *e.g.*, 18 U.S.C. § 1512(c)(1). There are other obstruction statutes that are drawn as catch-all provisions, but only in contexts that are inapplicable here. *See* 18 U.S.C. § 1512(c)(2) (catch-all provision regarding corruptly influencing an "official

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the check, there would be no need for inference about that; Bailey would have gladly testified to it, and the prosecutors would have surely asked that simple and critical question. On the contrary, Bailey presented the relevant activity as *his* idea, *his* desires and plans. (E.g., Tr. 475, R36-673). To "infer" a simple and crucial "fact" that the star witness would obviously have testified to had it been true, but did not, is unreasonable.

proceeding"). Congress knows how to write the obstruction statutes it wants, to cover the behavior it wants to criminalize, as broadly or narrowly as it chooses.

The panel failed to address the "intent to hinder, delay or prevent" portion of the statute, and thereby failed to give the statute the required sort of text-based analysis, even though such analysis was a major part of our argument. The panel decision thus conflicts with this Court's precedent on statutory interpretation. *See*, *e.g.*, *Reeves v. Astrue*, 526 F.3d 732, 734 (11th Cir. 2008) ("Statutory interpretation begins and ends with the text of the statute so long as the text's meaning is clear."); *U.S. v. Hurtado*, 508 F.3d 603, 607 (11th Cir. 2007) ("In interpreting a statute we look first to the plain meaning of its words."). The panel decision conflicts even with this Court's own precedent applying a text-based interpretive method to § 1512(b)(3) itself. *See U.S. v. Veal*, 153 F.3d 1233, 1245-46 (11th Cir. 1998); *U.S. v. Ronda*, 455 F.3d 1273, 1288 (11th Cir. 2006).[5]

The panel did not suggest that there was evidence to come within the text of this statute, once the entire text of the statute, including its "intent" clause, is

[5] Neither *Veal* nor *Ronda* expressly addressed the "intent to hinder, delay or prevent" element of the statute. But if those cases implicitly held that such element was met there, that would make sense, in a way that confirms how different this case is. In those cases, the effort was to mislead state investigators; and one can plausibly say that the intent in so doing was to hinder, delay or prevent those investigators from discovering inculpatory information and passing it along to others in law enforcement. Here, there is and can be no suggestion that Governor Siegelman thought that either Bailey, or his counsel, would pass on information to law enforcement that Governor Siegelman wanted to keep secret, and that they could be stopped from doing so by having Bailey write the check.

considered seriously. Nor did the prosecution so suggest on appeal, for that matter. There is absolutely no suggestion that Bailey would have given information to law enforcement, such that Governor Siegelman's receipt of the check was done with the intent to *hinder, delay or prevent* Bailey from doing so. Nor is it plausible to suggest that Governor Siegelman had that intent as to Bailey's counsel, the person allegedly misled. There is simply no way that Bailey's own lawyer would have gone to law enforcement to inculpate Bailey and Siegelman, such that Bailey and Siegelman would have misled him *in order to stop him*; that is the antithesis of a lawyer's role. Even the panel was unwilling to make such far-fetched suggestions. But only that sort of far-fetched suggestion, or something else equally lacking in evidentiary foundation and unmentioned by the panel, could bring the case within § 1512(b)(3), once one focuses (as the panel did not) on the words of the statute.

The Court should take this issue *en banc* to solidify its approach to statutory interpretation, and to ensure that Governor Siegelman does not stand convicted for something that is not a crime. *En banc* consideration of this issue is also warranted by the fact that, as the panel said, "This is an extraordinary case." [Slip Op. p. 3]. The Court should therefore give the case, as a whole, the most thorough consideration. This case is the subject of a deep national discussion, including Congressional investigation, as to whether it constitutes a distortion of the federal justice system. We do not ask this Court to answer that question, and we do not

even know whether there will ever be a definitive answer from any source. But this national discussion makes it all the more important for the appellate bench to fulfill its role in this case with the greatest degree of care and attention possible. At every stage of the way, more of the case against Governor Siegelman has been shown to lack merit, as it has been shown that prosecutors overreached. He prevailed on the great bulk of the charges at trial. Then, even the panel recognized that some counts of conviction were based on no evidence at all. Even a victory for Governor Siegelman on all but one count from the massive indictment would still leave open the troubling possibility of injustice. *En banc* review would be in the best traditions of a fair bench, especially for a case that is (as the panel itself emphasized, Slip Op. 3) an "extraordinary" one.

Similarly, if the Court accepts the case for *en banc* review, the Court should not limit itself to these two issues, if the Court does not find them sufficient to lead to a reversal on all counts. There are other troubling aspects of the panel decision as well, on each issue presented to the panel; given the space limitations of a petition for rehearing, we cannot delve into them now. In an ordinary case, these might not rise to the level of *en banc* issues. But this is no ordinary case.

Conclusion

We request that the Court rehear the case *en banc*, or that the panel issue a substitute opinion reversing the entire judgment against Governor Siegelman.

Respectfully submitted,

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The foregoing was prepared in Times New Roman, 14 point.

Certificate of Service

I certify that copies of the foregoing have been served by U.S. Mail on the following this 25th day of March, 2009, that on the same day fifteen copies have been sent to the Clerk for filing.

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