ORIGINAL

No. 18-8935

In The

Supreme Court of the United States

SCOTT BRIAN MISERENDINO

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SCOTT BRIAN MISERENDINO, Pro Se
REG. NO. 84246-083
FCC Petersburg Camp
P.O. Box 1000
Petersburg, VA 23804

QUESTIONS PRESENTED

1. This Supreme Court recently handed down *Buck v. Davis*, 137 S.Ct. 759 (2017), in which the Court criticized the Fifth Circuit for applying a too-high standard to the review process in applications for Certificates of Appealability ("COA"). In remanding the case to the Fifth Circuit, this Court emphasized that a merits-review goes far beyond what is required for a showing that reasonable jurists could disagree with the district court's resolution of the constitutional issue. The Fourth Circuit's procedures require petitioners seeking a COA to file a merits-brief that will become the Opening Brief reviewed by the Court of Appeals if a COA is issued. See Local Rule 34(b)(App.E1) and Preliminary Briefing Order (App.E2).

Does the Fourth Circuit's Local Rule 34(b) and Preliminary Briefing Order, which require COA applicants to file a brief that will become the merits-brief if a COA is issued, contradict this Court's holding in *Buck* and demand a too-high standard of COA applicants?

2. Because a proper preliminary review of Petitioner's claim that *McDonnell v. United States*, 136 S.Ct. 2355 (2016) invalidated his bribery conviction had obvious merit, even if the Fourth Circuit's COA standard is not too high a standard, the Court of Appeals still violated *Buck* by not issuing a COA.

After Petitioner Miserendino's conviction became final, this Court decided *McDonnell*, significantly narrowing the kind of conduct that qualifies as an "official act" as required for convictions of bribery of a public official under 18 U.S.C. Section 201(b). The *McDonnell* Court expressly excluded as "official acts" conduct even more egregious than Petitioner Miserendino's conduct, which included only proofreading and offering word/phrase suggestions to other reviewers of government Statements of Work and attending meetings with other government officials to give technical advice.

The District Court denied the merits of Petitioner Miserendino's Section 2255 petition, choosing (1) to ignore Petitioner Miserendino's clarifying affidavit evidence which did not contradict the record, (2) to ignore that Petitioner Miserendino was a government contractor significantly removed from the decision-making process with no influence over said decisions and who lacked the standing or authority or influence to commit bribery, and (3) to refuse to hold an evidentiary hearing regarding his disputed material evidence showing same.

Does the *McDonnell* decision exclude the specific conduct Petitioner Miserendino agreed he committed and thereby invalidate his bribery conviction, and how could any reasonable jurist not disagree with the District Court's resolution of the constitutional issue?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit denying a Certificate of Appealability (COA) is unreported and attached hereto as *Appendix A*. The judgment denying habeas relief entered by the United States District Court for the Eastern District of Virginia is unreported and attached hereto as *Appendix B*.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit became final on January 23, 2019 upon the denial of a Petition for Panel Rehearing and Rehearing *En Banc*. See *Appendix C*. The jurisdiction of this Honorable Court is invoked pursuant to Title 18, United States Code, Section 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Relevant statutory and constitutional provisions are reprinted in an appendix to this petition. See *Appendix D*.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On May 23, 2014, a grand jury returned a six-count indictment[1], charging Scott Miserendino, one of two co-defendants, with Conspiracy to Commit Bribery of a Public Official, in violation of 18 U.S.C. Section 371 (Count One); Bribery of a Public Official, in violation of 18 U.S.C. Section 201(b)(1)(A)(Counts Two and Three); Acceptance of a Bribe by a Public Official, in violation of 18 U.S.C. Section 201(b)(2)(A)(Count Four); Conspiracy to Commit Obstruction of Criminal Investigations and to Commit Tampering with a Witness, in violation of 18 U.S.C. Section 371 (Count Five); and Obstruction of Criminal Investigation, Aiding and Abetting, in violation of 18 U.S.C. Sections 1510(a)(Count Six). ECF No. 1. The indictment alleged that Mr. Miserendino committed the alleged offenses between 2004 and 2013 and also contained a Forfeiture Notice. *Id.*

On August 12, 2014, Mr. Miserendino pleaded guilty to Counts One and Four of the indictment. ECF No. 39. Mr. Miserendino and the government also agreed to a Statement of Facts ("SOF"). ECF No. 40. The lower court entered judgment on November 10, 2014. ECF No. 78.

On June 27, 2016, the Supreme Court decided *McDonnell v. United States*, overturning former Virginia governor Robert McDonnell's conviction under 18 U.S.C. Section 201, the same federal anti-bribery statute under which Mr. Miserendino was charged. 136 S.Ct. 2355 (2016). The *McDonnell* Court narrowed the definition of "official acts" in the statute significantly, holding that an official act "must also be something specific and focused that is 'pending' or 'may by law be brought' before a public official." *Id.* This Court further emphasized that "to qualify as an 'official act,' the public official must make a decision or take an action on that 'question, matter, cause, suit, proceeding or controversy,' or agree to do so." *Id.* Additionally, this Court emphasized that "a typical meeting, telephone call, or event arranged by a public official does not qualify as a 'cause, suit, proceeding, or controversy.'" *Id.* at 2368.

[1] 2:14-CR-79-RBS-TEM-1

B. PETITIONER'S CLAIM PURSUANT TO 18 U.S.C. SECTION 2255(f)(3)

In light of *McDonnell*, on June 23, 2017, Mr. Miserendino filed a Motion to Vacate, Set Aside, or Correct a Sentence ("Motion") pursuant to 28 U.S.C. Section 2255, ECF No, 94, and an accompanying Memorandum in Support ("Memorandum"). ECF Nos. 95 (redacted), 103 (unredacted). Mr. Miserendino specifically argued that: 1) the Supreme Court's decision constituted a dramatic narrowing of the federal corruption statute under which he was convicted; and accordingly, 2) his conduct did not constitute "official acts" as now defined by the *McDonnell* Court because they were neither "specific nor focused," nor were his actions made with the knowledge and intent to influence a specific decision. Memorandum, at 1. Critically, the Motion does not challenge the conspiracy conviction, nor does it seek to justify Miserendino's codefendant Mr. Toy's actions. The claim is that Mr. Miserendino's own actions fail to meet the *McDonnell* definition of "official acts," a fact that -- if proven true -- undermines the validity of Mr. Miserendino's bribery conviction under 18 U.S.C. Section 201.

Because Mr. Miserendino's Section 2255 Motion was filed after the one-year statutory deadline for filing a Section 2255 Motion had expired, Mr. Miserendino argued that his Section 2255 Motion was timely under 28 U.S.C. Section 2255(f)(3). [2] The District Court found that Mr. Miserendino's Motion was timely, finding that *McDonnell* did establish a newly recognized right for purposes of 28 U.S.C. Section 2255(f)(3). ECF No. 109, at 14.

The United States filed its Response in Opposition to the Section 2255 Motion on September 19, 2017, ECF No. 104. Following the District Court's grant of leave to file a Reply on September 29, 2017, see ECF No. 107, Mr. Miserendino filed his Reply to the Government's Opposition on October 18, 2017. ECF No. 108.

[2] The statute requires that "[a] one-year period of limitation shall apply to a motion under this section." 28 U.S.C. Section 2255(f). The statute further provides, however, that the "[t]he limitation period shall run from ... the date on which the [constitutional] right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review ..." 28 U.S.C. Section 2255(f)(3).

C. THE DISTRICT COURT'S OPINION

On April 3, 2018, the District Court issued its opinion denying Mr. Miserendino's Section 2255 Motion without an evidentiary hearing. ECF No. 109. It did so without considering his Affidavit and Memorandum in Support of his petition. The District Court found that the "newly-alleged facts" in Mr. Miserendino's Section 2255 Affidavit and Memorandum "seek to contradict the information to which the Petitioner already agreed." *Id.* at 16. Additionally, the Court found that "to the extent that the alleged facts in the Petitioner's Affidavit seek to supplement, rather than contradict, the Statement of Facts, the Petitioner's efforts fail to support his Section 2255 Motion." *Id.* at 17. Finally, the Court found that "the Petitioner does not allege any extraordinary circumstances that would warrant disregarding the Statement of Facts" that he had sworn to at the time he entered his guilty plea. *Id.* at 19. Accordingly, the District Court "only utilize[d] the Statement of Facts in determining whether the Supreme Court's interpretation of 'official acts,' for the purposes of 18 U.S.C. Section 201(a)(3), supports Petitioner's conviction for Acceptance of a Bribe by a Public Official." *Id.* at 20.

Having limited itself to the Statement of Facts agreed upon at the time Mr. Miserendino entered his guilty plea, the District Court's analysis of *McDonnell* as applied to Mr. Miserendino's case, arrived -- not unexpectedly -- at the conclusion that "the facts in Petitioner's Statement of Facts are clearly sufficient to support a finding that he engaged in "official acts" for purposes of 18 U.S.C. Section 201. *Id.* at 29.

Despite the fact that Petitioner Miserendino was not convicted under the "stream of benefits" theory in this case and did not raise such argument to challenge the case at hand, the District Court further found that Mr. Miserendino failed to successfully challenge the "stream of benefits" theory and that he was convicted under it. *Id.* at 30. In so holding, the District Court clearly confused Petitioner Miserendino's case at hand with a completely separate and unrelated case which did involve the "stream of benefits" theory. Specifically, the District Court found that *McDonnell* "did not give any indication that its interpretation of 'official act,' for purposes of 18 U.S.C. Section 201(a)(3) would invalidate, or affect in any way, the 'stream of benefits' theory of liability for 18 U.S.C. Section 201(b) bribery." *Id.* at 31. Accordingly, the District Court found that *McDonnell's* requirement that an official act be specific and focused does not equate to the official act being identified at the time of the illegal agreement." *Id.*

The District Court further declined to issue a Certificate of Appealability ("COA") based upon the reasons stated in its opinion. *Id.* at 32.

D. THE COURT OF APPEALS' OPINION

During the review process of Mr. Miserendino's Application for a COA, possibly because the Fourth Circuit Court of Appeals applied a too-high standard in contradiction with this Court's instruction in *Buck v. Davis*, 137 S.Ct. 759 (2017) and further argued in Argument I, the Circuit Court declined to issue a COA despite Mr. Miserendino's showing that reasonable jurists could disagree with the District Court's resolution of Mr. Miserendino's constitutional issue. App. 18-4372. Mr. Miserendino raised this concern in a Petition for Panel Rehearing and Rehearing *En Banc*, which the Fourth Circuit denied on January 23, 2019. App. 18-4372.

STATEMENT OF FACTS

A. MR. MISERENDINO WAS FAR REMOVED FROM THE DECISION-MAKING PROCESS AND LACKED THE POSITION TO EVEN MAKE AN "OFFICIAL ACT" AS DEFINED BY *MCDONNELL*

Mr. Miserendino was employed as a contractor by the non-government corporation Information Systems Support, Inc. ("ISS") beginning in 1997; his co-defendant Kenny Toy was a government employee for the United States Navy's Military Sealift Command ("MSC"). (Statement of Facts ("SOF") at 1). As part of Mr. Miserendino's duties, he helped the government subcontract with private companies to perform maintenance for IT and communications on U.S. Navy ships. *Id.* He also made recommendations for various companies to fulfill MSC task orders for naval projects as part of his day-to-day job. See Petitioner's Affidavit at Paragraph 12 (describing the process by which Mr. Miserendino and his co-defendant made recommendations regarding the "normal procedure for any subcontractor.").

For the relevant task orders at the time in question, between 2004 and 2013, MSC -- though a government agency itself -- chose not to go through the process of forming contracts or going through the bidding process by itself. Instead, MSC relied on already-existing contracts administered by other government agencies -- most notably in this case NAVSHIPSO Philadelphia and Army CECOM R2, among others -- had with prime contractors (such as AMSEC for NAVSHIPSO and VSE, Inc. for Army CECOM R2) who had already been selected and approved through the proper government procedures. This was considered normal government procedure, and MSC continued this practice on a regular basis through at least June 2012.

As such, the process MSC chose to follow to obtain the work they needed through other government agencies' existing contracts began with MSC coming to ISS/SRA[3] seeking recommendations of a subcontractor who could perform the work they needed. Mr. Miserendino, supporting Mr. Toy, would find a subcontractor whom they believed could best perform the work and would make the recommendation. Critically, the act of recommending a subcontractor to perform maintenance, repairs, or upgrades does *not* constitute an "official act" in light of *McDonnell*, as argued in Argument II.

After a subcontractor who could perform the job was recommended, MSC would inform the relevant other government agency, NAVSHIPSO (for one) in this case, that MSC needed work done and wanted to use one of NAVSHIPSO's existing contracts rather than create one of their own contracts. NAVSHIPSO would ask MSC for a Statement of Work detailing the requested repair/upgrade and what technical skills, expertise, security clearances, etc. were required for the work, i.e. whether it required cable runs, welding, and/or electrical; whether the equipment was computer or radio-based; whether the type of technician needed was IT or RF; the level of security clearance the technicians needed, etc. MSC often relied on other contractors to help them draft Statements of Work which were sufficiently detailed and in proper format to increase the likelihood of their resulting in a task order awarded to another government agency with their own existing prime contractors who were willing to do the work for MSC while working for the other agency, like NAVSHIPSO

[3] Mr. Miserendino worked for Information Systems Support, Inc. ("ISS") and MERCOMMS Unlimited, Inc. -- which was later acquired by a company called SRA International, Inc. ("SRA") for the period in question (2005 through 2009).

After MSC submitted the Statement of Work and funding to NAVSHIPSO, NAVSHIPSO would submit its own Statement of Work to one of their own existing prime contractors with which they already had a continuing contract, in this case AMSEC. AMSEC would then review the Statement of Work and contact subcontractors already approved to work under AMSEC whom they believed may be qualified for and interested in the job. The subcontractor would then determine whether they were able to fulfill the task order and convey that information back to AMSEC, who in turn conveyed it to NAVSHIPSO. Once NAVSHIPSO had received the information, they would pass everything along to MSC and then issue their own task order to AMSEC to perform the job for MSC, and AMSEC could determine whichever subcontractors they wanted to perform the actual work. As such, MSC was not issuing their own task orders for the work done on the ships under their command for the acts relevant to this case, and any influence with MSC could not automatically result in influence of the Statements of Work or task order decisions because those decisions were simply suggested by MSC but actually processed beyond their personal purview.

These facts are critical to Mr. Miserendino's claim because throughout the indictment and Petitioner's SOF, the only influence he is alleged to have had regarding the task order and Statements of Work process was over MSC officials and MSC prime contractors, and that influence was only alleged to exist through Mr. Toy. The Government alleged that Mr. Miserendino's influence gave him power over the issuing of MSC task orders, which may constitute an "official act" as required for a bribery conviction under 18 U.S.C. Section 201(b). But MSC had no such task orders relevant to this case, and Mr. Miserendino did not have any influence -- nor was there any allegation of same -- over other government agencies or *their* prime contractors. Additionally, MSC simply made a request to NAVSHIPSO and conveyed the work needed and NAVSHIPSO obtained task orders for AMSEC -- who then assigned the work to *their* own subcontractors. As such, as Mr. Miserendino has disputed all along, there is no evidence or allegation that he -- as a contractor for a non-government company during the relevant period -- somehow had influence over any other government agencies with which he did not work, such as NAVSHIPSO, by himself or even through Mr. Toy. That sort of influence may even have been beyond the government official Mr. Toy.

As an employee of ISS/SRA, Petitioner Miserendino did not have influence and could not pressure or influence the task order process in any "official" or reasonable way because his work for ISS/SRA cannot convey sufficient official authority to rise to an "official act" as required for a bribery conviction under Section 201(b) even if he proofread and made word/phrase suggestions to other non-government employee reviewers working for ISS/SRA when they were drafting Statements of Work knowing that ISS/SRA would pass that menial advice along to MSC. To even begin to constitute "official" in light of *McDonnell*, Petitioner Miserendino would have had to pass along some official influence (which he lacked) to *another* government agency *and* the prime contractors working for those agencies to select subcontractors those prime contractors had already approved long prior to Mr. Miserendino's involvement for subcontracting work under them.

This simply couldn't -- and therefore didn't -- happen because Petitioner Miserendino was so substantially separated from the ultimate decision-makers that he lacked any authority to make an "official act" in any fashion relevant to this case, as argued in Argument II.

B. MR. MISERENDINO'S ACTS DO NOT RISE TO THE LEVEL OF "OFFICIAL ACTS" IN LIGHT OF *MCDONNELL*

While Petitioner Miserendino and his co-defendant Mr. Toy did begin receiving gifts from MAETS and MHD† around 2004, agreeing to provide technical support, influence, and favorable treatment, Petitioner Miserendino was not even able to fulfill or act in any official way that could lead to the granting of task orders, as shown *supra*. Mr. Toy's position, on the other hand, may have had such influence, but maybe not even him. As Petitioner Miserendino raised in the proceedings below, his own acts were more akin either to receiving an illegal gratuity or the conspiracy to commit bribery conviction he declines to challenge.

† Mid-Atlantic Engineering Technical Services, Inc. ("MAETS") is referred to as Company A in the Statement of Facts and Plea Agreement. Miller, Hardman Designs, Inc. ("MHD") is referred to as Company B

Separately, the facts which the Government received with Petitioner Miserendino's signed agreement in his SOF included:

> *In exchange for bribes, MISERENDINO and Toy provided official action, on behalf of MSC, that was favorable to [MAETS], [MHD], Miller, Hardman, Smith, McPhail, White, and others, including the following:*
>
> *i. assisting in the preparation of Statements of Work for tasks that [MAETS] and [MHD] sought to perform under U.S. Government contracts, subcontracts, and task orders;*
>
> *ii. influencing, or causing to be influenced, other government officials to further [MAETS's] and [MHD's] efforts to obtain U.S. Government contracts, subcontracts, and task orders;*
>
> *iii. influencing, or causing to be influenced, MSC contractors to further [MAETS's] and [MHD's] efforts to obtain U.S. Government subcontracts and task orders; and*
>
> *iv. providing favorable treatment to [MAETS] and [MHD] in connection with U.S. Government task orders.*

SOF at 4-5.

These facts do not meet the specificity requirements this Court has previously required to underlie a bribery conviction under Section 201(b) -- as further detailed in Argument II -- and the facts remaining reek even less of bribery than those which this Court held do not qualify as official acts in *McDonnell*. This is especially true when considering Petitioner Miserendino's clarifying affidavit, submitted along with his habeas petition to the District Court, in which he clarified that his "assisting in the preparation of Statements of Work for tasks" was really more of a role of proofreading and offering word/phrase suggestions, he only proofread and offered such suggestions for six or so of these Statements, and he was never the final reviewer or the one who submitted the Statements of Work for final review or approval. Petitioner's Affidavit Paragraph 9.

With respect to the alleged influence over contracting decisions -- despite Petitioner Miserendino's inability to act officially in this matter as described *supra* -- his affidavit clarified that he and Mr. Toy "would recommend a contractor who [they] believed could perform the task. [They] both recommended MAETS and MHD when [they] believed those companies to be the best fit for what the program office needed. [They] also recommended other contractors -- approximately five or six -- when MAETS and MHD were not the right contractor for the job." *Id.* at Paragraph 10. The affidavit further raised that after the subcontractors successfully completed the work, the program offices would often call and request the same subcontractors because they were satisfied with the previous work. As raised in Argument II, recommendations of subcontractors do not constitute "official acts" in light of *McDonnell* as required for the challenged bribery conviction.

In this way, Petitioner Miserendino did openly recommend MAETS when he believed them to be the best subcontractor for the job, and he did not voice opposition to MHD when Mr. Toy made the recommendation in his presence when he believed MHD to be the best for the job. Notably, later, when MHD stopped fulfilling its payments to vendors, Mr. Miserendino removed himself from even that silent concession and stopped recommending them in any fashion. *Id.*

Despite all of this and more submitted to the District Court, the District Court confusingly discounted the affidavit in its entirety, refusing to consider even the statements that weren't contested to conflict with the record, and chose to rely solely on the statements in the SOF. The lower court additionally refused to hold an evidentiary hearing on all of the new facts presented which raised meritorious issues in light of this Court's holding in *McDonnell* and somehow held that the admitted actions in the SOF somehow reeked more of bribery under Section 201(b) than those of Governor McDonnell.

REASONS FOR GRANTING THE WRIT:

I. THIS COURT'S HOLDING IN *BUCK V. DAVIS* IMPLICATES AND DEMANDS REVISION OF THE FOURTH CIRCUIT'S REQUIRED BRIEFING ON THE MERITS WHEN A PETITIONER SEEKS A CERTIFICATE OF APPEALABILITY (COA)

Recently, this Court clarified the requirements for the issuance of a Certificate of Appealability (COA), holding that the COA "inquiry ... is not coextensive with a merits analysis." *Buck v. Davis*, 580 U.S. ___, 137 S.Ct. 759, 773 (2017). Chief Justice Roberts wrote the opinion for the Court, especially instructing that "[a] 'court of appeals should limit its examination [at the COA stage] to a threshold inquiry into the underlying merits of [the] claim,' and ask 'only if the District Court's decision was debatable.'" *Id.*

This comports with the long-standing application of *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), describing that a COA applicant must make only a substantial showing of the denial of a constitutional right -- as emphasized by 28 U.S.C. Section 2253(c)(2) -- and that the District Court's assessment of the constitutional issue is debatable or wrong.

As the Chief Justice further explained:

> *That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean that he failed to make a preliminary showing that his claim was debatable. Thus, when a reviewing court ... inverts the statutory order of operations and 'first decid[es] the merits of an appeal, ... then justifi[ies] its denial of a COA based on its adjudication of the actual merits,' it has placed too heavy a burden on the prisoner at the COA stage. Miller-El v. Cockrell, 537 U.S. [322], 336-337 (2003). Miller-El flatly prohibits such a departure from the procedure prescribed in Section 2253.*
>
> *The statute sets forth a two-step process: an initial determination whether a claim is reasonably debatable, and then -- if it is -- an appeal in the normal course. We do not mean specify what procedures may be appropriate in every case. But whatever procedures are employed at the COA stage should be consonant with the limited nature of the inquiry.*

Buck, 137 S.Ct. at 774 (emphasis and alterations added).

The Fourth Circuit has yet to address its Local Rule 34(b) or standard Informal Preliminary Briefing Order post-*Buck*, but the clear and unambiguous language in its published rule and issued orders demonstrates an apparent contradiction to this Court's clear instruction in *Buck*.

The Fourth Circuit's Local Rule 22(a) governs COAs, and its Local Rule 34(b) governs filings of Informal Briefs, including applications for COAs under Rule 22(a). Fourth Circuit Local Rule 34(b) specifies:

> *Whenever the Court determines pursuant to Local Rule 22(a) that briefing is appropriate on an appeal in a non-capital case from the denial of a writ of habeas corpus or of a motion under 28 U.S.C. Section 2255 ... the clerk shall notify that appellant that [they] shall file, within 21 days after service of such notice, an informal brief,* listing all the specific issues and supporting facts and arguments raised on appeal.

Fourth Circuit's Local Rule 34(b)(emphasis added); see App.E1.

The Fourth Circuit's standard Informal Preliminary Briefing Order especially betrays the too-heavy merits-briefing requirement:

> *The court will review the informal opening brief in determining whether to grant a certificate of appealability. If a certificate of appealability is granted,* the informal opening brief will also serve as appellant's opening brief on the merits of the appeal[.]

Fourth Circuit's standard Informal Preliminary Briefing Order (emphasis added); see App.E2.

Requiring an appellant seeking a COA to fully brief the merits of the appeal before the Fourth Circuit Court of Appeals will even review the application for such COA is the very picture of what this Court rebuked in *Buck*. In denying Petitioner Miserendino's COA application, the Circuit Court's panel held that it had

"independently reviewed the record and conclud[ed] that Miserendino ha[d] not made the requisite showing." App.A1. In light of the extensive evidence presented by Petitioner Miserendino, both in his Section 2255 petition and his brief to the Court of Appeals, that his bribery conviction is now unconstitutional under the narrowed *McDonnell* standard, the panel's decision is necessarily in conflict with *Buck* on one of either two levels.

If the panel's decision, issued without any discussion or analysis, represents that the panel reviewed the record and found that "no reasonable jurists could find that the district court's assessment of the constitutional claims is debatable or wrong," the panel's decision directly conflicts with the requisite distinction made in *Buck* between a meritorious claim and a debatable claim. As Chief Justice Roberts, writing for the *Buck* majority, explained:

> *That a prisoner has failed to make the ultimate showing, at the certificate of appealability (COA) stage of a habeas proceeding, that his claim is meritorious does not logically mean he failed to make a* preliminary showing *that his claim was debatable, as required for a COA.*

Buck, (citing *Miller-El*, 537 U.S. at 336-337)(emphasis added).

The panel's review of the record would have had to have similarly wholly ignored his claims in order to arrive at a decision that he failed to establish a *preliminary showing* that his claims were debatable.

On the other hand, if the panel's decision signifies that it reviewed the record and found Mr. Miserendino's claim meritless, then it directly conflicts with this Court's holding in *Buck* that an appellate court's COA analysis "is not coextensive with a merits analysis." 137 S.Ct. at 773. Chief Justice Roberts restated the Court's standard in a singular manner: "The *only* question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.* (quoting *Miller-El*, 537 U.S. at 337). In reversing the Fifth Circuit, the Chief Justice expressly stated that "[w]hen a court of appeals sidesteps [the COA] process by first deciding the merits

of an appeal, and then justif[ies] its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id.*

Accordingly, granting certiorari to review this issue in light of *Buck* is warranted and appropriate.

II. PETITIONER MISERENDINO'S CONSTITUTIONAL CLAIM THAT *MCDONNELL* INVALIDATES HIS BRIBERY CONVICTION UNDER 18 U.S.C. SECTION 201(b) AND THE EVIDENCE SUBMITTED MET THE PRELIMINARY SHOWING THAT HIS CLAIMS WERE DEBATABLE, WARRANTING A COA

Pre-*McDonnell*, the definition of "official act" as it relates to bribery convictions under Section 201(b) was exceedingly broad, so much so that this Court criticized the overbroad application, saying the over-prosecutions violate a defendant's Fifth Amendment Due Process right to notice because:

> *the term "official acts" is not defined "with sufficient definiteness that ordinary people can understand what conduct is prohibited." ... [Courts] cannot construe a criminal statute on the assumption that the Government will use it responsibly. [] Th[is] Court [previously] declined to rely on the Government's discretion to protect against overzealous prosecution under Section 201, concluding instead that a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter.*

McDonnell v. United States, 136 S.Ct. 2355, 2373-2374 (2016)(quoting *United States v. Stevens*, 559 U.S. 460, 480 (2010)).

The Supreme Court further cautioned, "Invoking so shapeless a provision to condemn someone to prison for up to 15 years raises serious concern that the provision does not comport with the Constitution's guarantee of due process." *McDonnell*, 136 S.Ct. at 2373.

The statute of conviction, Title 18, United States Code, Section 201(b)(2)(A), provides that:

> *Whoever-- ... being a public official ... directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for ... being influenced in the performance of any official act [shall be guilty of acceptance of a bribe by a public official].*

18 U.S.C. Section 201(b)(1)(A).

As in the *McDonnell* case, there is no dispute that Mr. Miserendino and Mr. Toy received things of value (the quid). The claim turns on, however, the definition of "official act" post-*McDonnell* and what Mr. Miserendino argues is the lack of such official act. Without his performing an official act, Mr. Miserendino is innocent of the bribery conviction and must be resentenced without that conviction.

The Government and the Court in the proceedings below relied solely on Petitioner Miserendino's SOF to find that he committed official acts. None of the four alleged acts, however, constitute official acts, as shown herein.

Supra, the four alleged acts the Government and District Court relied on were listed. Because the *McDonnell* case is the one on which Mr. Miserendino relies, Governor McDonnell's five acts are listed below:

> *(1) "arranging meetings for [the briber] with Virginia government officials, who were subordinates of the Governor, to discuss and promote [the briber's business product]";*

> *(2) "hosting, and ... attending, events at the Governor's Mansion designed to encourage Virginia state research universities to initiate studies of [the briber's business product]";*

(3) "contacting other government officials in the [Governor's Office] as part of an effort to encourage Virginia state research universities to initiate studies of [the briber's business product]";

(4) "promoting [the briber's business] products and facilitating its relationships with Virginia government officials by allowing [the briber] to invite individuals important to [the briber's] business to exclusive events at the Governor's Mansion"; and

(5) "recommending that senior government officials in [the Governor's Office] meet with [the briber's business] executives to discuss ways that the company's products could lower healthcare costs."

McDonnell 136 S.Ct. at 2365-66 (quoting the indictment against McDonnell).

Despite these recommendations, meetings, and events being initiated by Governor McDonnell and held in the Governor's Mansion -- Virginia State's equivalent to the President's White House -- this Court held that none of this conduct constituted "official acts," summarizing, "setting up [] meeting[s], hosting [] event[s], [and] contacting [government] official[s,] ... without more[,] do[] not count as [] 'official act[s].'" *McDonnell*, 136 S.Ct. at 2365-66.

This Court further explained, "Simply expressing support for the research study at a meeting, event, or call -- or sending a subordinate to such a meeting, event, or call -- similarly does not qualify as a decision or action on the study." *Id.* at 2371.

In this explanation, this Court has made clear that a recommendation, or expression of support, does not qualify as an "official act." As such, Petitioner Miserendino's recommendations of MAETS and MHD as a subcontractor who could perform the work MSC needed does not qualify as an official act for purposes of Mr. Miserendino's bribery conviction.

There is at least one federal district court that has applied *McDonnell* to permit a public official's influencing the approval of a task order to qualify as an "official act," but the court made clear that its decision was only because the defendant actually had the direct power to sign such task orders into effect. See

United States v. Pomrenke, 198 F.Supp.3d 648, 701 (W.D. Va. Aug. 1, 2016)(defendant moved for acquittal in light of *McDonnell*, but the district court held that the defendant there was still guilty despite *McDonnell* only because that defendant "*had the real power ... to decide* who did business with [the prime contractor].")(emphasis added).

As shown *supra*, Petitioner Miserendino was so far removed from the decision-making process that he lacked "the real power" to decide who did business with the prime contractor. His recommendation to use a subcontractor was just that, and there was nothing to enforce it or ensure that the recommendation was followed.

Further, none of the four actions listed in the SOF qualify as "official acts."

Action (1) *supra*, merely "assisting in the preparation of Statements of Work" does not rise to the level of "a subject or point of debate or a proposition being or to be voted on in a meeting" such as a question "before the senate" or "a topic under active and usually serious or practical consideration" such as "a matter before the committee" that may at any time be brought before a public official. See *McDonnell*, at 2368. Additionally, Action (1) fails to allege "a specific official act" given or promised in return for a bribe as required by the bribery statute. See *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404-405 (1999). Action (1) cannot qualify as an "official act" in light of *McDonnell*.

Similarly, Actions (2) and (3) fail because of a lack of specificity and cannot qualify as "official acts" in light of *McDonnell*. The Actions fail to specify who the "government officials" and "MSC contractors" were who were supposedly influenced by Mr. Miserendino and his codefendant. Moreover, the actions supposedly performed by Petitioner Miserendino and Mr. Toy to "further ... efforts to obtain U.S. Government contracts" are far too general and vague to qualify as "official acts." Further, as charged, the actions do not rise to the level of "a lawsuit before a court, a determination before an agency, or a hearing before a committee" that may be pending or may by law be brought before a public official, so they no longer qualify as "official acts."

Action (4) also falls short of action which could qualify as an "official act" because of the general language charged by the Government. Action (4) charges only that Petitioner Miserendino and his codefendant provided some vague and general "favorable treatment ... in connection with U.S. Government task orders." What is the favorable treatment, according to the Government? Whatever it is, it is not enough to rise to the level of *McDonnell's* definition of "official acts."

What's more is that Mr. Miserendino, in the hopes of providing more information and clarification than the Government sought or charged, provided and submitted an affidavit with the information that was lacking in the SOF, but the District Court confusingly turned the entire affidavit away, claiming it contradicted the SOF already agreed to. This conclusion is particularly nonsensical because the SOF -- as is -- cannot qualify to establish that Petitioner Miserendino performed any "official acts" at all and is thus actually innocent of the bribery conviction.

In Petitioner Miserendino's affidavit, he expounded on the details of his "assisting in the preparation of Statements of Work" to explain that it only "involved proofreading approximately six already-prepared Statements of Work that were placed before [him] by drafters. [He] was not the only person proofreading any of these six or so Statements of Work[,] ... and [] was never the final reviewer for and never 'approved' or certified any of these Statements of Work." App.F1, Paragraph 9. The District Court's holding that this additional information somehow conflicted with the significant lack of information is -- surely -- debatable or wrong, and the *McDonnell* Court emphasized that "[s]imply expressing support" (*McDonnell*, 136 S.Ct. at 2371) by an action such as proofreading and offering word/phrase suggestions to increase the likelihood that the Statement of Work would be approved is not enough to qualify as official action. Action (1) does not constitute an "official act" in light of *McDonnell.*

The affidavit also clarifies that Actions (2) and (3) involved meetings where codefendant Mr. Toy would ask Mr. Miserendino to attend with him. App.F2-3, Paragraphs 11-13. At the meetings with the officials representing the ship program offices requesting the upgrades/repairs, Mr. Miserendino was invited to attend "because of [his] technical knowledge." App.F2, Paragraph 11. At the meetings with the primary contractors, Mr. Miserendino "did not play any part in the negotiations or say anything during these meetings after introductions were made." App.F2, Paragraph 12. Mr. Miserendino's role in all of the meetings was minimal. Primarily, "Mr. Toy was the one who would specifically recommend ... [MAETS and MHD] to

his fellow civil servant employees. ... [Mr. Miserendino] backed Mr. Toy's recommendations at the meetings [of MAETS]" because he knew their technical skills to be exceptional. App.F2-3, Paragraph 13. Mr. Miserendino was more skeptical of MHD, and only "silently supported" Toy's recommendation of them. *Id.*

As noted *supra*, simply expressing support does not -- without more -- constitute an "official act" in light of *McDonnell*. Actions (2) and (3) do not constitute "official acts" under Section 201.

Mr. Miserendino discusses in his affidavit that his role was simply attending these meetings and relaying some communications back and forth between his codefendant and the contractors relating to the work as it was performed. App.F3, Paragraph 13. That was the extent of the "favorable treatment" described in Action (4) of the SOF and is not enough to rise to the level of an "official act" in light of *McDonnell*.

Mr. Miserendino was -- for all intents and purposes -- the "tech guy." Certainly, Congress did not have punishing the technical support staff for bribery under Section 201 when they wrote it into law, and that's why the *McDonnell* Court significantly narrowed the scope of what qualifies as "official acts" for purposes of Section 201.

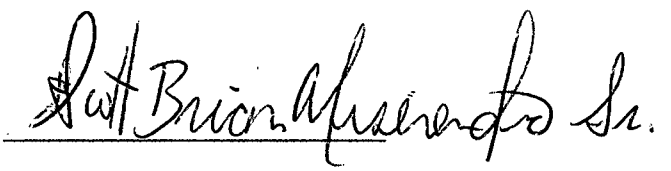
As Mr. Miserendino admitted from the beginning, the charged conduct is more appropriate under the conspiracy to commit bribery conviction *for the same acts* for which he already stands convicted. As in the *McDonnell* case -- accepting the gifts was "distasteful" and "tawdry," but the concern of this Court is "with the broader legal implications of the an overly broad interpretation of 'official act.'" *Id.* at 2375. The additional three (3) years of imprisonment above the correct statutory maximum, based on his bribery conviction does not serve Congress's purposes and warrants correction.

That the District Court chose to ignore the affidavit without adequate explanation as to why and decline an evidentiary hearing is certainly something with which reasonable jurists could disagree, warranting the grant of a COA and a full merits-review of the case. Granting certiorari to review how the Fourth Circuit is applying *McDonnell* in cases such as this is warranted and appropriate.

CONCLUSION

WHEREFORE, it is respectfully requested that a Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,



SCOTT BRIAN MISERENDINO